CRIMINAL JUSTICE
COMMISSION

REPORT ON
A REVIEW OF POLICE POWERS IN QUEENSLAND

VOLUME IV:
SUSPECTS' RIGHTS, POLICE QUESTIONING AND PRE-CHARGE DETENTION

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Dear Sirs

In accordance with section 26 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 IV.

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. In 1993, the Criminal Justice Commission released the first three volumes of its report on police powers. This is the fourth volume in that series. In this volume, the Commission deals primarily with issues relating to suspects' rights and police questioning of suspects. The volume includes recommendations for the establishment of a scheme of post-arrest, pre-charge detention, and for the provision of free legal advice to suspects in police stations.

The recommendations contained in this volume reflect two broad principles upon which the Commission has based its report. These are that police powers should only be increased where the need to do so has been demonstrated and secondly, that at all times, increased accountability should accompany any increase in police powers.

The recommendations have been made after considerable research and contain proposals which the Commission believes are practical. The subject of police powers is controversial and involves many competing interests. It is hoped that the Commission's work in this area will contribute towards the introduction into Queensland of a scheme of police powers which appropriately accommodates those competing interests.

The Commission will shortly be releasing a final volume covering issues such as the power to take fingerprints and body samples, identification parades, crime scene preservation and electronic surveillance.

To assist the reader, Appendix 13 of this volume reproduces the Executive Summary of Volume I. This summary provides the background to the Commission's review and describes key features of the current system of police powers. A list of recommendations from previous volumes can be obtained from the Commission on request.

R. S. O'Regan

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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.

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. We are grateful for the time that these people made available to discuss some of the complex issues surrounding police powers, and for the information which they provided to us.

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. We appreciate the valuable and timely advice provided by officers of those departments.

This volume was jointly written by two staff members in the Research and Co-ordination Division, Susan Johnson and Michele Rosengren. The Commission is grateful to both of them for the high quality of their work and their ability to work cheerfully under considerable pressure. We also wish to acknowledge the contribution of Dr David Dixon of the University of New South Wales Law School who acted as a consultant in the writing of the volume.

Finally, special thanks are due to Denyse Willimott, Tracey Stenzel and Amanda Carter, who were mainly responsible for preparing the volume for publication.

David Brereton
Director
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ABBREVIATIONS

ABS	Australian Bureau of Statistics
ALRC	Australian Law Reform Commission
Coldrey Committee	Consultative Committee on Police Powers of Investigation in Victoria
Commission	Criminal Justice Commission (Queensland)
Gibbs Committee	Review Committee of Commonwealth Criminal Law (Australia)
LRCT	Law Reform Commissioner of Tasmania
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
PACE Act 1984	Police and Criminal Evidence Act 1984
Philips Commission	Royal Commission on Criminal Procedure (England and Wales)
QPS	Queensland Police Service
Runciman Commission	Royal Commission on Criminal Justice (England and Wales)
QAILS	Queensland Association of Independent Legal Services

SUMMARY OF RECOMMENDATIONS: VOLUME IV

CHAPTER EIGHTEEN: THE CASE FOR REGULATION

18.1 Recommendation - Scope of the Regulated Scheme

The Commission recommends the introduction of a regulated scheme governing police dealings with suspects who have been arrested and those who are voluntary attendees, where relevant. The scheme should contain legislative obligations on police officers to inform suspects of their rights and status; the provision of free legal advice to suspects; and legislative provision for limited pre-charge detention for questioning and other investigative purposes.

A suspect should be defined as a person who is in the company of a police officer in a police station, police vehicle or police establishment, or is otherwise under police control and is either being questioned, or is to be questioned, to determine his or her involvement (if any) in the commission of an offence.

The Commission's recommendations regarding pre-charge detention are contingent upon the introduction of a free legal advice scheme.

CHAPTER NINETEEN: THE STATUS AND RIGHTS OF THE SUSPECT

19.1 Recommendation - Obligation to Inform Suspect of Status

The Commission recommends that when a police officer requests a suspect to go to, and/or remain at, any place designated by the police officer, the officer should inform the person that he or she is either under arrest, or is not under arrest and is therefore free to leave police company at any time unless and until arrested. If the police officer makes a decision at any time that the person is no longer free to leave, the person should be informed immediately that he or she is under arrest.

19.2 Recommendation – The Right to Remain Silent

The Commission recommends that the right to remain silent should be retained in its present form. To this end the Commission recommends that legislation should make it clear that the proposed scheme of pre–charge detention does not in any way derogate from the right to remain silent.

19.3 Recommendation – Obligation to Caution Suspects

The Commission recommends that, prior to any questioning, a police officer must caution a suspect in the following terms:

> You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer any questions, anything you say will be recorded and may be introduced as evidence in court.

CHAPTER TWENTY: THE LENGTH AND PURPOSE OF PRE–CHARGE DETENTION

20.1 Recommendation – Commencement of Detention

The Commission recommends that the pre–charge detention scheme should commence at the point of arrest. Nothing in the proposed scheme is to be taken to confer any power to detain a person not under arrest.

20.2 Recommendation – Procedure Following Arrest – Determining Need for Pre–Charge Detention

The Commission recommends that the following procedure apply in all cases where a person has been arrested:

Upon being arrested, the person is to be taken directly to the watchhouse or other appropriate facility to be charged and considered for bail, unless the police officer who makes the arrest believes there are grounds for detaining the person for one or more designated investigative and/or administrative purposes. If the officer considers

that such grounds exist, the person is to be taken to the Custody Officer at the nearest police establishment with the equipment and facilities needed to perform the required functions.

The Custody Officer, upon being satisfied that the person was lawfully arrested, may authorise the detention of the person for a specified period (see Recommendation 20.3) on the grounds that it is necessary to:

- enable such further investigation and inquiries as are reasonably necessary to determine whether a prosecution will be launched and, if so, the nature of the charges to be laid
- complete any necessary documentation which requires the presence of the detained person
- establish the identity of the person
- conduct other authorised investigative procedures.

20.3 Recommendation - Maximum Period of Pre-Charge Detention

The Commission recommends that the Custody Officer be able to authorise detention of an arrested person for a reasonable period not exceeding four hours. The reasonable period is to be determined by the Custody Officer by reference to the relevant circumstances including:

- whether the presence of the arrested person is necessary for the conduct of the investigation which is intended to be conducted after arrest
- the number and complexity of matters under investigation
- whether the person has indicated a willingness to make a statement or answer questions
- whether a police officer reasonably requires the time to prepare for any interview of the person in custody
- whether appropriate facilities are available to conduct an interview or other investigations

- the number and availability of other persons including co–offenders, victims etc. who need to be interviewed or from whom statements need to be obtained

- any need to visit the place where the alleged offence is believed to have been committed

- the total period of time during which the person has been in the company of police

- the time taken for police to attend at the place where the arrested person is being held (e.g. where a person has been arrested on a warrant)

- the time taken to complete any forensic examinations necessary.

The operation of this fixed maximum time period should be reviewed after 18 months.

20.4 Recommendation – Time–Out Periods

The Commission recommends that time–out periods should be disregarded when calculating the relevant time period for detention. Questioning of the arrested person is not to take place during a time–out period. The purposes for which time–outs should be allowed include:

- time reasonably required to:

  * convey the person from the place of arrest to the nearest premises with appropriate facilities

  * make and dispose of an extension application (see below)

  * process the person through the watchhouse.

- time questioning is suspended or delayed:

  * to allow a person to communicate with legal practitioner, friend or relative or consular official

  * to allow a legal practitioner, friend or relative or consular official to arrive at the place of questioning

* to allow a person to receive medical attention

* because the Custody Officer believes the person to be intoxicated

* to allow for identification procedures to be arranged and conducted

* to allow for a reasonable rest period.

20.5 Recommendation – Extension of Detention Period Beyond Four Hours

The Commission recommends as follows:

There should be a provision that before the end of the initial four hour period a police officer may apply to a magistrate to extend the period of detention for a further period of up to eight hours.

In exceptional circumstances, where police have been unable to complete their investigations within the extended period, an application for further extension may be made to a Supreme Court judge who shall specify the further period of detention authorised.

Provision should be made for applications to be made by telephone where appearance before a magistrate or a Supreme Court judge is not practicable because of the time of day or the remoteness of the location.

The arrested person or his or her legal representative should have the right to be heard on an application for extension. In the case where the application is for an extension for the purpose of further questioning of the person, the application shall not be granted unless the person indicates to the court his or her willingness to be interviewed further.

In any application the onus is on the police officer to satisfy the judicial officer that:

- the investigation is being conducted diligently and expeditiously; and

- a further period of detention without charge is reasonably necessary to preserve or obtain evidence or to complete the investigation; and

- there is no reasonable alternative means of obtaining the evidence other than by the continued detention of the person in custody; and

- circumstances exist which made it impracticable for the investigation to be completed within the four hours (see those circumstances relevant to determining a 'reasonable period') OR other circumstances of emergency made it impracticable for the investigation to be completed within that time.

20.6 Recommendation – Procedure at End of Detention Period

The Commission recommends that once the authorised period of detention has expired (including any authorised extension) the police must either:

- release the person without charge

- release the person on the basis that a summons has issued or will issue against the person

- take the person to the watchhouse or other appropriate facility for the purpose of being charged and

    * released on bail; or

    * taken before the first available Magistrates Court.

Where a Magistrates Court is not immediately available, no further questioning shall be allowed of the person in custody.

20.7 Recommendation – Provision for Re-Arrest

The Commission recommends that, once released, a person shall not be re-arrested without warrant and subject to further investigative detention for offence(s) which the person has previously been arrested, unless new evidence justifying a further arrest has come to light since the release.

20.8 Recommendation - Time Limits for Voluntary Attendees

The Commission recommends that after a period of four hours and at the end of a further eight hours, taking account of time-out, if the voluntary attendee is still in attendance at the police station, the voluntary attendee and the police officer should be required to appear before a magistrate and satisfy the magistrate that the person freely agrees to remain at the police station and for questioning to continue. Where it is impractical for them to appear before a magistrate, the hearing should be conducted by telephone.

CHAPTER TWENTY-ONE: THE INTRODUCTION OF A FREE LEGAL ADVICE SCHEME

21.1 Recommendation - Suspect's Right to Free Legal Advice

The Commission recommends that the Custody Officer (see Chapter Twenty-two) be required to advise the suspect of his or her right to contact a lawyer. The Custody Officer should advise the suspect that if he or she does not have a lawyer, a free and independent legal advice scheme is available to provide the services of a lawyer at the police station, or, in remote areas, over the telephone.

Where a suspect indicates a wish to communicate with a lawyer, the Custody Officer should arrange for the suspect to do so in private and must defer questioning and other investigative procedures involving the suspect until that has occurred. Where the suspect indicates a desire to have a lawyer present for an interview or other procedure, the interview or other procedure should be deferred until the lawyer arrives and has consulted with the suspect.

Where a lawyer having agreed to attend does not arrive within a reasonable time (up to two hours) the Custody Officer should make an attempt to contact another lawyer. In such circumstances the suspect is not to be questioned until he or she has had access to legal advice.

CHAPTER TWENTY-TWO: THE ROLE AND RESPONSIBILITIES OF THE CUSTODY OFFICER

22.1 Recommendation – The Custody Officer

The Commission recommends that, where practicable, a senior police officer who is independent of the investigation should exercise the functions of the Custody Officer. Where no officer independent of the investigation is available, approval for one of the investigating officers to exercise the functions of Custody Officer should be sought by telephone from a commissioned officer.

22.2 Recommendation – The Role of the Custody Officer

The Commission recommends that the responsibilities of the Custody Officer should be specified in legislation. These responsibilities should include:

- informing the suspect of his or her rights
- determining whether pre–charge detention is warranted
- authorising investigative procedures involving the suspect
- identifying and attending to any 'special needs' of the suspect
- ensuring that the suspect has medical assistance, rest and refreshment
- ensuring proper custody records are maintained.

As far as possible the new requirements should be integrated with current QPS procedure.

CHAPTER TWENTY-THREE: ENSURING COMPLIANCE WITH THE SCHEME

23.1 Recommendation – Notification of Breaches

The Commission recommends that where, in a criminal proceeding, it is revealed that a police officer may have contravened a statutory duty or a general instruction issued by the Commissioner of Police, the Director of Prosecutions or the magistrate who heard the matter, should be responsible for informing the Commissioner of Police of any breach that may warrant criminal, disciplinary or remedial action. The referral should be made even if the court does not exclude any evidence obtained in breach of these requirements.

23.2 Recommendation – Legislative Recognition of Exclusionary Rules

The circumstances under which unlawfully or improperly obtained evidence is to be admitted in court proceedings should be defined in legislation.

23.3 Recommendation – Admissibility of Unrecorded Confessions or Admissions

The Commission recommends that all interviews of suspects undertaken by the police must be electronically recorded.

The Commission further recommends that legislation be introduced stating that any unrecorded confession or admission not electronically recorded or confirmed on audio or video tape should be inadmissible in a criminal proceeding, unless the prosecution establishes on the balance of probabilities that the circumstances in which the confession or admission was made were exceptional and justify reception of the evidence.

CHAPTER SIXTEEN

INTRODUCTION TO VOLUME IV

The criminal justice system relies upon police to investigate suspected offences and collect the evidence sufficient to charge a person and bring that person before a court. A variety of investigative methods are used by police, depending upon the nature of the crime, the suspect(s), the circumstances of the case and other factors. These include the stopping and searching, and questioning, of suspects.

This volume of the Criminal Justice Commission (Commission) Report on a Review of Police Powers focuses upon the police use of questioning and considers the need for changes to the current law and practice in Queensland. Chapter Seventeen deals with the importance of police questioning in the investigative process. It examines the rules which govern police questioning of suspects and the ways in which police react to these rules. Chapter Eighteen considers different options for dealing with problems in the law and practice of police questioning of suspects. On the basis of this analysis, it is concluded that there is a need for a detailed legislative scheme to regulate the questioning of suspects by police.

Chapters Nineteen to Twenty–two detail the proposed scheme of regulation for the questioning of suspects – both those who have been arrested and those who are 'voluntary attendees'. The proposed scheme is based upon similar schemes operating in other states of Australia and in the United Kingdom, although there are several areas where the schemes differ. The chapters explaining the proposed scheme are organised under the following headings:

- the status and rights of the suspect
- the length and purpose of pre–charge detention
- the provision of free legal advice to suspects
- the role and responsibilities of the Custody Officer.

The final chapter of this volume considers the means of ensuring compliance with the requirements of the scheme.

The recommendations contained in this volume are the result of a broad consultative and research process. The Commission received written submissions on many of the issues addressed in this volume. In addition the issue of pre-charge detention was canvassed by a number of speakers at the Commission's public hearings into police powers in June 1992. Officers of the Commission have spoken to more than 70 police officers of various ranks throughout Queensland in order to obtain information about their experiences of current police powers and practices with respect to interviewing of suspects. Similarly, there has been consultation with criminal law practitioners from both the prosecution and defence sides.

During the Commission's review, it became apparent that few submissions had been received from people who were actually at the receiving end of police powers. Accordingly, it was decided to interview defendants about their experience of the criminal justice system and their awareness of the powers of police and the rights of suspects. This was done by approaching people appearing at several Magistrates Courts throughout Queensland at the time of their first court appearance. Thirty-six defendants agreed to be interviewed. It is not claimed that the sample is representative, but these interviews provide a valuable insight into individuals' experiences with the police investigation process. The interviews were particularly useful for this volume of the report because they revealed the extent to which people were unsure of their rights and more particularly of their status when in the company of police.

In preparing this volume, the Commission has referred extensively to many reports and discussion papers produced over the last decade on the issues of questioning of suspects and pre-charge detention. These reports include:

- *Criminal Investigation: An Interim Report* (Australian Law Reform Commission, 1975)
- *United Kingdom Royal Commission on Criminal Procedure* (Chairperson: Sir Cyril Philips, 1981)
- *Report on Section 460 of the Crimes Act 1958: Custody and Investigation* (Consultative Committee on Police Powers of Investigation 1986, Chairperson: Mr John Coldrey, QC)
- *Review of Commonwealth Criminal Law, Interim Report: Detention Before Charge* (Chairperson: Sir Harry Gibbs, 1989)
- *Police Powers of Detention and Investigation After Arrest: Criminal Procedure* (New South Wales Law Reform Commission, 1990)

- *Police Powers of Interrogation and Detention* (Law Reform Commission of Tasmania, 1990)

- *Criminal Evidence: Police Questioning* (New Zealand Law Commission 1992).

In addition, the Commission has examined in detail relevant legislation from various jurisdictions in Australia, and the *Police and Criminal Evidence Act 1984* from the United Kingdom. The key features of these Acts are summarised in Appendix 10. This appendix also summarises proposals put forward by law reform bodies in jurisdictions where legislation has not yet been enacted.

The recommendations of this volume combine what the Commission sees as the best features of existing and proposed schemes, and integrates them into a scheme which takes account of specific issues which arise in Queensland. In developing these proposals, the Commission has been guided by the principles which have informed other volumes of its police powers report. These are, firstly, that police powers should only be increased where the need to do so has been demonstrated and, secondly, that at all times, increased accountability should accompany any increase in police powers. In addition, the Commission has tried to take account of practicalities by devising a scheme which recognises the administrative and operational realities of modern policing. The Commission recognises that the Queensland Police Service (QPS) is engaged in a comprehensive review of policies and procedures which may alleviate some of the problems identified in this volume. Any proposal for reform should be integrated as far as possible with these revised policies and procedures.

The Commission's proposed scheme is designed to achieve a fair and workable balance between police powers and suspects' rights.

The various aspects of the scheme are carefully linked and therefore should be taken as a package. However, if the Parliament does not accept all of the proposals, the Commission wishes to emphasise the following:

- The recommendations in Chapter Nineteen regarding notification of suspects' status and rights should be implemented, even if no other changes are accepted.

- The recommendations in Chapter Twenty providing for pre-charge detention of arrested persons should not be introduced unless the free legal advice scheme is implemented. The Commission emphasises that it would not support the introduction of pre-charge detention without the free legal advice scheme.

Finally, the Commission stresses that the implementation of the proposed scheme should be accompanied by a properly designed and independent evaluation. An essential requirement for this evaluation is that accurate and comprehensive records are maintained by the police, so that the fairness and operational effectiveness of the scheme can be monitored. The Commission recognises that, after there has been a proper settling-in period, it may be necessary to modify some aspects of the scheme to take account of any unanticipated problems. However, substantial changes should not be made unless there is clearly documented, objective evidence that the scheme is not operating effectively.

CHAPTER SEVENTEEN

THE LAW AND PRACTICE OF POLICE QUESTIONING

INTRODUCTION

This chapter examines:

- the role and importance of police questioning in the criminal investigation process
- the restrictions on police questioning of suspects imposed by the existing law of arrest and related procedural requirements
- the strategies that police have developed to circumvent these restrictions, in particular their extensive use of the concept of 'voluntary co-operation'.

THE IMPORTANCE OF POLICE QUESTIONING

Police questioning serves a number of purposes in the criminal investigation process. Although its primary purpose is regarded as obtaining confessions, other purposes include detecting offences, obtaining evidence against alleged accomplices, clearing up unsolved crimes and recovering stolen property (Woods 1990).

The role of police questioning was closely examined by the Royal Commission on Criminal Procedure (Philips Commission) in the United Kingdom in 1981. It was suggested to the Philips Commission that the importance of interrogation in the investigation and prosecution of cases had been greatly exaggerated. In response to that claim, the Philips Commission arranged for a number of research projects to be undertaken into the subject. The following findings arose out of this research:

- In a study (Softley 1980) of police interrogation in four police stations, the great majority of suspects brought to the police station were interviewed there even though the existing evidence against them was strong. In only eight per cent of cases did the police feel that the questioning was essential if the case was to be brought to court, but in 70 per cent of cases they judged that the information given by the suspect would help to secure a conviction. About 60 per cent of the suspects made either a full confession or a damaging admission.

- Irving (1980), in his study of the Brighton Criminal Intelligence Division, also found that about 60 per cent of suspects made a confession or damaging admission. He suggested that the most important purpose of the interview was to obtain a confession, to use either as the main evidence or as important subsidiary evidence in the case. Irving observed that, to be on the safe side, the police often endeavoured to obtain a confession even where there was other sufficient evidence.

- In a study of cases heard in the Crown Court, Baldwin and McConville (1980) found that 13 per cent of cases would have failed to reach a *prima facie* case standard without confessional evidence and a further four per cent would probably have been acquitted. There was a strong association between a confession and a plea of guilty, although it was impossible to say whether there would have been a decrease in the number of guilty pleas if confessions could not have been obtained by questioning.

The Philips Commission pointed out that research based upon the examination of court cases tended to underestimate the importance of questioning, as there were other purposes of questioning. For instance, the Philips Commission referred to the studies of Irving (1980), Softley (1980) and Steer (1980), which illustrated that questioning may have contributed to the release of suspects without charge in up to 20 per cent of cases.

A number of other studies have suggested that interrogation is important in the detection and investigation of crime. These studies reported that between 25–40 per cent of offences were detected following the questioning of a suspect arrested for some other offence (Steer 1980; Mawby 1979; Bottomley and Coleman 1980).

More recently, Woods (1990, Appendix B) has challenged the assumption that confessions and police interrogations are of vital importance to the criminal investigation process. After reviewing a number of studies in the United States of America and the United Kingdom, including those conducted for the Philips Commission, Woods concluded that, although police interrogation is useful, care should be taken not to overstate its value:

> The empirical evidence clearly shows that there will be situations in which police interrogation will be vital, either by providing the evidence to strengthen an otherwise weak case or helping to clear up a previously unsolved crime. Police interrogation does have its uses: that much is obvious. What the empirical research shows is that interrogation has its limitations, and serious limitations they are. (1990, p. 240)

Woods has provided a timely note of caution. Police need to be reminded that interrogation is only one of a number of possible investigative strategies and that a strong prosecution case can often be mounted without resort to confessional evidence. However, as Woods concedes, British and American research has consistently shown that, in around 18–20 per cent of cases, confessions were needed to obtain a conviction (1990, p. 233). Moreover, as he also notes, for some offences, such as burglary and robbery, the proportion of cases where the case depends heavily on confessional evidence is considerably higher. These findings, together with research highlighting the other functions of interrogation (see above), lend strong support to the conclusion that questioning, properly used, is "an essential part of the modern police function" (New Zealand Law Commission (NZLC) 1992, p. 149; see also Philips Commission 1981, pp. 18–19).

The remainder of this chapter reviews the real and perceived restrictions imposed by law upon police questioning, and the manner in which Queensland police avoid those restrictions.

Current Law in Queensland

In addressing the legal issues surrounding the questioning of suspects, it is important to make a distinction between two categories of suspects. These are:

- persons who have been lawfully arrested – that is, a police officer has had reasonable grounds to suspect or believe that the person has committed an offence

- 'voluntary attendees' – that is, persons whom a police officer suspects of involvement in an offence but who have not been arrested, either because there is not sufficient evidence to reach the standard required to make an arrest, or because the police officer has considered it more convenient not to make an arrest.

The important distinction between the two groups is the act of arrest, which deprives a person of his or her liberty.

Mansfield CJ (p. 208) said:

> The Judges' Rules are not rules of law and it is not every breach of one or more of them which will require the rejection of evidence obtained as a result of such a breach . . .

As noted above, the Rules were originally promulgated in 1912. In 1930 a Home Office Circular was issued with the approval of the judges to remove difficulties, or divergences of opinion, as to the meaning of the Rules. It was the 1912 version with the Circular that was adopted in Queensland by the Court in *R v Nichols and Ors.*

In 1964 new Judges' Rules were promulgated by the Home Office in the United Kingdom. Following this revision, the Chief Justice of Queensland wrote to the President of the Bar Association informing him that the coming into operation of these rules had been deferred until further notice (Practice Note [1964] QWN 42). There does not appear to have been any subsequent practice note dealing with the Judges' Rules.

Numerous cases in Queensland have since applied the Judges' Rules, although there has been no consistent use of a particular version. In *R v Hart* [1979] Qd R 8 and *R v Borsellino* [1978] Qd R 128, reference was made to the 1964 rules. The judgments of the High Court in *Van Der Meer and Others v The Queen* (1988) 82 ALR 10 either expressly or impliedly refer to the 1930 explanation of the Rules. One commentator, Teh (1972, p. 489), has expressed the view that the rules in the Australian states correspond to the pre–1964 United Kingdom Judges' Rules.

Judges' Rule 3

Of particular interest in the context of this chapter is Rule 3 of the 1912 Rules, which states that "persons in custody should not be questioned without the usual caution first being administered". While the rule as stated seems relatively straightforward, it is complicated by the explanation contained in the 1930 Circular from the Home Office:

> *Rule 3 was never intended to encourage or authorise the questioning or cross–examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody*, and, long before this rule was formulated, and since, it has been the practice for the judge not to allow any answer to a question so improperly put to be given in evidence; but in some cases it may be proper and necessary to put questions to a person in custody after a caution has been administered, for instance, a person arrested for a burglary may before he is formally charged, say, 'I have hidden or thrown the property away' and after caution he would

> properly be asked 'Where have you hidden or thrown it?' . . . Rule (3) is intended to apply to such cases and, so understood, is not in conflict with and does not qualify Rule (7), which prohibits any questions upon a voluntary statement except such as is necessary to clear up ambiguity. [Our emphasis] (*Carter's Criminal Law of Queensland*, p. 9284)

For the purposes of the Judges' Rules the term "in custody":

> . . . is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody. (*Smith v The Queen* (1956) 97 CLR at 129 per Williams J)

It is difficult for police to comply with the Rule when a great deal of confusion surrounds the interpretation of the 1912 Rule 3 and its Explanatory Circular. For instance, Teh (1972) identifies the following competing interpretations of the Rule:

- it does not prohibit interrogation provided the suspect has been cautioned and the decision to charge has not been made
- it does not prohibit interrogation absolutely, so that an interrogation may be permissible if the circumstances justify it and provided a caution has been administered
- it prohibits questioning in respect of the particular offence upon which the person was arrested
- it prohibits interrogation once the suspect has been taken into custody.

The official QPS submission to the Commission was unclear as to whether Judges' Rule 3 imposed an absolute prohibition on questioning once a person was taken into custody, or whether it prohibited questioning only in relation to the offence for which the person was arrested:

> In cases where a suspect is first arrested by police for an offence and then interviewed with respect to that offence, any admission or confession gained during that interview is precluded from being accepted as evidence in subsequent court proceedings by virtue of Judges' Rule 3 read in conjunction with the 1930 Explanation Circular . . . [S]hould a violent and armed offender be located immediately after committing an offence, e.g. an armed robbery, police are placed in a position where the logical

> course of action would be to arrest the person. However, once an arrest is made, should it be for the armed robbery, the police are then legally prevented from questioning the offender in relation to that matter. (1991, pp. 38–39)

Police officers who discussed this issue with Commission researchers advanced a variety of interpretations of the rule:

- Many believed that the Judges' Rules prohibit them absolutely from questioning a person who has been arrested. This perception is consistent with Teh's fourth interpretation.

- Others expressed the view that the prohibition applies only to questioning in respect of the particular offence upon which the person was arrested. Teh (1972, pp. 500–501) cites a number of cases and commentaries in support of this interpretation.

- Some officers considered that a person in custody could be questioned as long as the caution had been administered and the questioning did not take the form of cross–examination, subject of course to the requirement to take the person as soon as practicable before a justice.

Some officers even expressed the view that questioning should take place and it should be left to the court to determine whether or not to allow the questioning to be admitted as evidence.

The view that Rule 3 prohibits the questioning of a person in custody – either absolutely or in relation to the particular offence for which the person was arrested – is inconsistent with views expressed by members of the High Court in *Williams*:

> There is nothing to prevent a police officer from asking a suspect questions designed to elicit information about the commission of an offence and the suspect's involvement in it, whether or not the suspect is in custody. But if the suspect has been arrested and the inquiries are not complete at the time when it is practicable to bring him before a justice, then it is the completion of the inquiries and not the bringing of the arrested person before a justice which must be delayed. (per Mason and Brennan JJ at 300 citing *R v Miller* (1980) 25 SASR 170)

And further:

> Where no delay is involved, there can, of course, be no objection to the occasion of the arrest being used for the purpose of further investigation of the offence in question or, for that matter, any other offences, provided the investigation is properly carried out and any necessary caution is given. (per Wilson and Dawson JJ at 306 citing *Hough v Ah Sam* (1912) 15 CLR 452)

A similar view was expressed by the New Zealand Court of Appeal in *R v Alexander* [1989] 3 NZLR 395 (*Alexander*). In that case, the Court held that the requirement that a person be brought before the court as soon as is reasonably possible did not preclude questioning either about the offence for which the person had been arrested or other offences – the rule only prohibited delay in bringing the arrested person before the court in order to question him or her.

The NZLC (1992, p. 138) has argued that it is impossible to reconcile the approach in *Alexander* with Rule 3 of the Judges' Rules if, as stated in the 1930 Circular, Rule 3 was never intended to encourage or authorise the questioning or cross-examination of a person in custody. Similarly, it is impossible to reconcile the approach of the High Court in *Williams* with that interpretation of the rule.

POLICE PRACTICE IN QUEENSLAND

The preceding sections of this chapter have outlined the real and perceived restrictions upon police questioning of persons in custody. In many instances, the police have endeavoured to comply with these restrictions to the best of their ability and understanding. However, individual police officers have also developed various strategies for circumventing these restrictions. Of these, the most important are as follows:

- to overcome the requirement that an arrested person be taken before a magistrate as soon as possible, police will sometimes arrest a person at a time of day when a magistrate is not available, thus allowing them legitimately to keep the person in police custody for 12 hours or more

- to deal with the restrictions imposed by Rule 3 of the Judges' Rules, police may choose to arrest a person on a 'holding charge' and question him or her in relation to any other offence

- to overcome either type of restriction, police may:
    - * deliberately postpone the act of arrest and rely instead on the voluntary attendance of a person
    - * 'take a chance' and question the person under arrest, then wait to see what the courts will do with the evidence so obtained.

The following section will discuss problems associated with these different strategies.

Arrest When Magistrates Are Not Available

As indicated, to avoid the constraints upon questioning imposed by the requirement to take a person before a magistrate as soon as practicable, police may arrest a person late in the day when no magistrates are available. Often, the time of the arrest will be determined by the time of the commission of the offence but, on other occasions, it will be for the police to decide when to arrest an identified suspect. If the police wish to question the person, the temptation is to delay the arrest until no magistrate is immediately available. The problems with this approach are:

- it is unacceptable in principle that wide differences in the treatment of suspects should depend on such an irrelevant matter as time of arrest
- if the arrest occurs when magistrates are not available, there is no legal regulation of the suspect's detention, except the requirement to present him or her at the next court, which may not be until several hours or (in the case of a holiday weekend) several days later.

As the New South Wales Law Reform Commission (NSWLRC) suggested in discussing the practice of arresting suspects 'out of hours':

> There is nothing actually **unlawful** in this gimmickry, but it is not a sound or ethical basis on which to operate a system of criminal investigation. (1990, p. 15)

On the other hand, if a suspect is arrested when magistrates are available, complying with the law may hamper proper and necessary police investigation (NSWLRC 1990, p. 15).

Holding Charges

Holding charges do not give police an advantage in terms of time in custody; suspects still have to be taken to a magistrate on the holding charge. However, these charges may be used with one of the other methods discussed here to enable police to question a suspect about an offence for which there is insufficient evidence to justify an arrest. In such cases, holding charges involve an abuse of the power to arrest. The use of holding charges is often justified by arguing that, while the Judges' Rules forbid the questioning of suspects about the offence for which they were arrested, they permit questioning about other suspected offences. That this practice has developed in response to rules supposedly designed to clarify police powers is further testimony to the inadequacy of the Judges' Rules.

Volunteers

One of the frequently employed methods of avoiding the restrictions imposed upon questioning of suspects after arrest is to refrain from formally arresting the person and instead treat the person as a 'volunteer' to whom the restrictions do not apply. As the Australian Law Reform Commission (ALRC 1975, p. 32) has observed, 'voluntariness' in this context is usually fictional:

> The fact that no shoulders may have been touched, or incantations mouthed, does not mean for a minute that a very large number of people indeed who were in the past 'voluntarily co-operating with police' or engaged in 'assisting the police with their inquiries' were just as surely arrested as if they had been bound in chains.

Suspects may be treated physically as if they were being formally arrested, or they may be told that they will be arrested if they do not comply with police requests; or they may agree to accompany officers to the police station in the belief that they have to do so. Such voluntariness:

> encompasses a range of states, which include approving agreement, unwilling acquiescence, submission, and a co-operation or compliance ignorant of the possibility of acting differently. (Dixon et al. 1990a, p. 346)

The 'free-willed' suspect, with the resources of power and knowledge to act in a truly voluntary manner, is very rare.

There are a handful of reported cases in which defendants have challenged the admissibility of alleged confessions on the grounds that they were made during unlawful detention rather than, as police claimed, while suspects were voluntarily attending stations (Odgers 1990, p. 225; Aronson et al. 1988, pp. 340–343). Judicial response has been confusing to say the least. For example, in *R v O'Donoghue* (1988) 34 A Crim R 397 at 399–403, the New South Wales Court of Criminal Appeal insisted that a suspect's belief that he or she was under arrest must be "conveyed by anything said or done by the police officer" and not merely be "a product of his own mind". In that case, the police (on the investigating officer's own account) told O'Donoghue "I would like you to come with us to King's Cross Police Station where I can interview you about this". He was cautioned and would have been arrested formally if he had refused to co–operate (p. 400). When asked why he went with the police, O'Donoghue told the court that he "felt that he did not have much option really, because there was an officer on either side of him at the time when he was asked to go". O'Donoghue's view that the only choice left to him was whether or not he would be wearing handcuffs on the way to the station was deemed to be legally irrelevant. The Court held that because O'Donoghue's impression that he was no longer free was formed solely by his own belief that the police officer's request constituted a command, there was no arrest.

In South Australia, it has been held that if a reasonable person would have understood that he or she had to go with the police, then officers have a duty to tell the suspect that he or she is not under arrest. If this is not done, "the apparent invitation or request may constitute an apprehension" (King CJ in *R v Conley*, quoted by Mitchell J in *R v S and J* (1983) 32 SASR 174). The difficulty with this approach is that it depends upon the assessment of what a 'reasonable person' would have thought. As the case of S and J (two young Aboriginal people) demonstrates, suspects may feel that they have no option but to go with the police, even though the police satisfy the court that the lack of arrest was communicated adequately for a reasonable person.

In Tasmania, the Court of Appeal has recently constructed a legal form of 'non–arrest detention' to provide for cases in which a volunteer is in de facto custody (*Sammak v The Queen*, unreported no. 33/1993). The Court said that where the suspect thinks that he or she is free to leave but the police officer has made up his or her mind that the person will not be allowed to leave, the suspect is 'in custody' for the purpose of the Judges' Rules but is not 'under arrest'. Again, this is a less than satisfactory response to the legal problem presented by volunteers.

'Taking a Chance'

Some police have indicated that they often take a chance and question a person, even if unsure of whether it is lawful, on the basis that the court will ultimately determine the issue. According to one officer, "you might as well question the person because even if the court excludes the evidence you are no worse off than if you did not interview the person".

In taking this approach, police are aware that the discretion of the court to exclude evidence obtained during unlawful detention is rarely exercised, especially where that evidence takes the form of a confession. It is understandable that magistrates and judges, sympathising with the police dilemma, have often taken this approach. However, it is not desirable that the courts should be drawn into what amounts to complicity in the circumvention of the law. Convicting on unlawfully obtained evidence does little for public confidence in the legal system and encourages cynicism on the part of the police. Moreover, as discussed in Chapter Twenty–three it is clear that the High Court is increasingly unwilling to tolerate such practices, even though they have long been accepted in criminal justice practice.

CONCLUSION

The preceding discussion has emphasised that questioning of suspects is an important part of the work of modern police services. The discussion has also shown that the rules governing the treatment of suspects give little recognition to the central role which questioning plays. Moreover, these rules are ambiguous and, for this reason, relatively easy for police to circumvent. The police have been assisted in this regard by the willingness of courts to accept legal fictions and loopholes such as voluntary attendance and out–of–hours arrests, and to admit evidence obtained in contravention of the rules. As a result, police have been encouraged to detain suspects unlawfully in order to question them, and to take the chance that the court will not exclude any evidence which emerges (NSWLRC 1990, p. 15).

CHAPTER EIGHTEEN

THE CASE FOR REGULATION

The previous chapter demonstrated that the current state of the law and practice concerning the questioning of suspects by police is confusing to both police and suspects. The divergence between law and practice has led police to make use of various legal loopholes, by such means as delaying arrest and relying on the fiction of 'voluntariness'. As a consequence, police have been encouraged to view the law in an undesirable way and public confidence in the law has suffered.

In deciding how best to respond to the problems identified, the Commission considered three broad options:

- accept that there will always be problems and do nothing
- enforce the current rules and rights of the accused
- adopt a regulated scheme that takes account of what police actually do.

This chapter briefly considers the first two options. It then sets out the case for adopting a regulated scheme and considers possible objections to this approach. The final part of the chapter addresses the issue of to whom a regulated scheme should apply.

THE OPTION OF DOING NOTHING

It is sometimes argued that current arrangements, while open to theoretical legal objection, work well enough in practice and should not be disturbed. This view is encapsulated in comments by the (then) Chair of the New South Wales Police Board on calls for legislative reform:

> I confess that I sometimes wonder if it all matters very much. With the present powers, our police manage to keep the criminal courts quite busy and the prisons full. (Jackson 1991, p. 15)

A less cynical but similar view is that the present system should be preserved despite its conceptual flaws. Those who take this view are fearful that change, however well-intentioned, will be counterproductive. Some police officers are concerned that they will be too restricted in carrying out their duties, while some civil libertarians fear that legal change, by providing police with new legal powers, will encourage more intrusive policing and will lead to pressure for additional powers. For instance, the Queensland Council for Civil Liberties, in its submission, contended that if the police were granted a power to detain suspects for the purposes of questioning:

> The first thing that a police officer will do is to extensively interview an accused. If an accused elects to exercise his right to silence, we contend that there will be a concerted (and, we fear, successful) push by police for abolition of the right to silence. (1991, p. 20)

In the Commission's assessment, such arguments are not persuasive. Concerns about threats to the right to remain silent are understandable but, as argued below, protection of this right is not inconsistent with adoption of a regulated scheme. As documented in the previous chapter, there are manifest inadequacies with the current law. These problems are a direct consequence of the fact that the law has failed to adapt to changing conditions within the criminal justice system (see Appendix 11). Unless the problems are addressed, the gap between law and practice will continue to grow. Police are being asked to work with law which is at least 100 years out of date. Moreover, the law's deficiencies have long been publicly acknowledged: it is almost 20 years since the ALRC's seminal 1975 report on *Criminal Investigation* made clear the need for reform, and eight years since the High Court decided *Williams v The Queen* (1986) 161 CLR 278 (*Williams*). As the NSWLRC (1990, p. 18) has commented caustically, it is:

> remarkable that an area of law of such fundamental importance to personal liberty has been left in a state which is so informal, so uncertain and so inconsistent for so long . . . It is highly unlikely that an area of law which dealt with the ownership of property would have been allowed to remain in this state without urgent legislative attention.

It may be that many police feel comfortable with the present system, but the situation is clearly unsatisfactory from the perspective of suspects. People are entitled to know what their rights are and, conversely, what are the powers and obligations of the police. The present arrangements rely on ambiguity and obfuscation for their effective operation. In addition, it surely is bad policy and organisational practice to pretend that the police are bound by a set of rules, but then allow the police to routinely circumvent the rules on the grounds that they are not practical. Such an approach can only promote disrespect for the law generally.

THE OPTION OF ENFORCING CURRENT RULES AND RIGHTS

A different view is that deficiencies in the way in which police currently deal with suspects should be addressed by giving the existing rules more 'teeth' – not by changing the rules to correspond with current practice. According to this argument, if the concept of the right to remain silent is to have any practical application, suspects must be clearly informed of their right and, furthermore, must be protected from implicating themselves through making confessions to the police. Similarly, police should be required to make it absolutely clear to a person who is not under arrest that he or she is entitled to leave at any stage. Advocates of this option consider that police should be under a legal obligation to inform suspects of their rights and status from the outset, and that a strict exclusionary rule should apply in relation to evidence obtained in contravention of the law.

Those who argue for this approach query whether it is proper, or necessary, for the police to rely as much as they do on confessional evidence. From this perspective, the heavy reliance on such evidence:

- inevitably sets up a conflict with the right to remain silent
- creates the danger of miscarriages of justice, by increasing the risk of people being 'verballed', or being otherwise pressured into making false confessions
- is not warranted, because the necessary evidence can generally be obtained by other, less intrusive, means.

The Commission has no difficulty accepting that police should be under a legal obligation to clearly inform people of their rights. However, it rejects the suggestion that these rights can only be protected by placing unworkable restrictions on the police use of interrogation. As the Review Committee of Commonwealth Criminal Law (Gibbs Committee 1989, p. 30) has argued:

> The questioning of persons suspected of having committed criminal offences is not in itself an evil. The interrogation of suspects plays a very important, and indeed a necessary, part in the process of law enforcement, and although objection may well be taken to the use of compulsion to answer questions, and to unfair or oppressive methods of questioning, there is nothing objectionable from the point of view of either law or moral principle in such questioning itself.

In fact, a properly designed regulated scheme, far from being in conflict with the right to remain silent, can help make this right more effective by ensuring that:

- prior to the commencement of any interrogation suspects are informed of, and understand, their right to remain silent

- any decision by a suspect to answer questions put to him or her is taken freely and with proper legal advice, and is not the result of any improper pressure applied by the police.

THE CASE FOR A REGULATED SCHEME

The key features of a regulated scheme are that:

- the rights of suspects and the powers of police are clearly spelled out in legislation

- the scheme takes account of what police do in fact and, in particular, recognises the important role of interrogation in the investigation of criminal offences

- provision is made for the limited detention for questioning and other investigative purposes of persons arrested by the police.

As is apparent from the preceding discussion, the Commission supports the adoption of such a scheme for Queensland. In reaching this conclusion, the Commission considers that it is important "to recognise reality and bring the law in the books closer to the practice on the ground" (Philips Commission 1981, p. 110). This does not mean that the law should simply legitimate what the police do. What it means is that the law should reflect fundamental changes in the structure and practice of criminal justice (see Appendix 11). The law should provide **appropriate** powers and **substantial** rights, not just rhetoric and empty symbols.

In its influential analysis, the Philips Commission suggested that criminal procedure should be evaluated according to three criteria: fairness, openness, and workability. The Philips Commission argued that for these criteria to be satisfied, powers and rights needed to be clearly defined and substantial. In the view of the Philips Commission (1981, pp. 20–21), this would be beneficial to both suspects and police:

> [I]f a suspect has a right he should be made aware of it. He should be able to exercise it, if he wishes, and waive it, if he wishes . . . If he is to be required to submit to a particular investigative procedure, he should be told under what power the requirement is made . . . Fairness applies equally to the police officer. He should not be required to work within a framework of rules which are unclear, uncertain in their application and liable long after the event to subjective and arbitrary reinterpretation of their application in a particular case . . . Police officers should not be required to operate with unclear and uncertain rules . . .

As the Philips Commission (1981, p. 20) insisted, "Both suspect and police officer should know where they stand, and the rules should be framed and promulgated in such a way as to enhance general awareness of them". Powers of arrest and custodial interrogation are, as noted above, major incursions into individual liberty. To be justified, they must be clearly defined by statutory rules which are comprehensible and comprehensive:

> Society should be prepared to give clear and open expression to the rights to be enjoyed by suspects, to the safeguards provided for them, to the rules to be observed by the police and to the exceptions to the generality of those rules where necessary to enable the police to perform their duty of enforcing the law and protecting the public. (Philips Commission 1981, p. 110)

Experience in the United Kingdom has shown that it is possible to devise a set of rules which are to the benefit of both police and suspects. While police initially viewed the *Police and Criminal Evidence Act 1984*[1] (*PACE Act 1984*) with suspicion, many have now recognised the benefits of legal clarity (Bottomley et al. 1991). Officers 'know where they stand': they know what they are expected to do and how to do it within the rules. This has contributed to a shift in police attitudes towards their work, and the emergence of what is often termed a 'new professionalism'. Active, expeditious investigation using the powers available under the *PACE Act 1984* now has more status than traditional methods of arresting on minimal evidence, relying on unsophisticated questioning, and taking weak cases to court if it was

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1 The *PACE Act 1984* was introduced in response to the recommendations of the Philips Commission.

thought they were 'worth a run' (Dixon et al. 1990b, p. 132). For their part, suspects also know where they stand, have a clearer understanding of their rights, and are in a better position to be protected against possible abuses of police power.

The approach proposed in this volume is also consistent with the views of the High Court, as expressed in *Williams*. The High Court's primary concern in this case was not to show how the law could be operated, but rather to highlight the need for fundamental reform of the law on detention for questioning. It was made clear that such reform should be the responsibility of the legislature. This was so both as a matter of constitutional principle and because legislatures, unlike courts, were able to provide detailed regulation of custodial interrogation, including specification of police powers and protections for suspects' rights (see Mason and Brennan JJ at 398 and Wilson and Dawson JJ at 410).

Objections to a Regulated Scheme

When, as here, it is recommended that fundamental change to the law is needed, complaints about the infringement of fundamental common law rights must be expected. Almost twenty years ago, the ALRC (1975, p. 34) responded appropriately:

> so far as possible it is better to legally recognise, and at the same time establish some legal controls over, justifiable police powers which are in fact exercised than to turn a blind eye to them because they have not traditionally been formally recognised by the common law or because they may have some potential for misuse.

Another objection often made is that the police should not be rewarded for ignoring the law through legalisation of their practices. To do so, it is argued, is to invite police to go beyond their new powers in the expectation that they will, in turn, be extended.

Several points can be made in response:

- The police were not solely responsible for the informal growth of custodial interrogation: it was a product, as suggested previously, of structural changes in the criminal justice system (see Appendix 11).

- The Commission does not simply propose the legalisation of police practices, nor does it recommend giving the police all the powers which were requested. Indeed, far from the police seeing the recommendations contained in this volume as an extension of their powers, some will no doubt complain that, in practice, it will restrict them. This was the response in England and Wales,

where the *PACE Act 1984* was paradoxically greeted by some civil libertarians as a draconian extension of police powers and by some police as a disabling straight jacket (Dixon 1992). The rules and procedures recommended here are primarily designed to regulate and clarify police powers. Where new powers are recommended, they are accompanied by significant safeguards.

- The objection relies on an unsubstantiated claim that police will always strain against procedural restrictions on their powers. The reality is that the police response will depend largely on the nature of the regulatory regime and on police attitudes towards it. If the law is unrealistic and contradictory as at present, police will be tempted to circumvent it. On the other hand, experience elsewhere suggests that, if police can be convinced of the benefits of using the law, it is more likely that they will be willing to work within it.

The Scope of the Regulated Scheme

The primary focus of regulated schemes is on the treatment of arrested persons while they are in police custody. However, a number of existing and proposed schemes also apply to persons who have not been arrested. The scope of these schemes varies (see Appendix 10), but all address, to at least some extent, the problem posed by 'voluntary attendees'.

In the Commission's view, there are two main arguments for including voluntary attendees in the scope of a regulated scheme:

- As outlined in Chapter Seventeen, the police currently make extensive use of the concept of 'voluntary co-operation' to circumvent many of the restrictions imposed on questioning by the existing law of arrest and related procedural requirements. If voluntary attendees are not covered by the scheme, police will continue to have an incentive to delay arresting people, so as to avoid any restrictions imposed by the scheme. The potential problem is clearly demonstrated by the consequences of the introduction of the *Criminal Justice (Scotland) Act 1980* which provided for a regime whereby police could question an arrested person for up to six hours. There was no provision for time-out or extension. The result has been a system in which more than half of the suspects questioned at some police stations are regarded as 'voluntarily' assisting the police, thereby enabling the police to avoid the statutory time constraints (NSWLRC 1990, p. 67).

- One of the functions of a regulated scheme is to clearly define the rights of suspects. If voluntary attendees were to be excluded from the scheme, this would effectively place them at a disadvantage compared with arrested persons. It is surely wrong, as a matter of principle and logic, that such persons should be provided with fewer rights and protections than those people who have been arrested.

For the purpose of determining the scope of the scheme, the Commission considers that the term 'suspect' should apply to any person who has been arrested or is "in a police station, police vehicle or police establishment in the company of a police officer, or is otherwise under police control" and is the subject of a criminal investigation to determine his or her involvement (if any) in the commission of an offence. This formulation is based on a NSWLRC recommendation (1990, p. 67). An essential feature of the definition is that a person becomes a suspect once the police have formed a suspicion, no matter how ill–founded, that the person may have been involved in the commission of an offence.

18.1 Recommendation – The Regulated Scheme

The Commission recommends the introduction of a regulated scheme governing police dealings with suspects who have been arrested and those who are voluntary attendees, where relevant. The scheme should contain legislative obligations on police officers to inform suspects of their rights and status; the provision of free legal advice to suspects; and legislative provision for limited pre–charge detention for questioning and other investigative purposes.

A suspect should be defined as a person who is in the company of a police officer in a police station, police vehicle or police establishment, or is otherwise under police control and is either being questioned, or is to be questioned, to determine his or her involvement (if any) in the commission of an offence.

CONCLUSION

This chapter has stated the case for adopting a comprehensive regulated scheme which recognises the rights of suspects as well as the importance of interrogation to the criminal investigation process. In the Commission's view, the regulated scheme proposed in the following chapters must also apply to voluntary attendees, subject to modifications where indicated.

CHAPTER NINETEEN

THE STATUS AND RIGHTS OF THE SUSPECT

INTRODUCTION

The focus of this chapter is on the point at which police first deal with suspects. This will sometimes be in the police station, but at other times the initial contact will occur 'in the field' – for example, at the crime scene, or at the suspect's residence. The key issues which arise in relation to this initial contact concern:

- the need to inform suspects, in particular 'voluntary attendees', of their status
- the need to inform suspects of their right to remain silent.

The chapter:

- examines current police practices in relation to voluntary attendees and suspects' experience of these practices
- recommends that persons who have been arrested are notified at the outset of the fact of arrest and of their right to remain silent
- proposes that police be required to inform suspects who are voluntary attendees that they are not under arrest and are free to leave, as well as informing them of their right to remain silent.

STATUS OF SUSPECTS: CURRENT PRACTICE

Comments and written submissions made to the Commission by various police officers indicate that suspects are often asked, and agree, 'to accompany police' to police stations for questioning. While most police officers insist that the presence of suspects at the police station in such circumstances is voluntary, it is clear that many suspects have not been informed of their status or rights. In a submission to the Commission one police officer wrote "the suspect is unsure as to his rights and obligations and the police are forced to take part in a charade or exercise in bluff in order to obtain evidence". Moreover, police generally do not see it as their responsibility to inform voluntary attendees that they are free to leave at any time if they so wish.

As outlined in Chapter Sixteen, Commission researchers conducted interviews with a number of people who had been questioned by police. The interviewees were asked if they attended at a police station, and, if so, why they went there. Many said that they agreed to go to the police station, but most did not see this as a free choice. The following examples taken from the interviews with suspects clearly demonstrate this point:

- A said that he attended at the police station for an interview because the police told him that if he did not they would be around to arrest him. A said that he was not arrested at any stage, despite stating that he was given a bail sheet and two charge sheets – a clear indication that he must have been arrested.

- B said that he was taken to the police station from his home by the police; therefore, he supposed that he must have been arrested. B was then interviewed at the station.

- C said that he was arrested at the police station. He said he knew he was arrested when the police told him that he had to appear at court the next day. C's reason for going to the police station was because the police asked him to. When asked if he tried to leave the station he said no – that it was better to stay than to "take off".

- D replied that she was not arrested at any stage. Further questioning revealed that she had attended at the police station because she had no choice – "the police said 'you're coming with me' ". D also said that she had been charged and fingerprinted, indicating that she must have been arrested at some stage.

- E was unsure whether he had been arrested at any stage. However it was obvious from the details provided by him that he must have been arrested because he was asked to get into the police car and was taken to the watchhouse.

- F said that, although the police did not say he was under arrest, he was told that he was going to the police station. F went because he thought he had no choice. He was at the police station for four hours before being taken to the watchhouse, during which time he was interviewed. This suggested that the police did not treat F as being under arrest at that time.

- G was asked by police to attend at the police station. He offered to take his own car but the police said no. He was taken to the major crime section and was interviewed. After the interview he was fingerprinted and photographed. He did not know whether he had been arrested or not.

NOTIFICATION OF STATUS

The anecdotal material presented above highlights the need to clarify the distinction between persons who are under arrest and persons who are consenting or 'voluntarily attending' at police stations. This line can only be drawn when police make it very clear to a suspect what his or her status is. Almost all of the public submissions which addressed this issue agreed that police should carry the onus of providing suspects with information about their status and rights.

At present there are legal requirements imposed upon police to make it clear to a person that he or she is under arrest and to caution that person. However, there is no requirement to make it clear to a person that he or she is **not** under arrest. It is assumed that if a person is not told that he or she is under arrest, that person will realise that he or she is free to go. However, the information gathered by the Commission suggests that this is rarely the case. There are many people who are influenced by the authority of a police officer and who will respond to a request by an officer because they feel that they must. For our system of justice to achieve a proper balance of police powers and the rights of suspects, it is imperative that suspects are at least as aware of their rights as the police are of their powers. As part of ensuring this awareness suspects need to know what their status is and, in particular, whether they must comply with a police request to attend and/or remain at a police station.

19.1 Recommendation – Obligation to Inform Suspect of Status

The Commission recommends that when a police officer requests a suspect to go to, and/or remain at, any place designated by the police officer, the officer should inform the person that he or she is either under arrest, or is not under arrest and is therefore free to leave police company at any time unless and until arrested. If the police officer makes a decision at any time that the person is no longer free to leave, the person should be informed immediately that he or she is under arrest.

THE RIGHT TO REMAIN SILENT

The work of the Commission has not involved a major review of the development of the right to remain silent, as this issue has already been comprehensively canvassed by the ALRC (1975) and, more recently, the NZLC (1992). Both of these Commissions concluded that the right to remain silent should remain untouched.[2]

The Royal Commission on Criminal Justice (Runciman Commission) in the United Kingdom also reviewed the issue of the right to remain silent in its Report (1993, p. 54). The majority of the Runciman Commission recommended that the right to remain silent in the face of police questioning should be retained. They found that doing away with the right might result in an increase in the number of convictions of guilty defendants. However, in their view this possibility was outweighed by the risk that the extra pressure on suspects to talk in the police station, and the adverse inferences invited if they did not, may result in more convictions of the innocent.

Both the Queensland Police Union of Employees and the QPS proposed that there should be no impediment to a jury being invited to draw an adverse inference from the fact that an accused person refused to answer questions put to him or her by police during the course of an electronically recorded interview.

Whilst there is some support from other sectors of the community for such a change, generally there seemed to be a strong objection to any tampering with the right to remain silent as it now stands. One person said that retention of the right was justified because it protected from self–incrimination those who may be in a state of shock. The Queensland Association of Independent Legal Services (QAILS) argued that if the right was abolished it would further disadvantage the young, the inarticulate and the uneducated. QAILS strongly opposed the acceptance of any adverse inference which might be drawn from a person's exercise of their right to remain silent. This view was shared by the Youth Affairs Network, which cited in support of its position the United Nations' standard minimum rules for the administration of juvenile justice.

The Queensland Criminal Code Review Committee has also supported the continued existence of the right to remain silent and the obligation on a police officer to inform a suspect of that right (1992, see draft section 262).

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2 Part I of the NZLC's discussion paper *Criminal Evidence: Police Questioning* (1992) provides a thorough discussion of the issues.

19.2 Recommendation – The Right to Remain Silent

The Commission recommends that the right to remain silent should be retained in its present form. To this end the Commission recommends that legislation should make it clear that the proposed scheme of pre–charge detention does not in any way derogate from the right to remain silent.

THE CAUTION

The Judges' Rules govern the giving of a caution to suspects. Rule 2 of the 1912 version requires a police officer to caution a person when the officer has made up his or her mind to charge a person with an offence. It appears that the current form of words used by the QPS is – "You are not obliged to say anything, but anything you do say may be given in evidence". In the 1964 version of the Judges' Rules, the police officer is required to caution a person when the officer has reasonable grounds to suspect that the person has committed an offence. This does not necessarily mean that a person is to be cautioned prior to the commencement of questioning. In fact under the current practice in Queensland it would appear that the caution is often not given until a relatively late stage in questioning.

The United Kingdom, Victoria and the Commonwealth have introduced legislation which requires that the suspect must be cautioned before any questioning commences. Other jurisdictions which are reviewing this area have proposed a similar requirement (see Appendix 10). The Commission likewise considers that there should be a legislative requirement that an appropriately worded caution be administered prior to any questioning of a suspect. The caution is an essential step in ensuring that a person is aware of his or her rights. However, it is of little practical value unless it is given at the outset.

19.3 Recommendation – Obligation to Caution Suspects

The Commission recommends that, prior to any questioning, a police officer must caution a suspect in the following terms:

> **You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer any questions, anything you say will be recorded and may be introduced as evidence in court.**

CONCLUSION

Currently, many suspects are unsure as to their rights, status and obligations when in police 'company'. This is a very unsatisfactory situation, as rights are of little value unless people are aware of these rights and in a position to exercise them.

This chapter has recommended that police be obliged by law to:

- inform suspects at the outset whether or not they are under arrest
- inform suspects who are not under arrest that they are free to leave
- caution suspects as to their right to remain silent, prior to the commencement of any questioning.

Given the fundamental nature of the rights involved, the Commission is strongly of the view that these recommendations should be implemented regardless of whether other features of the regulated scheme outlined in this volume are adopted.

CHAPTER TWENTY

THE LENGTH AND PURPOSE OF PRE-CHARGE DETENTION

Provision for pre-charge detention of arrested persons is one of the defining features of a regulated scheme for the treatment of suspects. This chapter expands upon the concept of pre-charge detention, addressing the following issues:

- the point at which the detention should commence
- the grounds for the detention
- the length of the initial detention period
- the basis for calculating the detention period
- provisions for extension of the detention period
- what happens at the end of the detention period.

The chapter then considers whether a time limit should apply to investigative procedures concerning 'volunteers'; that is, suspects who have not been arrested and therefore do not fall within the pre-charge detention proposals.

COMMENCEMENT OF DETENTION

The QPS, in its submission to the Commission on police powers, sought a power of detention prior to arrest rather than after arrest and before charge. In justifying the need for the power, the QPS pointed to the restrictions imposed upon police questioning of arrested persons by Judges' Rule 3, the requirement to take a person before a magistrate as soon as practicable, and *Williams v The Queen* (1986) 161 CLR 278 (*Williams*) (see Chapter Seventeen).

The QPS called for the detention power to be available only for the investigation of indictable offences where a police officer might suspect that a person has committed an indictable offence but "it may not be the case that a legal 'reasonableness' can

properly attach to that suspicion". The QPS also called for the power to be available in respect of a person who a police officer suspects is about to commit an indictable offence. In addition, the QPS argued that the power to detain, if available prior to arrest, would avoid the stigma associated with arrest.

The Commission has considered the arguments put forward by the QPS but is not satisfied that there is a justification for a pre-arrest detention power. This is because:

- The pre-charge detention power proposed in this report involves the removal of the restrictions on questioning after arrest. In the Commission's view, this is a better approach because it deals directly with the perceived problem.

- The police should not be authorised to deprive a person of his or her liberty unless they have reasonable grounds for suspecting that the person has committed an offence and therefore have grounds to arrest the person (Commission 1993, Volume III).

- It is artificial to call a deprivation of liberty a 'detention' rather than an 'arrest'; a citizen is either free or is not free. A detention as proposed by the QPS is simply an arrest by another name, in that it deprives a person of his or her liberty. To encourage the creation of a new type of arrest would complicate the criminal justice process. The Commission's stated aim throughout this review has been to simplify law and procedure.

- The other jurisdictions in Australia and the United Kingdom which have introduced a regulated scheme for questioning suspects have not provided for pre-arrest detention (see Appendix 10).

20.1 Recommendation - Commencement of Detention

The Commission recommends that the pre-charge detention scheme should commence at the point of arrest. Nothing in the proposed scheme is to be taken to confer any power to detain a person not under arrest.

GROUNDS FOR DETENTION

Upon arresting a person, the police officer must consider whether pre-charge detention is necessary. If there is no need for detention, the arrested person is to be taken directly to the watchhouse or other appropriate facility to be charged and released on bail, or taken before a Magistrates Court. It is expected that for most offences for which people are currently arrested this will be the standard procedure[3], as there will be no need for further investigation. Where the police officer considers that further investigation is required, the person is to be taken to the Custody Officer at the nearest police station with the equipment and facilities necessary to perform the required functions.

The role of the Custody Officer is described in detail in Chapter Twenty-two. In broad terms, under the proposed scheme this officer will be responsible for deciding whether there are grounds for detaining the person after arrest and before charge. The proposed power of pre-charge detention is not unlimited; it must be necessary to achieve a particular purpose. For this reason, the purposes for which a person may be detained should be specified in the legislation.

A review of the legislation in other jurisdictions (see Appendix 10) reveals a fairly standard set of purposes for detention. Some of these purposes are more administrative than investigative, such as the need to establish the identity of the person and the need to complete any documentation requiring the presence of the person. Other purposes for which a person may be detained should include the need to:

- conduct further inquiries to determine the proper charge to lay, which may include interviewing witnesses and/or victims
- question the arrested person in relation to the matter (subject to the right of the person to refuse to answer any questions)
- conduct other investigative procedures such as identification procedures or authorised searches.

Where the Custody Officer is not satisfied that it is necessary to detain an arrested person in order to effect one of the specified purposes, the person must be released or taken to the watchhouse immediately to be charged and taken before a court, unless granted bail (see p. 701).

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3 See Appendix 12.

20.2 Recommendation – Procedure Following Arrest – Determining Need for Pre-Charge Detention

The Commission recommends that the following procedure apply in all cases where a person has been arrested:

Upon being arrested, the person is to be taken directly to the watchhouse or other appropriate facility to be charged and considered for bail, unless the police officer who makes the arrest believes there are grounds for detaining the person for one or more designated investigative and/or administrative purposes. If the officer considers that such grounds exist, the person is to be taken to the Custody Officer at the nearest police establishment with the equipment and facilities needed to perform the required functions.

The Custody Officer, upon being satisfied that the person was lawfully arrested, may authorise the detention of the person for a specified period (see Recommendation 20.3) on the grounds that it is necessary to:

- **enable such further investigation and inquiries as are reasonably necessary to determine whether a prosecution will be launched and, if so, the nature of the charges to be laid**
- **complete any necessary documentation which requires the presence of the detained person**
- **establish the identity of the person**
- **conduct other authorised investigative procedures.**

Length of Detention Period for Arrested Persons

In determining the length of time for which an arrested person can be detained, the two issues to be addressed are:

- whether a maximum period of detention should be specified
- if so, what that maximum period should be.

Should a Maximum Period of Detention be Specified?

Some schemes allow for pre–charge detention for a 'reasonable period' up to a specified maximum time, with possible provision for extension and 'time–out'. Other schemes simply allow for a reasonable period of pre–charge detention with no specified upper limit. Schemes in this latter category set down statutory criteria defining the matters which may be taken into account in deciding what constitutes a reasonable period.

The maximum time limit approach has been implemented in the Commonwealth, South Australia and the United Kingdom (see Appendix 10). The ALRC made the first recommendation to introduce a maximum time limit for custodial investigation in 1975. The Gibbs Committee (1989), the NSWLRC (1990) and the NZLC (1992) have all recommended a maximum time limit for custodial investigation. In addition, the United Kingdom *PACE Act 1984* provides for a fixed maximum time limit although the permissible periods of detention far exceed what is generally considered acceptable in Australia.

The reasonable period with no specified maximum has been given legislative effect in Victoria and the Northern Territory [*Crimes Act 1958* (Vic.), section 464A, inserted by the *Crimes (Custody and Investigation) Act 1988* (Vic.); *Police Administration Act 1979* (NT), as amended by the *Police Administration (Amendment) Act 1988* (NT)]. The Law Reform Commissioner of Tasmania (LRCT 1990, p. 14) has also recommended a reasonable time approach.

Victoria initially had a fixed maximum time limit scheme, which allowed arrested persons to be held for a maximum of six hours. However, the law was changed in 1988 to provide for a reasonable time scheme. The change was made in response to the 1988 report of the Consultative Committee on Police Powers of Investigation in Victoria (Coldrey Committee). The Committee recommended the change despite reported evidence that over 99.5 per cent of all consensual interrogations or investigations had been completed within six hours of the person being arrested, even without a provision allowing for time–out (1988, p. 31). Although the Committee described the fixed period regime as "a success as an interim measure", it recommended the abandonment of this approach on the basis that it had the potential to create problems where:

- investigations are being made into complex crimes and multiple offences
- there are delays occasioned by travelling time, medical treatment, legal advice, the arranging of interpreters, rest periods and refreshment breaks

- the continuity of interviews is broken during the investigation of complex crimes and multiple offences

- people are held in custody in prison or on remand

- it is not practicable to bring people before a court (Coldrey Committee 1986, p. 178).

The QPS submission argued for a reasonable time approach in the context of pre-arrest detention, citing the Coldrey Committee's views in support of their argument.

The NZLC (1992, p. 178) advanced other arguments in support of the reasonable time approach with no upper limit, including:

- The setting of a fixed maximum period for the duration of police detention for questioning "achieve(s) certainty at the expense of flexibility and practical efficiency. To tie the police to a particular period of time to conduct post-arrest investigations unduly impedes the efficacious enforcement of the criminal law".

- There may be a tendency for the maximum to become the norm. That is, the arrested person could be detained for the maximum period even though that time was not necessary, or reasonable, for the purpose of the investigation.

- A fixed maximum period may create a tendency to rush pre-interrogation investigations so as not to use up too much of the investigation period, particularly where a suspect has been arrested at the time or shortly after the commission of the offence.

The main countervailing arguments for a fixed maximum time limit were summarised by the NZLC (1992, p. 176) as follows:

- The fixed maximum time approach offers a high degree of certainty. Persons being questioned by police are kept fully informed at all stages about their position and their rights, and are provided with clear protection against unduly prolonged detention.

- In those jurisdictions which have a fixed time regime, police have encountered few practical problems (see below).

- A fixed maximum time gives guidance to police officers and promotes accountability. This regime operates with procedural and evidentiary safeguards which regulate police conduct and provide clear standards and rules of procedure. It ensures proper record keeping, which is essential for review. In contrast the reasonable time approach places all operational discretion in the hands of police and prosecuting authorities, with only loose statutory guidance and little in the way of accountability and review.

- Measures can be introduced to control any possible tendency for police to allow the maximum to become the norm. The investigation period is not intended to provide time during which a person may simply be held in custody. Even within the investigation period, the time for which the person is held must be reasonable in the circumstances of the case.

- The problem of delays caused by factors beyond police control, such as travelling time, the need to wait for the arrival of a lawyer, and so on, can be dealt with by making provision for time-outs. It is not necessary to abandon fixed maximum time limits in order to be able to accommodate these factors.

- It is preferable to set an initial limit which will be appropriate in the vast majority of cases rather than setting an ill-defined outside limit which is not relevant to most cases and is really designed for exceptional cases. A fixed maximum time approach, with provision for extension, makes allowance for exceptional cases.

The Commission recognises that the arguments for both options have merit. However, on balance it considers the fixed maximum time approach to be preferable, on the grounds that this approach:

- provides police with clearer guidance as to what is appropriate

- facilitates accountability

- has been shown to be workable in other jurisdictions.

The Commission is aware that there is a possibility that difficulties could arise with the administration of a fixed time regime. It therefore considers that the issue of 'fixed' versus 'reasonable' time approaches should be examined after the proposed scheme has been in operation for a suitable length of time (say, 18 months). If, at the end of that period, the QPS is able to produce properly documented evidence that a

fixed maximum time approach has significantly hampered the conduct of investigations, consideration should be given to the introduction of a reasonable time approach, or modification of the fixed maximum scheme. The Commission would be willing to assist in the conduct of an evaluation for the purposes of such a review.

What Should be the Length of the Specified Maximum Period?

The limited research available indicates that the majority of investigations can be completed within a short time after arrest.

The ALRC (1975, para 92) recommended a four hour period with limited time-out exclusions. This proposal was based upon an empirical study which the ALRC commissioned, as well as research studies from America indicating that as many as 97 per cent of cases could be cleared in this time.

As indicated, the report of the Coldrey Committee showed that 99.5 per cent of cases were disposed of within the initial six hour period, even though there was no allowance for time-out. The Committee also quoted research findings with respect to a similar Scottish provision for a fixed maximum of six hours pre-charge detention, in operation since 1980. This study found that the average time a suspect spent at a police station, despite the permissible six hour maximum, was two hours and fifteen minutes; 20 per cent of suspects spent less than one hour and 50 per cent of all detentions lasted less than two hours (1988, p. 69).

A pilot survey carried out by the New South Wales police for three months in 1987 found that in 91 per cent of cases surveyed it took less than four hours to process suspects between arrest and charge. Time-out exclusions were not taken into account, "nor were the police operating in a system in which time was of the essence" (NSWLRC 1990, p. 91).

A maximum four hour initial detention period has been operating in South Australia since 1985. Senior South Australian police officials and lawyers have indicated that "the legislation has proven to be effective", "is a vast improvement" from an operational viewpoint, and "there have not been any major problems encountered in the application of the legislation" (Letter to the NSWLRC from the South Australian

Commissioner of Police, Mr D A Hunt, 8 August 1990). The Commonwealth *Crimes Act 1914* likewise provides for a four hour period of pre-charge detention.[4] The NSWLRC has also recommended four hours for the initial period of custodial investigation, as has the NZLC.

On the basis of the research referred to above and the experience of those jurisdictions which employ a fixed maximum time approach, the Commission considers that four hours is an appropriate maximum time period for which a person can be detained prior to being charged. This is subject to provisions being made for time-outs and extensions, as discussed below. In recommending four hours, it should be emphasised that this is to be regarded as the upper limit, not the norm. In all cases police should only detain the arrestee for as long as it is reasonably necessary to achieve some specified purpose. A review of similar provisions in other jurisdictions has identified a number of relevant circumstances which should be considered in determining the length of pre-charge detention. These include the following:

- whether the presence of the arrested person is necessary for the conduct of the investigation which is intended to be conducted after arrest
- the number and complexity of matters under investigation
- whether the person has indicated a willingness to make a statement or answer questions
- whether a police officer reasonably requires the time to prepare for any interview of the person in custody
- whether appropriate facilities are available to conduct an interview or other investigations
- the number and availability of other persons including co-offenders, victims etc. who need to be interviewed or from whom statements need to be obtained
- any need to visit the place where the alleged offence is believed to have been committed
- the total period of time during which the person has been in the company of police

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4 An exception is created in the case of Aborigines, Torres Strait Islanders and juveniles where the maximum period is two hours.

- the time taken for police to attend at the place where the arrested person is being held (e.g. where a person has been arrested on a warrant)

- the time taken to complete any forensic examinations necessary.

In determining what is a reasonable period, the Custody Officer must balance the period necessary for the custodial investigation against the circumstances and seriousness of the alleged offence and the requirement that the investigation be conducted diligently and expeditiously. It should not be necessary for the Custody Officer to nominate at the outset a specific period in terms of hours and/or minutes. It may be that the designated period is the time necessary to take a statement or to visit the scene. The crucial aspect is that, however the period is described, the Custody Officer monitors the detention to ensure that the period of detention is reasonable.

20.3 Recommendation - Maximum Period of Pre-Charge Detention

The Commission recommends that the Custody Officer be able to authorise detention of an arrested person for a reasonable period not exceeding four hours. The reasonable period is to be determined by the Custody Officer by reference to the relevant circumstances. The operation of this fixed maximum time period should be reviewed after 18 months.

Time-outs During Period of Detention

The time limits imposed on the detention of arrested persons should relate to the time actually available for investigation. Various periods of waiting time should be excluded from the calculation of the detention period. Questioning of the arrested person should not be allowed during any time-out period.

This approach is similar to that taken by the NZLC (1992) and the NSWLRC (1990). The ALRC (1975) and the Gibbs Committee (1989) also recommended that provision be made for time-out. Legislation in the Commonwealth and South Australia makes provision for disregarded time. As discussed previously, the Victorian *Crimes Act 1958* initially provided for a six hour period but made no allowance for time-out. The Coldrey Committee agreed with the criticism that there were inevitably reasonable delays which could significantly reduce the initial period of time available for investigation and interrogation (Coldrey Committee 1986, p. 41).

A time–out provision serves the interests of both police and detained persons. Such a provision is especially important in Queensland because of the distance factors. For instance, in some cases it could take hours to convey suspects to a police station which has the facilities necessary to undertake a tape recorded interview. In addition, a time–out provision will:

> make it more likely that police will be prepared to co–operate in ensuring that the safeguards promised are actually available. If time spent in the effort to secure a lawyer, for example, was permitted to cut significantly into the time police are allowed to pursue their investigations, it is easy to foresee that such efforts on behalf of suspects would become perfunctory at best. (NSWLRC 1990, p. 95)

On one view, allowing exclusions may detract from the certainty benefits of the fixed maximum time limit scheme. However, time–outs will only be allowed for specific purposes. Such purposes might include:

- time reasonably required to:
  - * convey the person from the place of arrest to the nearest premises with appropriate facilities
  - * make and dispose of an extension application (see below)
  - * process the person through the watchhouse.
- time questioning is suspended or delayed:
  - * to allow a person to communicate with legal practitioner, friend or relative or consular official
  - * to allow a legal practitioner, friend or relative or consular official to arrive at the place of questioning
  - * to allow a person to receive medical attention
  - * because the Custody Officer believes the person to be intoxicated
  - * to allow for identification procedures to be arranged and conducted
  - * to allow for a reasonable rest period.

These purposes are generally recognised in other jurisdictions which make use of time–out provisions (see Appendix 10).

The Custody Officer should be required to record the length of, and reason for, any time–out to ensure that there is proper accountability.

20.4 Recommendation – Time–Out Periods

The Commission recommends that time–out periods should be disregarded when calculating the relevant time period for detention. Questioning of the arrested person is not to take place during a time–out period. The purposes for which time–outs should be allowed are as outlined above.

Extension of Time for Detention

Research confirms that the majority of investigations can be completed within a short time after arrest. However, there will always be some serious and complicated matters which require additional time for investigation and interrogation. The Commission recognises that some provision needs to be made for extension of the detention period in those cases where a properly conducted investigation cannot be completed within the initial four hour period. The main issues which need to be addressed are:

- what should be the maximum permissible extension?
- on what basis should the decision to extend be made?

What Should be the Maximum Permissible Extension?

Legislation in both the Commonwealth and South Australia provides for a specified maximum four hour period with provision for extension by a magistrate for a further period not exceeding eight hours. The Commission proposes that before the end of the initial detention period a police officer may apply to a magistrate to extend the

period of custodial interrogation for up to a further eight hours (excluding time-out periods). The Commission considered the possibility of allowing a commissioned police officer to hear and determine applications for the extension of the detention period. Such a proposal had some appeal in that it would avoid many of the logistical and cost problems associated with having to go before a magistrate. However, pre-charge detention has such a significant impact upon the fundamental liberty of the individual that judicial scrutiny of the necessity for further custody must be regarded as essential. Magistrates are independent of the police.

> This allows for an impartial assessment of the circumstances of each case by a court officer trained to make these types of decisions, free from any suggestion that police interests are given greater weight than those of the person in custody. (NSWLRC 1990, p. 110)

Making provision for applications by telephone should overcome some of the logistical problems. This would enable police officers to make such applications where it is not practicable to appear personally before a magistrate because of the time of day or the remoteness of the location.

The Commission recognises that, in very rare circumstances, the extended period may be insufficient for the police to carry out their duties properly. In such cases, before the end of the extended period, a police officer should be able to apply to a judge of the Supreme Court for a final extension of the detention period (as proposed by the ALRC 1975). The proposal that a Supreme Court judge should have to determine the application recognises that fundamental rights are at issue, and that applications for extensions beyond 12 hours should only be entertained in the most serious and complex cases.

The Commission has not specified a maximum period for the extension authorised by a Supreme Court judge. The cases in which an application will be made are likely to be so rare and unusual that it is more appropriate to leave it to the discretion of the Supreme Court judge. Provision should also be made for such applications to be made by telephone where necessary.

On What Basis Should the Decision to Extend be Made?

As stated earlier in this chapter, available evidence indicates that nearly all investigations will be completed within the initial four hour period (taking account of time-out periods). Thus only the more serious and complex cases are likely to result in an application for extension. Even then, an extension should not be granted lightly.

It should be seen as the exception, not the rule. Accordingly, the magistrate or where appropriate, the Supreme Court judge, should look carefully at a number of matters when considering the application. These should include:

- the nature of the offence
- the general nature of the evidence
- what investigation has already taken place and what further investigation is proposed
- the reason continued custody of the person is necessary
- whether the person has obtained legal advice or wants legal advice
- the extent to which a person in custody is co–operating in the investigation
- whether any earlier applications have been made in respect of the same, or substantially the same, matter (NSWLRC 1990, Rec. 4.3.2).

In relation to the last point, it is proposed that every application for extension must disclose whether there have been any prior applications in respect of the matter. The proposed scheme provides that before the expiry of the initial four hour period a police officer may apply for an extension of the detention period for up to a further eight hours. If the application is refused the police may continue questioning, or carrying out other investigative procedures which directly involve the arrestee, up to the end of the current authorised period of detention. However, the Commission recognises that a refusal may create the temptation for police to make further applications for extension to other magistrates or judges. To preclude this, there should be a requirement that where an application is refused any further applications for extension in respect of the same matter must be supported by new evidence.

Where the extension is applied for on the grounds that it is necessary in order to question, or further question, the arrested person, the magistrate or judge should ask the arrested person whether he or she agrees to be questioned. If the person asserts the right to remain silent, the detention period should not be extended. More generally, in considering an extension application the magistrate or the judge must consider whether further detention is necessary to preserve or obtain evidence or complete the investigation of the offence, and whether the investigation is being conducted properly and without delay.

The Commission also considers that arrested persons or their legal representative should be given the opportunity to be heard on any application for extension of the investigation period. The ALRC (1975), the Gibbs Committee (1989) and the NZLC (1992) have made similar proposals. Further, the Commonwealth *Crimes Act 1914*, the United Kingdom *PACE Act 1984* and the South Australian *Summary Offences Act 1953* provide that the person or the legal representative may make representations to the judicial officer on an application for extension.

20.5 Recommendation – Extension of Detention Period Beyond Four Hours

The Commission recommends as follows:

There should be a provision that before the end of the initial four hour period a police officer may apply to a magistrate to extend the period of detention for a further period of up to eight hours.

In exceptional circumstances, where police have been unable to complete their investigations within the extended period, an application for further extension may be made to a Supreme Court judge who shall specify the further period of detention authorised.

Provision should be made for applications to be made by telephone where appearance before a magistrate or a Supreme Court judge is not practicable because of the time of day or the remoteness of the location.

The arrested person or his or her legal representative should have the right to be heard on an application for extension. In the case where the application is for an extension for the purpose of further questioning of the person, the application shall not be granted unless the person indicates to the court his or her willingness to be interviewed further.

In any application the onus is on the police officer to satisfy the judicial officer that:

- **the investigation is being conducted diligently and expeditiously; and**
- **a further period of detention without charge is reasonably necessary to preserve or obtain evidence or to complete the investigation; and**

- **there is no reasonable alternative means of obtaining the evidence other than by the continued detention of the person in custody; and**

- **circumstances exist which made it impracticable for the investigation to be completed within the four hours (see those circumstances relevant to determining a 'reasonable period') OR other circumstances of emergency made it impracticable for the investigation to be completed within that time.**

PROCEDURE AT THE END OF THE DETENTION PERIOD

At the end of the detention period, a decision must be made as to whether or not to charge the detained person. Where there is sufficient evidence to charge the person, he or she should be either released on the basis that a summons will issue or should be formally charged.

While this formal charging process currently occurs at the watchhouse and the charge is read by the watchhouse keeper, there appears to be no reason why that could not be done at the police station by the Custody Officer provided the appropriate equipment and facilities are available. Similarly, there seems to be no reason why those people processed at police stations could not have the question of bail determined by the Custody Officer if the Queensland Law Reform Commission's (1993) proposals to amend the *Bail Act 1980* are implemented.

Where the facilities to process the person are not available at the police station, he or she should be taken to the nearest watchhouse. At the watchhouse the person must be charged and taken before the Magistrates Court, unless bail is granted.

If, at the end of the authorised detention period(s), there is insufficient evidence to charge the person, the person must be released. This is consistent with the Commission's recommendation in Volume III (1993) of this report that there be a specific legislative provision requiring a police officer to release an arrested person where the officer no longer has reasonable grounds to suspect that the person has committed or is committing an offence. This, in effect, is a power to 'unarrest' a person.

20.6 Recommendation – Procedure at End of Detention Period

The Commission recommends that once the authorised period of detention has expired (including any authorised extension) the police must either:

- **release the person without charge**
- **release the person on the basis that a summons has issued or will issue against the person**
- **take the person to the watchhouse or other appropriate facility for the purpose of being charged and**
  - **released on bail; or**
  - **taken before the first available Magistrates Court.**

Where a Magistrates Court is not immediately available, no further questioning shall be allowed of the person in custody.

RE-ARREST

In some circumstances there may be a genuine need to re-arrest a person who has been released, for example, where an arrested person is questioned about one matter and admits involvement in another unrelated criminal matter. Assuming the evidence with respect to the unrelated matter amounts to a reasonable level of suspicion, this would be a proper basis for arresting the person again and commencing a new period of investigation.

However, the Commission recognises that some police may be tempted to circumvent the rules limiting detention times by releasing an arrested person and then immediately re-arresting the person in order to detain the person for another four hours or more. The Commonwealth legislation (s. 23C(6)) provides that if a person has been arrested more than once within any period of 48 hours, the detention period for each arrest other than the first is reduced by so much of any earlier detention period or periods that occurred within that 48 hours. However, the Commission views this approach

as too restrictive and prefers that police be given a new period of custodial detention in genuine cases. The Commission therefore proposes that a person shall not be re-arrested and subject to further investigative detention for the offence(s) for which they were previously arrested, unless new evidence justifying a further arrest has come to light since the release. The ALRC (1975, para 89) and the NSWLRC (1990, Rec. 3.8) have made recommendations in similar terms.

20.7 Recommendation - Provision for Re-Arrest

The Commission recommends that, once released, a person shall not be re-arrested without warrant and subject to further investigative detention for offence(s) which the person has previously been arrested, unless new evidence justifying a further arrest has come to light since the release.

THE POSITION OF VOLUNTEERS

The Commission has had considerable difficulty in resolving the issue of whether the proposed four hour time limit, plus extension provisions, should also apply to police dealings with 'voluntary attendees'. On the one hand, it can be argued that if a voluntary attendee has been warned that he or she is free to leave, and that person then consents to remain at the police station and be questioned, there should be no need for any further restrictions upon police. In support of this view, it has been suggested that it is unnecessarily burdensome for the police to have to appear before a magistrate after four hours to obtain authorisation to continue questioning a person who has agreed to participate. Another objection to setting a time limit for volunteers has been raised by the NZLC. According to the NZLC (1992, p. 160), "to apply the time limits to any custodial questioning of a suspect, even if the suspect has not been formally arrested, would create the (mistaken) impression that it is legitimate to detain for questioning a person who has not been arrested provided that the detention is for a limited time".

On the other hand, the reality of the situation is that once people are inside a police station and being questioned, they are likely to be subject to various pressures to remain. It may be very difficult for a person who has been subjected to some hours of police questioning at a police station to exercise the right to leave. Furthermore, a number of studies in the United Kingdom have demonstrated that the manner in

which a person is informed of his rights may influence the take-up of those rights (see p. 708). Most importantly, if there is no time limit set in the questioning of voluntary attendees, the police will have an incentive to evade the time limits by continuing to deem people to be voluntary attendees rather than under arrest. This would largely defeat the purpose of bringing in a regulated scheme.

On balance, the Commission has been persuaded that time limits should apply to voluntary attendees as well as to arrestees. This means that the police officer and the voluntary attendee must appear before a magistrate at the end of the four hour period so that the magistrate can inform the person of his or her rights in an atmosphere removed from the police station, and be satisfied that the person understands them. Time will commence to run from the point at which the person falls within the definition of suspect provided in Chapter Eighteen. Where it is impractical to appear personally, hearings could be conducted by telephone.

The role of the magistrate at this point should be to establish that the person is in fact voluntarily co-operating with police. Unlike the case of an arrested person, it would be inappropriate for the magistrate to nominate a period of further questioning. This is because to do so may convey to a voluntary attendee that he or she is under some form of compulsion to remain for that period. It should be made clear to a person at the first hearing that he or she can leave at any time unless informed that he or she is under arrest. These measures, combined with the prior warning at the station, should be sufficient to protect the suspect's rights. If, at the end of the further eight hour period, the volunteer is still being questioned at the police station, a further appearance before the magistrate would be necessary to remind the person of his or her rights and to ensure that the person is aware that he or she is free to leave.

20.8 Recommendation - Time Limits for Voluntary Attendees

The Commission recommends that after a period of four hours and at the end of a further eight hours, taking account of time-out, if the voluntary attendee is still in attendance at the police station, the voluntary attendee and the police officer should be required to appear before a magistrate and satisfy the magistrate that the person freely agrees to remain at the police station and for questioning to continue. Where it is impractical for them to appear before a magistrate, the hearing should be conducted by telephone.

CONCLUSION

This chapter has recommended the introduction of legislation allowing detention of arrested persons. It has proposed that the detention be for a reasonable period up to a maximum of four hours, taking account of time-out periods. It has also recommended that provision should be made for an extension by a magistrate up to a further eight hours and, in very unusual cases, a further extension authorised by a Supreme Court judge.

The Commission has recommended a fixed maximum time period for pre-charge detention of arrested persons rather than an unlimited 'reasonable period'. While there are strong arguments for both, the Commission has opted for the former with provision for time-outs and extensions. However, the Commission considers that the operation of the fixed maximum time period be reviewed after 18 months.

The chapter has also addressed the extent to which time limits should apply to volunteers. It has recommended that volunteers and police should appear before a magistrate after the first four hours and again after a further eight hours (not counting time-outs). This is so the magistrate can be satisfied that the person is a volunteer. Applying the time limit to volunteers should prevent police from circumventing the restrictions by classifying people as volunteers rather than arresting them.

CHAPTER TWENTY-ONE

THE INTRODUCTION OF A FREE LEGAL ADVICE SCHEME

It is crucial to the proper balance of the scheme which the Commission proposes that free legal advice be available to arrestees who are detained by the police for the purposes of questioning, and to 'voluntary attendees'.

This chapter addresses the following issues:

- the importance of making lawyers available to suspects
- lessons to be learnt from England and Wales, where suspects have a right of access to free legal advice
- the proposed form and estimated cost of a free legal advice scheme for Queensland.

THE NEED FOR LEGAL REPRESENTATION OF SUSPECTS

The Importance of Pre-Trial Processes

The right of defendants to legal representation at trial is firmly established. As the High Court decision in *Dietrich v The Queen* (1992) 67 ALJR 1 suggests, a right to have such representation publicly funded (at least in serious cases) also appears to be emerging in Australian law.

While no-one would deny the importance of legal representation in court, this focus on the trial encourages a fundamental misunderstanding of our criminal justice process:

> It is time to shift the focus away from the jury trial, which is used in only a tiny proportion of criminal matters, to the pre-trial process, the site which actually determines the fate of most accused persons. As Sallmann and Willis have written: 'The perception of the jury trial as the stage where the only really important decisions are made is often accompanied by a view of criminal investigation as exploratory, procedural, mechanical, introductory ... Nothing could be further from the truth, and in fact a great many persons' convictions are signed, sealed and delivered in the police station during the criminal investigation process.' (NSWLRC 1990, p. 21)

By its very nature, the adversarial system emphasises pre-trial processes:

> The prior investigation of a suspect by the police and the circumstances in which statements are made by him and produced in evidence at trial (and the rules that govern these matters) form part of the central core of the whole criminal process. (Philips Commission 1981, p. 3)

Pre-trial processes are also of vital importance in generating the mass of guilty pleas which resolve most cases: "The guilty plea is the central empirical fact in our criminal justice system ...". (NSWLRC 1990, p. 18)

Suspects need lawyers in the pre-trial investigative process just as much as they do at trial. If a right to legal representation exists, it must logically apply to pre-trial procedures.

The Value of Legal Representation

> The right to consult a lawyer is part of our basic constitutional inheritance. Not surprisingly it is also a central feature of contemporary international statements of human rights. The right is pivotal in assuring so far as possible that both those detained and those detaining them act in accordance with the law. It recognises the reality that an individual who is arrested or detained is ordinarily at a significant disadvantage in relation to the informed and coercive powers available to the State. Access to counsel is a means of reducing that imbalance and of ensuring that anyone arrested or detained is treated fairly in the criminal process. In that regard the right to a lawyer facilitates access to knowledge and also allows for representation by an independent intermediary. (*MOT v Noort* [1992] 8 CRNZ 114, Richardson J at 136, quoted in NZLC 1992, p. 165)

According to policing mythology, giving detained suspects access to legal advice will simply lead to them being advised not to answer police questions. The reality has been shown to be very different (Dixon 1991a). Legal advisers can provide a range of formal and informal services to detained clients.

The provision of legal advice involves much more than advising about the right to remain silent. Other aspects on which advice might be given include the following. Did the client's alleged behaviour amount to an offence? What intent or other mental element must the prosecution prove? What charges are available to police? What are the possible penalties? Are any defences available? Is an early confession likely to be helpful? What other offences may be considered? Should admissions to these be made? If the client has not been arrested, should he or she attempt to leave the station? If an arrest has been made, how long can the person be detained? What powers of investigation (fingerprints, identification parades, photographs, medical examinations) do the police have? Is bail likely or possible? How can complaints be made? These are just some of the more obvious questions which a legal adviser may have to consider. "Only an experienced lawyer can give (a detained suspect) this kind of information and advise how best to proceed." (Philips Commission 1981, p. 100)

The lawyer may also play an important informal role in supporting the client, aiding communication between police and suspect, and negotiating with police about a range of matters which are not strictly legal. Lawyers may be able to play this role more effectively than lay people because of their familiarity with the police station environment and their ability to deal confidently with police.

> Suspects can . . . be helped to give their accounts coherently . . . and protected from misconduct. They should be given practical advise on how to deal with the police. As one solicitor explained, 'you have to get clear to your client . . . that nothing with the police is informal' and that they must be careful in talking to detectives who may 'nip into the cell and have a quick word'. They 'should also be advised about the conduct of the interview . . . how they should read everything three times before they sign it, even if they are fed up and tired'. (Dixon 1991a, p. 237)

As the ALRC (1975, p. 48) noted:

> The very presence of counsel is an important guarantee of general fair treatment for the suspect . . . Nor ought we to underestimate the important role played by the legal profession as a psychological prop to citizens caught up, especially for the first time, in the frightening circumstances of police restraint.

The presence of a lawyer can have a significant impact on the atmosphere in which questioning is conducted. "A court where the defendant is unrepresented is a very different place, however reasonably the magistrate may try to act, from a court where a lawyer is present." (Basten et al. 1982, p. 223) Likewise, a police interview room where a suspect is accompanied by a legal adviser is a very different place from one where the suspect faces police questioning alone.

Implications of Experience in England and Wales

The most important example of an attempt to provide substance to the right to legal advice is the *PACE Act 1984* (UK) (s. 58 and Code of Practice C). Under the Act, suspects detained at police stations must be informed that they have a right of access to free legal advice. Legal advisers can speak privately to their clients and are entitled to attend, and provide advice, during interviews. Access to legal advice can be delayed only in closely specified and unusual circumstances. Legal aid funds are available to solicitors who advise clients at police stations and duty solicitor schemes are provided for suspects who do not know a solicitor to contact.

The extensive research which has been carried out on the *PACE Act* has been critical of the legal advice scheme (Baldwin 1992; Dixon et al. 1990b; McConville and Hodgson 1993; McConville et al. 1994; Sanders et al. 1989). Part of the problem has been the relatively low 'take-up rate'. For instance, it was found in earlier studies that the proportion of suspects who requested a lawyer varied dramatically between stations (from 11.4% to 41%), indicating substantial differences in how police informed suspects of the right to legal advice (Dixon et al. 1990b, p. 121; Brown et al. 1992, p. 59). It was also established that police officers often used various means to discourage requests (Sanders et al. 1989). In 1991, Code C of the *PACE Act* Codes of Practice was amended to make clear that police must inform suspects that advice is free. Subsequently the request rate rose to almost a third. However, it is still the case that, for a variety of reasons, about two-thirds of suspects do not avail themselves of the free legal advice scheme.

A further area of criticism has related to the performance of the English and Welsh legal professions. There has been extensive criticism of solicitors employing unqualified and sometimes inappropriate staff (notably ex-police officers) to attend stations; advising by telephone rather than attending the interview in person; providing inadequate advice; putting pressure on clients to plead guilty; and failing to actively assist their clients (Baldwin 1992; Dixon et al. 1990b; Sanders et al. 1989; McConville and Hodgson 1992; McConville et al. 1994). It has been suggested that

some legal advisers may do even more harm than good, notably if their presence provides a gloss of legitimacy to police questioning, and the adviser does nothing to assist the client or to protest against oppressive interrogation tactics (Sanders and Bridges 1990, p. 507; Runciman Commission 1993, p. 12).

The variable quality of advice provided is in part a function of economic factors: there have been longstanding complaints about the inadequacy of legal aid payments, and these have led to difficulties in attracting solicitors to provide advice in some areas. But recent research emphasises that the problem is cultural and social as much as economic: some solicitors provide poor service to clients because they hold disparaging views about criminal legal practice and the clients which it attracts.

It is clear from the *PACE Act* experience that providing suspects with a right to free legal advice is no panacea. How such advice is to be provided raises difficult questions. But it must be stressed that in England and Wales the issue for debate is how a free legal advice scheme should be organised and operated, not whether it is desirable. None of the *PACE Act* scheme's critics shift from the position that access to legal advice is vital. The debate is about how to give more substance to that right (Runciman Commission 1993, pp. 35–39).

The *PACE Act* experience suggests the need to be more imaginative in arranging a legal advice scheme than was initially the case in England and Wales. In particular, as the Runciman Commission (1993, p. 38) recommends, there is a clear need for legal advisers to be adequately trained, monitored and supervised. The legal aid system must also be funded and organised in such a way as to attract competent lawyers who are willing and able to provide a professional service.

Will Lawyers Make Police Work Impossible?

A common objection to providing a right to free legal advice is that suspects will be encouraged to exercise their right to remain silent and, thereby, will obstruct the police in criminal investigation. However, it is inconsistent to insist that a right to remain silent exists but then object to providing suspects with the ability to exercise it. In any event, most critics of free legal advice schemes oversimplify the way in which lawyers advise clients about their right to remain silent. Research in England and Wales suggests that lawyers rarely advise clients not to co–operate with police (Dixon 1991a). This research also indicates that few suspects exercise their right to remain silent. Those who do remain silent are not less likely than other suspects to be charged or convicted (Dixon 1991b; Leng 1993; McConville and Hodgson 1993).

In fact, the experience of England and Wales suggests that police can benefit from suspects receiving legal advice. Lawyers often assist communication between police and suspects. Quite properly, the advice provided by lawyers will often lead suspects to co–operate and confess earlier than they might otherwise have done. A suspect or defendant will find it difficult to claim convincingly that he or she was mistreated during detention. Similarly, "if a statement is made by the arrested person it cannot later be objected to on the ground that it was involuntarily made or unfairly obtained" (NSWLRC 1990, p. 125).

WHAT FORM SHOULD A FREE LEGAL ADVICE SCHEME TAKE?

In the Commission's view, it is primarily a matter for the Queensland Legal Aid Commission, with other interested parties, to determine the most appropriate way of operating a free legal advice scheme. The scheme, however it is structured, should be flexible, cost effective, and deliver a reasonable quality of service.

One possible way of operating the scheme could be via a tendering arrangement, similar to that currently being used to supply duty lawyer services to a number of Magistrates Courts in Queensland. Under such an arrangement:

- The private legal profession would be primarily responsible for servicing the scheme.

- In larger population centres, where the volume warranted it, the bulk of the work could be contracted out to one or more firms, or a consortium of firms, through a tendering process.

- In smaller centres, where tendering would be impractical, payments for attendance would have to be made case by case. Given the sometimes unpredictable flow of work, it might also be necessary to use case–specific payments to manage occasional overflows and backlogs in the larger centres.

- Suspects should be able to request the attendance of their own lawyer, but in such cases should have to bear the cost of the lawyer attending, unless that lawyer is a participant in the scheme. A similar principle is applied to medical patients: access to free medical services through the public hospital system is at the price of not being able to choose the practitioner; patients who want to use the doctor of their choice must pay for the privilege.

- In very small, remote communities, where legal practitioners are either not available, or are unwilling to participate in the scheme, provision would have to be made for legal advice to be provided over the telephone by experienced practitioners located in larger population centres. However, as a general rule, the use of telephone advice should be avoided. The heavy reliance by lawyers in England and Wales on advising by telephone has been the subject of considerable criticism and has led to action to discourage this practice. A legal adviser who does not attend the station cannot properly assess the client's situation or needs. Geographical and logistical problems may make it inevitable that some initial advice is provided in some areas by telephone, but this should be minimised and should certainly only become routine in the most isolated areas.

Possible objections to the scheme outlined above include that:

- participation in the scheme would be unattractive to most practitioners, because of the likely low level of payment and the unpredictable hours of work required

- suspects would be provided with poor quality advice, as firms would be under pressure to 'cut corners'

- people in remote communities would be disadvantaged.

Each of these objections will be considered in turn.

Willingness of Practitioners to Participate

It has been suggested that it will be difficult to find criminal lawyers of sufficient experience to participate in the scheme – especially where it involves after hours and weekend work. This was a potential problem when the United Kingdom Legal Aid Commission proposed their scheme. However, the experience in the United Kingdom was that solicitors began to find the police station duty lawyer scheme more attractive than the Magistrates Court duty lawyer scheme.[5] This was because they could benefit from a 'flow-on' of court work from the cases which they attended at police stations.

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5 According to senior officer in the Legal Aid Commission, United Kingdom.

While the proposed tendering process may guarantee the successful firm(s) a steady flow of work and the potential to achieve some economies of scale, participation in the scheme may not be as attractive to Queensland practitioners as has been the case in the United Kingdom. The reason for this is that a current Queensland Law Society rule prevents firms from referring work to themselves, thereby potentially denying Queensland practitioners the benefits of the flow-on of work.

Unless this rule is amended, it may be necessary to increase the rate of payment for police station services (at least out of hours) so as to ensure the participation of experienced criminal lawyers.

Quality

It is probable that the task of attending at police stations would fall disproportionately on relatively junior staff, especially out of hours. However, it should not be too difficult to train these staff to provide appropriate advice, especially as they would soon build up expertise through frequent attendance at interviews. Even if the legal advice given was of variable quality, this would be a very considerable improvement over the current situation, in which suspects are routinely detained and questioned without having any access to a lawyer. Another advantage of tendering systems is that they assist in quality control: expertise in the area can be one of the grounds on which the tender is awarded; conversely, poor performance can provide a justification for discontinuing the use of a firm's services.

The Problem of Distance

As indicated, in some instances it may be impractical to provide face-to-face legal advice because of the constraints imposed by distance. The Commission acknowledges that this is a problem with developing a free legal advice scheme for Queensland, but this is not a sufficient ground for rejecting the proposal.

There is no reason to believe that the proposed scheme will worsen the position of residents of remote areas in their dealings with police. In fact, if provision is made for free telephone advice to be provided, the situation in these areas would be improved to some extent. Moreover, the reality is that most of the population and, more importantly, most suspects, live in substantial population centres. According to

the most recent census, 73 per cent of Queenslanders live in communities with a population exceeding 5,000 people. The particular problems of remote areas should not be used as an excuse for failing to introduce reforms which would clearly be in the interests of the criminal justice system as a whole.

How Many Suspects Will Use Free Legal Advice?

Experience in England and Wales suggests that the mere provision of a statutory right to free legal advice is not enough. Suspects must also be encouraged to make use of legal advice if they need it. In part, this is a matter of ensuring that police inform suspects of their right to advice in a proper way (Sanders et al. 1989). As noted above, a 1991 amendment to the *PACE Act* Code of Practice C, mandating that suspects be told that advice is not only available, but also free, contributed to an increase in the percentage of suspects requesting legal advice from 24 to 32 per cent (Brown et al. 1992, p. 59). However, it is more difficult to tackle suspects' preconceptions and perceptions which can be remarkably resistant to attempts to provide information:

> Intimidated by the situation, distrusting or unused to dealing with lawyers, assuming that legal services are costly, fearing that asking for legal advice implies guilt . . . most suspects feel that the appropriate response in the situation is to decline. (Dixon et al. 1990a, p. 356)

Public education, training of Custody Officers, and provision to suspects of useful information about their rights will all be essential in ensuring that legal advice is obtained by suspects who need it.

The Commission has estimated that in the early years of a free legal advice scheme, somewhere between 8,000 and 13,000 people (on 1991/92 figures) would make use of the scheme in a given year (Appendix 12). This estimate assumes that the utilisation rate for the scheme would be between 24 and 40 per cent of eligible cases. As noted, when the *PACE Act* scheme was first initiated, the take-up rate was only 24 per cent. On the evidence available, it is unlikely that the rate for Queensland would be much higher, at least initially. As in the United Kingdom, it will require a major cultural shift on the part of both police and suspects for both parties to come to terms with lawyers being routinely present in police stations.

How Much Will A Free Legal Advice Scheme Cost?

The Commission has estimated that the total annual cost of operating a free legal advice scheme along the lines outlined in this chapter would be in the range of $1.55 million to $2.59 million (see Appendix 12). This should not be regarded as optional expenditure. For the reasons outlined above, legal advice for suspects in police detention should be seen as a necessary corollary of the power to detain and question. Budgetary provision should be made to operate the scheme, just as budgetary provision is made for police officers, police stations, and police equipment.

The costs of operating the proposed scheme must be kept in perspective. In 1992/93 the QPS budget was approximately $444 million. Two programs – 'prevention of offences' and 'detection of offences' – accounted for $273 million (QPS 1993). The amount required to operate a free legal advice scheme therefore represents, at most, only 0.6 per cent of the total QPS budget and only 0.9 per cent of the amount allocated to the prevention and detection of offences. Given the central role which interrogations play in the investigation of offences, and the legal and practical difficulties which the police presently encounter, this is a relatively small price to pay to improve police efficiency and effectiveness in this area.

It should also be emphasised that increased expenditure on the provision of legal advice to suspects at their first point of contact with the legal system has the potential to generate substantial savings further down the track. For instance:

- If lawyers are present at the time of the interview, there will be fewer disputes later about whether the interview was properly conducted and, hence, less time and resources spent on voir dires and appeals.

- Where lawyers are present from the outset, they will be in a better position to advise their clients. This should assist in the early identification of pleas of guilty and the prompt processing of cases (Fazio et al. 1985).

- The suspect's lawyer will often be in a position to have some input into bail decisions. The Commission's research shows that in about one-third of cases where the police had the power to grant bail but denied it, bail was subsequently granted by the magistrate.[6] If the proportion of cases where police deny bail could be reduced, this would lessen pressure on watchhouse populations and lead to commensurate cost reductions.

21.1 Recommendation - Suspect's Right to Free Legal Advice

The Commission recommends that the Custody Officer (see Chapter Twenty-two) be required to advise the suspect of his or her right to contact a lawyer. The Custody Officer should advise the suspect that if he or she does not have a lawyer, a free and independent legal advice scheme is available to provide the services of a lawyer at the police station, or, in remote areas, over the telephone.

Where a suspect indicates a wish to communicate with a lawyer, the Custody Officer should arrange for the suspect to do so in private and must defer questioning and other investigative procedures involving the suspect until that has occurred. Where the suspect indicates a desire to have a lawyer present for an interview or other procedure, the interview or other procedure should be deferred until the lawyer arrives and has consulted with the suspect.

Where a lawyer having agreed to attend does not arrive within a reasonable time (up to two hours) the Custody Officer should make an attempt to contact another lawyer. In such circumstances the suspect is not to be questioned until he or she has had access to legal advice.

CONCLUSION

This chapter has argued that provision of a free legal advice scheme should be seen as an essential part of any pre-charge detention scheme. The chapter has outlined the possible features of such a scheme and considered its likely cost. Depending on the assumptions which are made, the annual cost of operating such a scheme is likely to be in the range of $1.55 million to $2.59 million.

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6 This estimate is based on a study of all arrests processed through the Brisbane City Watchhouse in August 1992. Aspects of this study are discussed in the third volume of the Commission's police powers report (1993, p. 599).

If objection is taken to the cost of the scheme, the implications must be clearly understood. The power to detain for questioning cannot be justified unless it is accompanied by adequate protections for suspects. As the NZLC concluded:

> effective access to legal advice is an essential component of the proposed questioning regime, to the extent that in the absence of such access, we would not recommend that provision be made to enable the questioning of suspects after arrest and before charge. (1992, p. 167)

If legal advice is considered too costly, much more radical alternatives must be considered, such as a shift in police investigative practice away from relying on interrogation, or confining questioning to the courtroom by a magistrate.

CHAPTER TWENTY-TWO

THE ROLE AND RESPONSIBILITIES OF THE CUSTODY OFFICER

INTRODUCTION

The scheme proposed by the Commission aims to provide the police with a workable framework within which to operate, and to enhance suspects' rights. As emphasised, the proposed pre-charge detention power is contingent upon the provision of accessible rights to the arrested person during the period of detention, including the right to free legal advice. In allowing for pre-charge detention, the Commission also considers it essential that a designated 'Custody Officer' is responsible for the care of the person and the protection of his or her rights during this period. The Custody Officer should also be responsible for protecting the rights of 'volunteers'. The issues considered in this chapter are:

- who should be the Custody Officer?
- what should be the responsibilities of the Custody Officer?

WHO SHOULD BE THE CUSTODY OFFICER?

The concept of Custody Officer is based on the designated Custody Officer recommended by the Philips Commission in the United Kingdom. The Philips Commission proposed that where the number of suspects dealt with at a police station warranted it, there should be an officer whose sole responsibility should be for receiving, booking in, supervising and charging suspects. The officer should be at least of the rank of sergeant. At other stations, it should be one of the responsibilities of the officer in charge of the station to deal with suspects. The Philips Commission acknowledged that in one or two-person stations, it would not be possible to maintain the strict demarcation between the responsibilities of the arresting or investigating officer and the officer who has the duty to look after the suspects. However, the Philips Commission considered that this should not affect the general position.

This recommendation was implemented in the *PACE Act 1984*. The Act provides for there to be a Custody Officer at every designated police station (being the station in a particular area designated to be used for the purpose of detaining arrested persons). At other police stations there must simply be someone able to take on the job if the need arises. The Custody Officer must be at least of the rank of sergeant, although an officer who is not a sergeant can perform the functions at a designated station "if a Custody Officer is not readily available to perform them". There is nothing in the Act which requires that a Custody Officer perform his or her functions over any particular period of time, or which prevents the officer from having other duties as well (s. 36 *PACE Act 1984*).

Under the *PACE Act 1984*, at designated police stations the investigative and custodial functions are meant to be distinct. If the suspect is taken to a non-designated police station, the function of Custody Officer must be carried out by someone not involved in the investigation, "if such officer is readily available" (s. 36(7)(a)). If no such officer is available the functions may be carried out by the officer who took the person to the station "or any other officer" (s. 36(7)(b)). If so, such an acting Custody Officer must as soon as practicable notify an officer of the rank of inspector or above at a designated police station that this is the case (subs (9) and (10)).

The designated Custody Officer is not a feature of any of the legislative schemes currently operative in Australia. However, the NSWLRC recommended the introduction of a formal system of Custody Officers who would be responsible, for example, for determining whether detention for the purpose of investigation was warranted and what was a 'reasonable period' of detention in the circumstances, as well as maintaining the custody record (1990, Rec. 3.4.2).

The NSWLRC recommended that the Custody Officer should be of, or above, the rank of senior constable, or be in charge of the police station for the time being. Unless it was unavoidable, the arresting officer should not act as the Custody Officer (1990, Rec. 3.4.4).

In proposing a formal system of Custody Officers the NSWLRC took account of the following:

- the New South Wales Police Commissioner's Instructions already used the term Custody Officer; that definition included any police officer having responsibility for the detention and care of persons in custody at a police station

- the Custody Officer system has been widely regarded as a major success of the *PACE Act 1984*.

The NSWLRC observed that in England and Wales the distances are much smaller and the population is less spread out – hence, regional police stations can be designated as custody stations with at least one Custody Officer per shift. In New South Wales there are many small country towns often staffed by only one or two officers. However, the NSWLRC argued that the Custody Officer system should not be discarded simply because of the problems caused by isolated country police stations, especially as these stations account for only a very small proportion of arrests.

In Queensland, as in New South Wales, most of the population and most suspects live in substantial population centres. Thus, while the factors identified by the NSWLRC may make it impractical to create designated specialist Custody Officers here, the concept should not be abandoned. A workable compromise is to require that a senior police officer who is independent of the investigation exercise the functions of the Custody Officer. In most cases, the functions could be carried out by the Duty Sergeant or the officer in charge of the police station. In the rare case where the arresting officer is the only officer available, approval for this officer to perform the functions of the Custody Officer should be sought by telephone from a commissioned officer and the details entered in the custody index.

It was put to the Commission that the concept of Custody Officer would be unworkable in the Queensland context because such officers would not act independently and would simply 'rubber stamp' the actions and decisions of the investigating officer. The Commission acknowledges that for the Custody Officer scheme to operate as intended, changes in practices and attitudes will be required in the QPS. The need for cultural change of this nature was identified by the Fitzgerald Inquiry[7] and the reforms implemented over the last five years have tried to address the problem. The Commission recognises that change takes time to achieve and requires that resources be devoted to training and monitoring. However, it is better to put structures in place which will help encourage change than to accept the status quo. The alternatives, neither of which are attractive, are to:

- abandon the scheme and maintain existing practices with all the attendant problems documented in Chapter Seventeen; or

- adopt a pre-charge detention scheme but leave the investigating officers to function without supervision.

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7 Commission of Inquiry Pursuant to Orders in Council 1989, Report, 26 May 1987, 24 June 1987, 29 June 1989 (Chairperson: GE Fitzgerald QC), Government Printer, Brisbane.

The advantage of implementing the Custody Officer scheme is that someone will be made responsible and accountable for the treatment of persons while in custody.

22.1 Recommendation – The Custody Officer

The Commission recommends that, where practicable, a senior police officer who is independent of the investigation should exercise the functions of the Custody Officer. Where no officer independent of the investigation is available, approval for one of the investigating officers to exercise the functions of Custody Officer should be sought by telephone from a commissioned officer.

THE RESPONSIBILITIES OF THE CUSTODY OFFICER

In general terms, the Custody Officer should be responsible and accountable for the welfare of suspects at the police station, including arrested persons during the detention period and volunteers attending for investigative purposes. Upon arrival at a police station, the investigating officer should take the suspect before the Custody Officer immediately. The Custody Officer should then assume primary responsibility for the manner in which the suspect is treated, as well as supervising the detention. This responsibility carries with it a number of obligations, some of which have already been discussed and others which will be outlined below. These include:

- informing the suspect of his or her rights
- determining whether pre-charge detention is warranted
- authorising investigative procedures involving the suspect
- identifying and attending to any 'special needs' of the suspect
- ensuring that the suspect has medical assistance, rest and refreshment
- ensuring proper custody records are maintained.

Informing the Suspect of His or Her Rights

An integral part of the Commission's proposed scheme is that suspects are accorded appropriate rights while involved in the police investigative process. Upon arrival at the police station, the Custody Officer should inform the suspect of his or her rights. The information provided will differ slightly depending upon whether the suspect has been arrested or not.

The Right to Remain Silent

The Custody Officer must inform all suspects of the right to remain silent. The Commission recognises that in some cases this may duplicate a prior warning given 'in the field'. However, requiring the Custody Officer to administer the caution at the police station ensures that all suspects are informed of the right to remain silent by an officer independent of the investigation. In addition, the Custody Officer should also satisfy himself or herself that the person understands the caution.

The Right to Free Legal Advice

The Commission proposes that the Custody Officer's duties include informing all suspects of the right to free and independent legal advice as outlined in Chapter Twenty–one. Where the suspect wishes to have access to legal advice, the Custody Officer is responsible for ensuring that occurs, subject to the deferral provision discussed below. In the case of Aborigines and Torres Strait Islanders, the Custody Officer must notify the Aboriginal Legal Service or other Aboriginal legal aid organisation and inform the person of this procedure, as outlined in the 'special needs' section of this chapter.

The Right to Communicate with Others

The final right of which the Custody Officer must inform all suspects is the right to communicate with another person such as a friend or relative, or consular official. Currently, the QPS Custody Manual recognises that a medical practitioner, legal representative, diplomatic or consular representative, relative, or other person who may be concerned about the whereabouts or safety of a prisoner, may contact the police to inquire about the person (p. 18). However, the Manual only requires the arresting officer to inform a foreign national of his or her right to contact a consular official.

It does not require a police officer to inform a person of his or her right to contact any of the other nominated people. The Commission considers it important that suspects at police stations be given a right to communicate with the persons nominated above and that suspects are informed of the right.

Deferral of Communication Rights

With respect to persons who have been arrested, there may be cases where police have reasonable grounds to believe that the right to communicate with a person will result in "the tipping off of an accomplice, who may himself escape or arrange for the disappearance, destruction or fabrication of evidence" (ALRC 1975, p. 46). These are likely to be rare cases but are acknowledged in existing legislative schemes. The circumstances which might justify deferring communication rights are where the police officer believes on reasonable grounds that:

- immediate compliance will result in
    - * an accomplice taking steps to avoid apprehension; or
    - * the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
- the questioning is so urgent, having regard to the danger of harm to some other person.

This proposal is also consistent with the recommendations of the Criminal Code Review Committee (see draft s. 263).

Any restriction on the right of the 'voluntary attendee' to communicate with other persons would be contrary to the concept of 'voluntary co–operation'. The voluntary attendee is in fact free to go at any time unless and until arrested. Any denial of the communication rights would simply present the opportunity for voluntary attendees to exercise their right to leave the police station. The Commission therefore proposes that there be no restrictions whatsoever on the right of the voluntary attendee to communicate with those persons.

The 'Free to Leave' Warning

In the case of volunteers, the Custody Officer should ensure that the person is in fact a true volunteer. When a police officer invites a suspect to go to a police station, police vehicle or police establishment, the police officer must inform the person that he or she is **not** under arrest and is free to leave police company at any time unless and until arrested. Upon the suspect's arrival at the police station, the Custody Officer must be satisfied that the person is in fact a true volunteer and that the person is aware that he or she is free to leave at any time unless and until arrested. It is also the responsibility of the Custody Officer to ensure that if a volunteer wishes to leave the police station he or she can do so.

Oral and Written Information

The information regarding the rights of the suspect should be given both orally and in writing by the Custody Officer. It would be insufficient to provide it only orally because the suspect may be in such a state of shock or nervousness at being at the police station for investigation that he or she may not be able to take in the information. By providing the suspect with a written notice, the suspect can refer to that during the period at the police station to be reminded of the rights. The provision of only a written notice would disadvantage those who were unable to read. The notices should be produced in a number of languages.

Upon receipt of the information, the suspect must sign an acknowledgement of having been told and having received written notice of his or her rights.

Determining Whether Pre-charge Detention is Warranted

The Custody Officer is responsible for determining, in respect of arrested persons, whether pre-charge detention is necessary according to the criteria (see Chapter Twenty). Where the detention is authorised, the Custody Officer must explain to the arrested person the basic rules of pre-charge detention and the grounds upon which the detention has been authorised.

The Custody Officer may authorise detention for a reasonable period not exceeding four hours. It is his or her responsibility to monitor what occurs during the period of detention to ensure that the period of detention is 'reasonable'.

Authorising Investigative Procedures Involving the Suspect

During the period of detention or during a period of voluntary attendance, the investigating officer may wish to carry out investigations that involve the suspect. Such investigations include questioning, the taking of samples, photographing and so on. These procedures will often involve taking the suspect to a nominated place such as an interview room or photographing room. Because the Custody Officer is responsible for the suspect during his or her time at the police station, it is imperative that the Custody Officer knows the whereabouts of each suspect. He or she must also ensure that the investigative procedures are carried out properly.

To enable the Custody Officer to oversee these procedures, the investigating officer should seek the authorisation of the Custody Officer prior to carrying out any investigations involving the suspect. The Custody Officer is then to be responsible for:

- Authorising the questioning of the person and ensuring that such questioning is conducted properly. This will involve ensuring that a proper caution has been administered and, where necessary, deferring the questioning until the arrival of a lawyer, interpreter and/or interview friend (see below). The Custody Officer will also be responsible for ensuring that the interview is recorded and that the time the suspect is in an interview room is recorded.

- Authorising the removal of the suspect from the police station to another place to inspect the scene of the alleged offence; or obtaining any other relevant evidence with the consent of the suspect or, where necessary, with the authority of a magistrate.

Identifying and Attending to any 'Special Needs' of the Suspect

The Commission recognises that there are groups in the community who, because of their status, background or intellectual capacity, are especially vulnerable and may be at particular risk when involved in police investigations. The current QPS Policeman's Manual and General Instructions provide for special rules to be applied to special need groups such as Aborigines and Torres Strait Islanders and juveniles. These rules have recently undergone a comprehensive review as part of the QPS production of a new Policies and Procedures Manual.

In the draft Chapter 6 "Special Needs" which is not yet effective, the QPS defines special need persons as those who, "because of any cultural, ethnic, physical, mental, psychiatric, educational or other condition or circumstance [have] a reduced capacity to look after or manage their own interests" (6.3.1). A number of circumstances are listed which, while not exhaustive, should be considered as creating a special need. They include:

- immaturity, either in terms of age or development
- any infirmity, including early dementia or disease
- intellectual disability
- illiteracy or limited education which may impair the person's capacity to understand the questions being put to him or her
- inability or limited ability to speak or understand the English language
- chronic alcoholism
- physical handicaps including deafness or loss of sight
- drug dependence
- cultural, ethnic or religious factors including those relating to gender attitudes
- intoxication, if at the time of contact the person is under the influence of alcohol or a drug to such an extent as to make him or her unable to look after or manage his or her own needs.

Aborigines and Torres Strait Islanders are recognised as having a high potential for exhibiting a special need, because of certain cultural and sociological conditions. The draft chapter states that the existence of a special need should be assumed with Aborigines and Torres Strait Islanders until the contrary is clearly established. Special rules will apply to the questioning of such persons. These rules basically reflect the recommendations contained in the *Report on the Investigation into the Complaints of Kelvin Ronald Condren and Others* (Commission 1992), which were based on the

provisions of section 23H of the Commonwealth *Crimes Act 1914*. Broadly, they relate to notifying a representative of an Aboriginal legal aid organisation and arranging for an 'interview friend'[8] to be present during any questioning or other investigative procedure.

The QPS draft chapter differs slightly from the Condren recommendations and the Commonwealth provision in that it only provides for notification of the Aboriginal Legal Service "upon request by an Aborigine or Torres Strait Islander". The Commission prefers the approach proposed in the Condren Report that the police must notify the Aboriginal Legal Service unless the suspect indicates that he or she does not wish that to occur.

According to the draft chapter, all juveniles are to be considered as having a special need and to be subject to the special procedures under the *Juvenile Justice Act 1992*. Questioning of juveniles should not take place without an appropriate 'interview friend'[9] being present. The Commission agrees that juveniles should be classified as a special needs group. This is also consistent with the approach taken in other jurisdictions.

Apart from these specific categories, there are a number of other groups who may have special needs, such as persons from a non-English speaking background, deaf persons, and persons with intellectual disabilities[10]. Some of these persons may be relatively easy to identify but others may not. The draft chapter proposes that when establishing whether a special need exists, consideration should be given to whether the person is:

- capable of understanding the questions posed
- capable of effectively communicating answers
- capable of understanding what is happening to him or her

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8 As to who is an appropriate 'interview friend' see for example, section 23J of the Commonwealth *Crimes Act 1914*.

9 As to who is an appropriate 'interview friend' see for example, section 23K of the Commonwealth *Crimes Act 1914*.

10 See *People with and Intellectual Disability and the Criminal Justice System* (NSWLRC, 1992) for a detailed discussion of the problems in this area.

- fully aware of the reasons why the questions are being asked
- fully aware of the consequences which may result from questioning
- in the opinion of the investigating officer, capable of understanding his or her rights at law (6.3.2).

In establishing whether a special need exists, the police officer is to take account of a variety of factors such as the age, standard of education, cultural background and so on of the person.

Once a special need is established, action must be taken to address it. This may involve arranging for an interpreter or an interview friend.

The responsibility for establishing whether a special need exists lies with the investigating officer under the QPS proposal. The Commission considers that, with the creation of a Custody Officer scheme, that responsibility should pass to the Custody Officer. He or she should determine the issue and the action necessary to address the special need in consultation with the investigating officer. The Custody Officer is responsible for ensuring that such action is taken.

Ensuring that the Suspect has Medical Assistance, Rest and Refreshment

As already recognised in the QPS Custody Manual, police are made expressly responsible for the safety and well-being of persons in custody. Consistent with the International Covenant on Civil and Political Rights, prisoners are entitled to humane treatment while in custody. This treatment should extend to persons in pre-charge detention and to volunteers attending at police stations.

The Commission considers that such treatment should include the provision of:

- reasonable rest and refreshment
- toilet facilities

- facilities to enable a person to shower, shave and change prior to going before the court, if the person has been at the station long enough for it to be reasonably required

- medical treatment for those who require it.

The Custody Officer should be the officer responsible for ensuring that such treatment is provided.

Ensuring that Proper Custody Records are Maintained

Police must be accountable for any action taken in respect of a person while the person is at a police station and not yet delivered into the custody of a judicial officer. To make police accountable for the treatment of the person detained and to enable the scheme to be monitored, the Custody Officer should be responsible for ensuring that a complete and comprehensive custody record is maintained. While the Commission is conscious of the widespread objection among operational police to any increase in paperwork, there can be no avoiding the need to keep records of the treatment of suspects while in police custody. Indeed the new Custody Manual obliges police to maintain comprehensive records. It is not envisaged that the record keeping requirements imposed on the Custody Officer will create any significant increase in record keeping, as discussed below.

Upon the suspect's arrival at the police station, the Custody Officer should be responsible for ensuring that the person's details are entered on the custody index. Where detention is authorised, the recording of all relevant times is to be carried out by the Custody Officer. The Custody Officer will also be responsible for ensuring that the matters currently required by the Custody Manual to be recorded in the custody index are entered, along with:

- the name and other details of the arresting officer, any accompanying officers, and the officer responsible for maintaining the custody record

- the grounds for detention for the purpose of investigation

- any property taken from the person

- communications by the person with friends, relatives, legal practitioners, interpreters, consular officials and others

after arrest. Despite such claims, the Commission was unable to find any instance where a police officer was charged with an offence. Inquiries with the Office of the Director of Prosecutions also did not reveal any such cases.

Disciplinary Action

A review of complaints against police made to the Commission revealed very few allegations of unlawful detention. This could be explained partly by the fact that the law in the area has been so unclear. People who may have been subjected to a period of unlawful detention may not have been aware that the detention was unlawful, or that action could be taken against the officers concerned. This would not explain why those who challenge the evidence in court fail to also refer the matter to the Commission. However, an experienced lawyer has suggested that, in such cases, where the court admits the evidence and the person has been convicted, that person may have no further interest in pursuing the matter.

Improving Compliance

The problem of enforcement should be partially addressed by the Commission's proposed scheme, as the scheme will:

- provide a clear set of documented rules by which police must operate
- increase internal supervision and clarify lines of responsibility by designating a responsible and accountable Custody Officer
- facilitate the presence of lawyers, and other independent persons, at police stations.

However, these measures alone will not be sufficient to ensure compliance with the scheme. More active monitoring will also be required. The QPS needs to develop appropriate internal monitoring processes. In addition, greater external oversight is needed.

The time when breaches of the rules by police are most likely to come to light is during court proceedings. On occasions, where serious and blatant breaches of the rules by police have been revealed, the courts have referred the matter to the Director of Prosecutions to determine whether or not charges should be laid against a police officer. However there is no obligation on any party to routinely refer significant breaches to the Director.

A breach of the duties imposed by statute will often constitute an offence under the statute. Section 137 *Criminal Code* (see above) creates a specific offence of failure to comply with the obligation under section 552 of the *Criminal Code* – that is, failing to take a person before a magistrate as soon as practicable. Section 204 creates a general offence of disobedience to statute law. The Criminal Code Review Committee (1992, p. 263) recommended that this provision be incorporated in its proposed Simple Offences Act and that it be applied to police officers who fail to inform suspects of their rights. A breach of a provision of a code of conduct or of an instruction issued by the Commissioner of Police may constitute a disciplinary offence under the *Police Service Administration Act 1990*.

The Commission considers that a formal referral procedure should be put in place to ensure that, where it becomes apparent during court proceedings that police have acted in a way that may warrant criminal, disciplinary or remedial action, the breach is referred to the Commissioner of Police. In the higher courts, breaches could be referred to the Commissioner of Police by the Director of Prosecutions. In lower court matters, where the prosecution is usually conducted by police officers, consideration could be given to requiring that magistrates refer appropriate cases to the Commissioner of Police. The most important requirement is that someone, who is independent of the police and involved in the proceedings, be given the specific responsibility to ensure that such matters are referred.

23.1 Recommendation – Notification of Breaches

The Commission recommends that where, in a criminal proceeding, it is revealed that a police officer may have contravened a statutory duty or a general instruction issued by the Commissioner of Police, the Director of Prosecutions or the magistrate who heard the matter, should be responsible for informing the Commissioner of Police of any breach that may warrant criminal, disciplinary or remedial action. The referral should be made even if the court does not exclude any evidence obtained in breach of these requirements.

The Approach of the Courts

Another means of regulating police use of their powers is by excluding from court proceedings evidence which has been unlawfully or improperly obtained. Exclusion has the effect of denying police 'the fruit of the poisoned tree' and, in some circumstances, can lead to the failure of prosecutions in which substantial police resources have been invested.

Nearly twenty years ago the ALRC criticised the Australian exclusionary rules on the basis that they tend "to encourage illegality, and hence reliance on illegally obtained evidence rather than other evidence" (ALRC 1975, p. 140). The rules allowed illegally or improperly obtained evidence to be admitted unless a court in the exercise of its discretion excluded the evidence on the basis that to admit it would be unfair to the accused. The ALRC (1975, p. 136) said:

> The discretion is in practice a narrow one. It is often mentioned but rarely acted upon. It is far more common for police misconduct to be criticised by the court than for the evidence obtained as a result to be excluded.

There have been a number of cases before the courts in which confessional evidence has been challenged on the grounds that it was obtained during a period of unlawful detention. Anecdotes from senior criminal lawyers suggest that the courts are reluctant to exclude evidence obtained in such cases. By and large, the tendency for courts is to admit available evidence, even if it was unlawfully or improperly obtained. For example, the NSWLRC (1990, p. 17):

> received many submissions from members of the judiciary which emphasised that there is a compelling community interest in ensuring that accused persons who are factually guilty are found guilty by a court. [The submissions indicated] a real reticence about excluding probative evidence at trial in order to 'punish' the police for some wrongdoing.

Recent decisions of the High Court suggest that the court is now giving more emphasis to its role of guarding the rights of a suspect in police custody. *Pollard v R* (1992) 110 ALR 385 (*Pollard*) and *Foster v R* (1993) 113 ALR 1 (*Foster*) are cases in which the admissibility of confessions was challenged on the basis that they were unlawfully obtained. In *Pollard* the accused confessed to the offence and the confession was tape–recorded. The court held that the evidence should have been excluded because the police officer had failed to comply with the provisions of section

464C of the *Crimes Act 1958* (Vic) requiring a caution to be given and requiring the person to be informed of his right to communicate with a friend, relative or lawyer. There was no express provision in section 464C to the effect that evidence of a confession or admission made to an investigating official under questioning or investigation carried out in breach of its requirements is inadmissible as evidence against that person in subsequent criminal proceedings.[13] Nevertheless, the court relied on the common law discretion to exclude the evidence.

In the course of their judgments, several members of the court made general observations on the subject. Brennan, Dawson and Gaudron JJ said (at 399):

> The exercise of the discretion to exclude evidence which has been improperly or illegally obtained involves a balancing of competing public policy considerations and is not so much concerned with the individual accused as with 'whether the illegal or improper conduct complained of . . . is of sufficient seriousness or frequency of occurrence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end': *Cleland v The Queen* (1982) 151 CLR 1 at 34.

Deane J referred to previous decisions of the High Court including *R v Ireland* (1970) 126 CLR 321, *Bunning v Cross* (1978) 141 CLR 54 and *Cleland*. Deane J considered that those authorities established two distinct if overlapping discretionary grounds for the exclusion of evidence improperly obtained:

> The first . . . is that the reception of the evidence would be unfair to the accused. The second is that considerations of public policy require that it be excluded. (p. 402)

His Honour quoted the following words from Barwick CJ's judgment in *Ireland* (p. 334–335) as to the competing considerations involved in the exercise of the discretion:

> On the one hand there is the public need to bring to conviction those who commit offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.

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13 This is in contrast to section 464H of the *Crimes Act 1958* (Vic) which renders a confession not recorded inadmissible unless exceptional circumstances are shown by the prosecution.

In his judgment, Deane J expressed the view that the detective's misconduct in *Pollard* amounted to a reckless disregard of statutory duties imposed for the protection of suspects and that the confession should definitely be excluded. Mason CJ agreed with Deane J, and even went a little further by saying that something less than reckless disregard would have sufficed for exclusion.

In *Foster* the confessions were obtained during a period of unlawful arrest and detention. The High Court again excluded the evidence, emphasising the deliberate and reckless disregard of the law by police as a ground for excluding the evidence.[14]

The judgments of the High Court in *Pollard* and *Foster* demonstrate a greater willingness by the High Court to exclude evidence which has been unlawfully obtained. However, the shift in approach is yet to be demonstrated to any great extent in the Supreme and District Courts of the States.

The Case for Tighter Rules

In the Commission's view, exclusion of unlawfully or improperly obtained evidence, used in conjunction with the sanctions discussed earlier in this chapter, is potentially a valuable strategy for promoting police compliance with procedural requirements. The discretion to exclude is only directly relevant in the very small number of cases which go to trial and in which defence lawyers are willing and able to challenge the prosecution case effectively. Traditionally, police have been encouraged to 'take a chance' by the apparent reluctance of courts to exclude unlawfully or improperly obtained evidence. However, if there is a strong likelihood that a prosecution will be lost or an appeal upheld as a result of evidence being excluded, this will send a strong signal to the police about the need to operate within the rules in the future. Moreover, police organisations will be likely to take a more rigorous approach to ensuring compliance with the rules if it is clear that contravention of these rules may jeopardise a prosecution.

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14 See Palmer (1993) for a more detailed discussion of these cases.

In the Commission's view, the most appropriate way to improve the effectiveness of exclusionary rules is by defining in legislation the circumstances under which unlawfully or improperly obtained evidence is to be admitted in court proceedings, rather than leaving the matter solely to the discretion of the courts.[15] The benefits of such a provision are that it will:

- provide greater guidance to courts – as noted above, although the High Court has shown an increased willingness to exclude evidence which has been unlawfully or improperly obtained, courts at State level have been slow to follow this lead

- provide clear guidelines to police in relation to the admissibility of such evidence.

How such provisions should be formulated will be considered in detail in the next, and final, volume of this report (except for the specific issue of the admissibility of unrecorded confessional evidence discussed below). The application of exclusionary provisions is relevant to the exercise of a range of police powers, not simply those relating to questioning and detention. For instance, the issue also arises in relation to the Commission's proposed search and seizure powers, and its proposals relating to the conduct of electronic surveillance (to be considered in Volume V). Given that any proposed exclusionary provisions are likely to be of general application, it is appropriate that the matter is dealt with in the concluding volume, when the full implications of any proposal can be considered.

23.2 Recommendation – Legislative Recognition of Exclusionary Rules

The Commission recommends that the circumstances under which unlawfully or improperly obtained evidence is to be admitted in court proceedings should be defined in legislation.

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15 The Commonwealth and New South Wales are currently working on draft Evidence Bills which include presumptive exclusionary rules for evidence improperly obtained.

ADMISSIBILITY OF UNRECORDED CONFESSIONS

The electronic recording of interviews with suspects is one of the most important ways of monitoring police interrogation practices. Electronic recording provides a means of ensuring that the suspect who was being interviewed was given the appropriate caution, and that the questioning was conducted in a fair and proper manner. Moreover, recording dramatically reduces the opportunities for records of interview to be fabricated or altered. These and other benefits of electronic recording have been recognised by the QPS which, as a matter of policy, now requires police to record all interviews for indictable offences, other than those conducted in the field. In the latter case, "any conversation is included in any subsequently electronically recorded interview" (QPS 1991, p. 47).

In its submission, the QPS supported the introduction of legislation specifying that interviews for all indictable offences be electronically recorded.

The QPS added the proviso that electronic recording of interviews:

> should be one leg of a legislative package . . . [which] should include the authority to detain for questioning [prior to arrest] and the right of a trial judge to instruct a jury that they may draw an inference from an accused's election to remain silent during an interview. (1991, p. 48)

The Commission agrees with the QPS that electronic recording should be mandated by legislation. However, the Commission's approach to this issue differs from that of the QPS in the following respects:

- As has been made clear in preceding chapters, the Commission does not endorse the other 'legs' of the legislative package proposed by the QPS.

- The Commission considers that the requirement that interviews be electronically recorded should apply to all offences, not only indictable offences. As a matter of practice, for most simple offences it will not be necessary for the police to conduct a formal record of interview with the suspect. However, if police choose to use any confessional material in a prosecution of a person for a simple offence, the evidence obtained should conform to the same standards set down for indictable offences.

Legislation requiring electronic recording of interviews should also address the issue of admissibility of unrecorded confessions or admissions. Under the QPS proposal, interviews which had not been recorded would be inadmissible unless:

> reasonable circumstances exist which do not allow for an electronically recorded interview to be conducted or other reasonable circumstances justify the reception of the evidence of an admission or confession which has not been electronically recorded. (1991, p. 47)

The Commission agrees that unrecorded confessions or admissions should be presumed to be inadmissible. However, it is of the view that the grounds on which they should be admitted as evidence need to be more limited than those proposed by the QPS. The Commission prefers the formulation contained in section 464H of the Victorian *Crimes Act 1958*. This section provides that unrecorded admissions and confessions are to be excluded unless the prosecution establishes on the balance of probabilities that the circumstances were exceptional and justify the reception of the evidence. The provision was adopted following the recommendation of the Coldrey Committee. When discussing 'exceptional' circumstances, the Coldrey Committee said:

> It would not be useful or possible to list the circumstances which might be taken into account under the exceptions provisions, however, one example would be the availability of an independent witness to the making of the statement and to whom the legislation did not apply. It would be for the judges to decide whether in their judgment the circumstances were exceptional. (1986, p. 86)

Where confessions or admissions were made prior to recording facilities being available, section 464H states that they are also presumed to be inadmissible unless subsequently confirmed on tape. The Commission considers that such a rule is necessary to ensure compliance with the recording provisions of the scheme. Otherwise, some police may be tempted to circumvent the requirements of the legislation by interviewing people away from police stations and taping facilities.

23.3 Recommendation – Admissibility of Unrecorded Confessions or Admissions

The Commission recommends that all interviews of suspects undertaken by the police must be electronically recorded.

The Commission further recommends that legislation be introduced stating that any unrecorded confession or admission not electronically recorded or confirmed on audio or video tape should be inadmissible in a criminal proceeding, unless the prosecution establishes on the balance of probabilities that the circumstances in which the confession or admission was made were exceptional and justify reception of the evidence.

This recommendation is not intended to affect the common law discretion of a court to exclude evidence on the grounds of oppression, or on the grounds that it would be unfairly prejudicial or misleading, or that it was unfairly obtained.

CONCLUSION

An essential requirement of any regulatory scheme is that it is enforceable. This chapter has outlined the limitations of existing sanctions for dealing with breaches of procedural requirements by police and considered how they might be made more effective. The Commission's proposed scheme should facilitate enforcement by:

- providing a clear set of documented rules by which police must operate
- increasing internal supervision and clarifying lines of responsibility
- ensuring that lawyers, and other independent persons, are able to be present at police stations while questioning, or other investigations, take place.

In addition, the Commission has proposed that:

- there be a formal procedure for ensuring that, where it becomes apparent during court proceedings that police have acted in a way that may warrant criminal, disciplinary or remedial action, the breach is referred to the Commissioner of Police

- legislation be developed which defines the circumstances in which unlawfully or improperly obtained evidence is to be admitted in court proceedings

- all interviews of suspects by the police be electronically recorded and that unrecorded confessions and admissions be inadmissible in court proceedings unless there are exceptional circumstances.

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APPENDICES

APPENDIX 10

LEGISLATION AND PROPOSALS IN OTHER JURISDICTIONS

The following table summarises the legislation in Victoria, the Commonwealth (part 1), South Australia, the Northern Territory (part 2) and the United Kingdom (part 4). It also summarises the proposals for reform in Tasmania, New South Wales (part 3) and New Zealand (part 4).

The legislation and proposals are summarised under the following headings:

- Who is entitled to questioning safeguards?
- The caution
- Right to interpreter
- Right to communicate with lawyer
- Delay access to lawyer
- Right to contact a friend or relative
- Defer grant of communication rights
- Right of foreign national to communicate with Consular Officer
- Defer right to contact Consular Officer
- Special rules regarding Aborigines and Torres Strait Islanders
- Special rules regarding juveniles
- 'Free to leave' warning
- Time limit on investigation period
- Extend period of investigation
- Time-outs during period of detention
- Custody Officer
- Ensuring compliance with the provisions of the questioning regime

PART 1: EXISTING AUSTRALIAN LEGISLATION – VICTORIA AND THE COMMONWEALTH

VICTORIA: **CRIMES ACT 1958**
COMMONWEALTH: **CRIMES ACT 1914**

VICTORIA	COMMONWEALTH
WHO IS ENTITLED TO QUESTIONING SAFEGUARDS?	
A person is in custody if he of she is: (a) under lawful arrest by warrant; or (b) under lawful arrest under sections 458 or 459 or a provision of any other Act; or (c) in the company of an investigating official and is – (i) being questioned; or (ii) to be questioned; or (iii) otherwise being investigated – to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence (s. 464(1)).	The provisions in Part IC Investigation of Commonwealth Offences apply if a person is lawfully arrested for a Commonwealth offence. Section 23B(2) provides that a person who is arrested includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if: (a) the official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence that is to be the subject of the questioning; or (b) the official would not allow the person to leave if the person wished to do so; or (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so. This provision is subject to subsections (3) and (4).

VICTORIA	COMMONWEALTH
(1) THE CAUTION	
Before any questioning or investigation, other than a request for the person's name and address, an investigating official must inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence (s. 464A(3)).	Before starting to question the person under arrest the investigating official must caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence (s. 23F(1)). The caution must be given in a language in which the person can communicate with reasonable fluency, but need not be given in writing (s. 23F(2)).
(2) RIGHT TO INTERPRETER	
If a person in custody does not have knowledge of the English language sufficient to enable the person to understand the questioning, an investigating official must, before any questioning, arrange for the presence of a competent interpreter and defer the questioning until the interpreter is present (s. 464D(1)).	Where an investigating official believes on reasonable grounds that a person under arrest is unable to communicate orally with reasonable fluency in the English language, the investigating official must arrange for an interpreter to be present and defer the questioning until the interpreter is present (s. 23N).

VICTORIA	COMMONWEALTH
(3)(a) RIGHT TO COMMUNICATE WITH LAWYER	
Before any questioning commences an investigating official must inform the person in custody that he or she may communicate with or attempt to communicate with a legal practitioner. The investigating official must defer the questioning for a time that is reasonable in the circumstances to enable the person to make, or attempt to make, the communication (s. 464C(1)). The investigating official must afford the person reasonable facilities as soon as practicable (s. 464C(2)(a)) and allow the person's legal practitioner or a clerk to communicate with the person in custody in circumstances in which as far as practicable the communication will not be overheard (s. 464C(2)(b)).	Before starting to question a person the investigating official must inform the person that he or she may communicate with a legal practitioner of his or her choice and arrange for the legal practitioner to be present during questioning. Questioning must be deferred for a reasonable time to allow the person to make the communication and for the legal practitioner to attend (s. 23G(1)(b)). Reasonable facilities must be provided to enable the communication and in circumstances where it will not be overheard (s. 23G(2)). The person must be allowed to consult with the legal practitioner in private and to have the legal practitioner present during questioning (s. 23G(3)).

VICTORIA	COMMONWEALTH
(3)(b) DELAY ACCESS TO LAWYER	
Access to a lawyer may be delayed if the investigating official believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed (s. 464C(1).	The provisions in respect of access to a legal practitioner do not apply if, and for so long as, the official believes on reasonable grounds that compliance with the requirements is likely to result in an accomplice taking steps to avoid apprehension; the concealment, fabrication or destruction of evidence or the intimidation of a witness; or if the questioning is so urgent, having regard to the safety of other people (s. 23L(1)). This applies only in exceptional circumstances and must be authorised by an officer of the rank of Superintendent or above or the holder of a prescribed office and a record made of the grounds for belief (ss. 23L(3) and (4)). If this results in preventing or delaying the person from communicating with the legal practitioner of his or her choice or preventing the legal practitioner from attending, the services of another legal practitioner must be offered and if accepted, the necessary arrangements made (s. 23L(2)).

VICTORIA	COMMONWEALTH
(4)(a) RIGHT TO CONTACT A FRIEND OR RELATIVE	
Before any questioning or investigation, an investigating official must inform the person in custody that he or she may communicate with or attempt to communicate with a friend or relative to inform that person of his or her whereabouts (s. 464C(1)). The investigating official must afford the person reasonable facilities as soon as practicable (s. 464C(2)(a)).	Before starting to question the person the investigating official must inform the person that he or she may communicate, or attempt to communicate with a friend or relative to inform that person of his or her whereabouts. Questioning must be deferred for a reasonable time to allow the person to make, or attempt to make, the communication (s. 23G(1)). The investigating official must, as soon as practicable, give the person reasonable facilities to make the communication (s. 23G(2)).
(4)(b) DEFER GRANT OF COMMUNICATION RIGHTS	
Right may be deferred on the same grounds as the right to access legal advice (s. 464(1)).	Similar to delay access to lawyer. See section 23L(1) only.
(5)(a) RIGHT OF FOREIGN NATIONAL TO COMMUNICATE WITH CONSULAR OFFICER	
Before any questioning or investigation, the investigating official must inform the person in custody that he or she may communicate with or attempt to communicate with the appropriate consular office (s. 464F(1)). The investigating official must defer the questioning for a time that is reasonable in the circumstances to enable the person to make or attempt to make the communication. The person must be afforded reasonable facilities as soon as practicable to enable the person to do so (s. 464F(2)).	If the person is not an Australian citizen the investigating official, before starting to question the person, must inform the person that he or she may communicate with, or attempt to communicate with, the appropriate consular office and defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication (s. 23P(1)). Reasonable facilities to make the communication must be provided as soon as practicable (s. 23P(2)).

VICTORIA	COMMONWEALTH
(5)(b) DEFER RIGHT TO CONTACT CONSULAR OFFICER	
This right may be deferred if the investigating official believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed (s. 464F(1)).	Similar to delay access to lawyer. See section 23L(1) only.
(6) SPECIAL RULES REGARDING ABORIGINES AND TORRES STRAIT ISLANDERS	
No specific provisions in respect of Aborigines and Torres Strait Islanders.	Where an Aborigine or Torres Strait Islander is in police custody, before questioning such a person, the police officer must notify a representative of an Aboriginal legal aid organisation and inform the suspect of this procedure (s. 23H(1)). There must be no questioning unless an "interview friend" (s. 23H(9)) is present while the person is being questioned and before the start of questioning, the official has allowed the person to communicate with the interview friend in circumstances where it will not be overheard, or the person has expressly and voluntarily waived the right to have such person present. These special safeguards do not apply where the officer believes on reasonable grounds that having regard to the person's level of education and understanding the person is not at a disadvantage in respect of the questioning in comparison with other members of the Australian community generally (s. 23H(8)).

VICTORIA	COMMONWEALTH
(7) SPECIAL RULES REGARDING JUVENILES	
If a person under 17 years is in custody, an investigating official must not question that person unless a parent or guardian or, if not available, an independent person is present (s. 464E(1)). Before questioning the investigating official must allow the person to communicate with his or her parent or guardian or the independent person in circumstances in which as far as practicable the communication will not be overheard. This does not apply if the investigating official believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or the questioning or investigation is so urgent, having regard to the safety of other people, that it should be delayed (s. 464E(2)).	A person under the age of 18 years must not be questioned unless an interview friend is present (s. 23K). Before questioning commences the person must be allowed to communicate with the interview friend. An 'interview friend' may be a parent/guardian or other person specified (s. 23K(3)). This right is subject to section 23L.
(8) "FREE TO LEAVE" WARNING	
No specific provision.	No specific provision.

VICTORIA	COMMONWEALTH
(9) TIME LIMIT ON INVESTIGATION PERIOD	
Every person taken into custody for an offence must be – (a) released unconditionally; or (b) released on bail; or (c) brought before a bail justice or the Magistrates' Court – within a reasonable time of being taken into custody (s. 464A(1)). In determining what constitutes a reasonable time the following matters may be considered: (a) the period of time reasonably required to bring the person before a bail justice or the Magistrates' Court; (b) the number and complexity of offences to be investigated; (c) any need of the investigating official to read and collate relevant material or to take any other steps that are reasonably necessary by way of preparation for the questioning or investigation;	The investigation begins when the person is arrested. Detention is possible after arrest for a reasonable period up to two hours where a person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander; or in any other case 4 hours (s. 23C(4)). In ascertaining any period of time regard shall be had to the number and complexity of matters being investigated (s. 23C(5)).

VICTORIA	COMMONWEALTH
(9) TIME LIMIT ON INVESTIGATION PERIOD . . . CONT'D	
(d) any need to transport the person from the place of apprehension to a place where facilities are available to conduct an interview or investigation; (e) the number of other people who need to be questioned during the period of custody; (f) any need to visit the place where the offence is believed to have been committed or any other place reasonably connected; (g) any time taken to communicate with a legal practitioner, friend, relative, parent, guardian or independent person; (h) any time taken by the persons in (g) to attend; (i) any time during which questioning is suspended or delayed to allow the person to receive medical attention; (j) any time during which the questioning is suspended or delayed to allow the person to rest; (k) the total period of time during which the person has been in the company of an investigating official before and after the commencement of custody; (l) any other matters reasonably connected with the investigation of the offence (s. 464A(4)).	

VICTORIA	COMMONWEALTH
(10) EXTEND PERIOD OF INVESTIGATION	
Not relevant to this scheme.	If the person is under arrest for a serious offence, the investigating official, at or before the end of the investigation period, may make an application for an extension. The application must be made to a magistrate, or a justice of the peace if a magistrate is unavailable (s. 23D(2)). The application may be made before the judicial officer, in writing, or by telephone (s. 23E) and the person or the legal representative may make representations (s. 23D(3)). The investigation period may be extended for a period not exceeding eight hours (s. 23D(5)). The judicial officer may grant the application if satisfied that : (a) the offence is a serious offence; and (b) further detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or another serious offence; and (c) the investigation is being conducted properly and without delay; and (d) the person or the legal representative has been given the opportunity to make representations about the delay (s. 23D(4)).

VICTORIA	COMMONWEALTH
(11) TIME–OUTS DURING PERIOD OF DETENTION	
Not relevant to this scheme.	The following times are to be disregarded: (a) time reasonably required to convey person from the place of arrest to nearest premises with appropriate facilities; (b) time questioning is suspended or delayed to allow person to communicate with legal practitioner etc; (c) time questioning suspended or delayed to allow legal practitioner etc to arrive at place of questioning; (d) time questioning suspended or delayed to allow person to receive medical attention; (e) time questioning suspended or delayed because of person's intoxication; (f) time questioning suspended or delayed to allow for identification parade to be arranged and conducted; (g) time reasonably required to make and dispose of application under section 23D; (h) reasonable time during which questioning suspended or delayed to allow for rest (s. 23C(7)).

VICTORIA	COMMONWEALTH
(12) CUSTODY OFFICER	
No specific provision.	No specific provision.
(13) ENSURING COMPLIANCE WITH THE PROVISIONS OF THE SCHEME	
Tape recording of confessions and admissions (s. 464H).	Tape recording of confessions and admissions (s. 23V).

SOUTH AUSTRALIA	NORTHERN TERRITORY
(4)(b) DEFER GRANT OF COMMUNICATION RIGHTS	
The member of the police force who is in charge of the investigation may decline to permit the person in custody to make a telephone call to a friend or relative, or a friend or relative to be present at an interrogation or investigation if the police officer has reasonable cause to suspect that communication between the person in custody and that particular person would result in an accomplice taking steps to avoid apprehension or would prompt the destruction or fabrication of evidence (s. 79a(2)).	If the investigating officer believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence or the questioning or investigation is so urgent having regard to the safety of other people that it should not be delayed, then the investigating officer must defer the questioning and investigation involving the direct participation of the person for a time that is reasonable in the circumstances (s. 140).
(5)(a) RIGHT OF FOREIGN NATIONAL TO COMMUNICATE WITH CONSULAR OFFICER	
No specific provision.	No specific provision.
(5)(b) DEFER RIGHT TO CONTACT CONSULAR OFFICER	
No specific provision.	No specific provision.
(6) SPECIAL RULES REGARDING ABORIGINES AND TORRES STRAIT ISLANDERS	
No specific provision.	No specific provision.

SOUTH AUSTRALIA	NORTHERN TERRITORY
(7) SPECIAL RULES REGARDING JUVENILES	
Where a minor has been apprehended on suspicion of having committed an offence and the minor does not nominate a solicitor, relative or friend to be present during an interrogation or investigation or, the solicitor, relative or friend nominated is unavailable or unwilling to attend then the minor must not be subjected to an interrogation or investigation until the member of the police force in charge of the investigation has secured the presence of either a person nominated by the Director-General of Community Welfare to represent the interests of children subject to criminal investigation or, where no such person is available, some other person (not being a minor, member of the police force, or employee of the Police Department) who, in the opinion of the member of the police force, is a suitable person to represent the interests of the minor (s. 79a(1a)). Notwithstanding section 79a(1a) an interrogation or investigation may proceed if the suspected offence is not an offence punishable by imprisonment for two years or more, and it is not reasonably practicable to secure the presence of a suitable representative of the child's interests (s. 79a(1b)).	No specific provision.
(8) "FREE TO LEAVE" WARNING	
No specific provision.	No specific provision.

SOUTH AUSTRALIA	NORTHERN TERRITORY
(9) TIME LIMIT ON INVESTIGATION PERIOD	
A police officer may, for the purpose of investigating the suspected offence, detain the person prior to delivering him or her into custody at the nearest police station, for so long as may be necessary to complete the investigation of the suspected offence, or four hours, whichever is the lesser (s. 78(2)). The time is calculated from the time of apprehension.	A person who has been taken into custody may be held for a reasonable period to enable the person to be questioned or for investigations to be carried out (s. 137). Section 138 outlines the matters to be taken into account in determining what is a reasonable period which is similar to the matters set out for other jurisdictions with the same scheme. However, it also includes the time taken for an operating electronic recording facility to become available, and any interruptions to the electronic recording of the interviewing of the person because of technical reasons beyond the control of the investigating officer (s. 138(s) and (t)).
(10) EXTEND PERIOD OF INVESTIGATION	
A Magistrate may authorise an extension of up to eight hours (s. 78(6)). An application to a Magistrate may be made by telephone and a written record must be made in the prescribed form (s. 78(4)).	Not relevant to 'reasonable time' scheme.
(11) TIME–OUTS DURING PERIOD OF DETENTION	
Any delays occasioned by arranging for a solicitor or other person to be present during the investigation and the time that would have been reasonably required to convey the person from the place of apprehension to the nearest police station are not included in the detention period (s. 78(6)).	Not relevant to reasonable time scheme.

SOUTH AUSTRALIA	NORTHERN TERRITORY
(12) CUSTODY OFFICER	
No specific provision.	No specific provision.
(13) ENSURING COMPLIANCE WITH THE PROVISIONS OF THE QUESTIONING REGIME	
No specific provision.	Electronic recording of confessions and admissions (s. 142).

PART 3: OTHER PROPOSED AUSTRALIAN SCHEMES – TASMANIA AND NEW SOUTH WALES

TASMANIA: POLICE POWERS OF INTERROGATION AND DETENTION (1990), LAW REFORM COMMISSIONER OF TASMANIA

NEW SOUTH WALES: POLICE POWERS OF DETENTION AND INVESTIGATION AFTER ARREST (1990), LAW REFORM COMMISSION REPORT

TASMANIA	NEW SOUTH WALES
WHO IS ENTITLED TO QUESTIONING SAFEGUARDS ?	
The scheme applies when a police officer has arrested any person or has the custody of an arrested person (Rec. 2(a) and (c)). A person who is arrested and taken to a police station shall be deemed to be in the custody of the officer who takes him there. That custody is transferred to the officer in charge of the watch-house or station when the arrested person is presented to that officer (Rec. 2(c)).	Scheme commences when suspect is arrested or held in police custody. Person is in custody if (a) under lawful arrest by warrant; or (b) under lawful arrest under section 352 Crimes Act or provision of any other Act; or (c) in police station, police vehicle or police establishment in the company of a police officer or is otherwise under police control, and is (i) being questioned, or (ii) to be questioned, or (iii) otherwise being investigated to determine his or her involvement (if any) in the commission of an offence (Rec. 2.3.1).

TASMANIA	NEW SOUTH WALES
(1) THE CAUTION	
Before questioning an arrested person a police officer shall explain that the person is not obliged to answer any questions but any answers he gives may be used in evidence (Rec. 2(g)).	At time of arrest, and after informing person of fact of arrest and grounds for it, caution arrested person in following or similar terms: You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer any questions, anything you say will be recorded and may be introduced as evidence in court. Caution to include an explanation of the basic rules of custodial investigation (Rec. 2.5.4). Caution and information about safeguards also to be in written form and handed to all persons in the custody of police (Rec. 2.5.6).
(2) RIGHT TO INTERPRETER	
No specific recommendation.	Police officer administering caution to inquire whether services of interpreter needed. If so, caution to be given in appropriate language before questioning commences (Rec. 2.5.2). Defer questioning until interpreter present (Rec. 5.4).

TASMANIA	NEW SOUTH WALES
(3)(a) RIGHT TO COMMUNICATE WITH LAWYER	
A police officer shall not refuse an arrested person access to a legal practitioner or delay in any way communicating on behalf of the arrested person with any named practitioner except as outlined below (Rec. 2(h)).	Before questioning or investigation commences the person in custody must be informed that they have the right to communication with a lawyer and the person must be given the opportunity to meaningfully exercise that right (Rec. 5.3.1). Where a lawyer has agreed to attend police station, police must delay questioning for a reasonable period up to two hours, until the lawyer has arrived (Rec. 5.3.4). If the person is not in a position to obtain advice from a lawyer of his or her choice, Custody Officer to inform person of availability of free legal advice (Rec. 5.3.6).
(3)(b) DELAY ACCESS TO LAWYER	
A police officer may deny a person access to his or her legal representative for such period (being no longer than four hours) as will enable the person to be presented before a magistrate and an application made in camera for a holding order. The magistrate may make orders for the further detention of the arrested person in the custody of persons other than police officers and for restriction or deprivation of any communication by and to him. The magistrate may make orders that the person be not further interrogated except upon such conditions as to time, manner and place as he shall lay down (Rec. 2(h)).	The only possible valid ground for denying the right to access a lawyer is where there is in existence a warrant for arrest or other criminal process issued by a court in relation to the lawyer.

TASMANIA	NEW SOUTH WALES
(4)(a) RIGHT TO CONTACT A FRIEND OR RELATIVE	
No specific recommendation.	Before any questioning or investigation commences, the person in custody must be informed that he or she has the right to communicate with a friend or relative to inform them of their whereabouts (Rec. 5.2). Where a friend or relative has agreed to attend the police station, police must delay questioning for a reasonable period, up to two hours, until the person has arrived (Rec. 5.2.4).
(4)(b) DEFER GRANT OF COMMUNICATION RIGHTS	
As for delay access to legal advice (Rec. 2(h)).	The right may be delayed for so long as is reasonably necessary only where Custody Officer believes on reasonable grounds that such communication will probably result in: escape of accomplices; disappearance, fabrication or destruction of evidence; or hindering the recovery of any person or property relevant to alleged offence (Rec. 5.2.3).
(5)(a) RIGHT OF FOREIGN NATIONAL TO COMMUNICATE WITH CONSULAR OFFICER	
No specific recommendation.	Recommendation similar to right to contact friend or relative (Rec. 5.5).

TASMANIA	NEW SOUTH WALES
(5)(b) DEFER RIGHT TO CONTACT CONSULAR OFFICER	
As for delay access to legal advice (Rec. 2(h)).	As for contacting friend/relative (Rec. 5.5.2).
(6) SPECIAL RULES REGARDING ABORIGINES AND TORRES STRAIT ISLANDERS	
No specific recommendation.	Recommendation that special rules be developed and that no questioning or investigation take place unless an appropriate independent person is present (Rec. 6).
(7) SPECIAL RULES REGARDING JUVENILES	
No specific recommendation.	As for Aborigines and Torres Strait Islanders (Rec. 6).
(8) "FREE TO LEAVE" WARNING	
No specific recommendation.	Voluntary attendee informed at beginning that they are entitled to leave at will unless placed under arrest. If a decision is taken at any time by a police officer to prevent that person from leaving at will – the person shall be informed at once that he or she is under arrest (Rec. 2.3.2).

TASMANIA	NEW SOUTH WALES
(9) TIME LIMIT ON INVESTIGATION PERIOD	
Within a 'reasonable time' after arrest a police officer must either release the arrested person or present him before a court on a charge (Rec. 2(a)). In determining what is a 'reasonable' time the police officer having custody of an arrested person must take into account all relevant material available to him and in particular may consider whether there is a need to detain the person– (i) for the purposes of questioning him concerning the offence for which he was arrested or any other offence; (ii) for the purpose of transporting him to a place where he can be questioned; (iii) whilst further investigations are carried out; (iv) whilst material for presentation to a Court empowered to grant bail is obtained; (v) whilst an identification parade is being arranged; (vi) in order to prevent him from communicating with other persons suspected of committing offences;	Detention for purposes of further investigation for reasonable period up to four hours (Rec. 3). Grounds for detention following arrest if necessary to: (1) follow up reasonable suspicions to confirm or dispel suspicions; (2) enable further investigation to determine whether prosecution will be launched and nature of charges; (3) complete necessary documentation requiring presence of detained person; (4) establish identity of person; or (5) conduct other authorised investigative procedures (Rec. 3.5). "Reasonable time" for detention for purpose of investigation determined by reference to all relevant circumstances including matters set out in Rec. 3.3.1.

TASMANIA	NEW SOUTH WALES
(9) TIME LIMIT ON INVESTIGATION PERIOD ... CONT'D	
(vii) whilst other suspects are questioned; (viii) whist searches or forensic examinations are carried out; (ix) whilst other suspects are questioned (x) pending the availability of a judicial officer to preside at the Court (Rec. 2(b)).	
(10) EXTEND PERIOD OF INVESTIGATION	
Not relevant because detention for a 'reasonable time'.	Before end of initial 4 hour period police officer (preferably the Custody Officer) may apply to court for detention warrant. Application to Judge of District or Supreme Court, Local Court Magistrate or, if none of these available, a justice in the administration of the Local Courts specifically empowered (Rec. 4). When courts not in session, some Judges etc should be available by telephone to hear applications (Rec. 4.2). Application for detention warrant can be in relation to: • offence for which original arrest made; or • where police officer forms belief on reasonable grounds in course of custodial investigation that person has committed another offence; or • on both offences (Rec. 4.3).

TASMANIA	NEW SOUTH WALES
(10) EXTEND PERIOD OF INVESTIGATION . . . CONT'D	
	Detained person and legal representative have no affirmative right to be heard on the application however judicial officer may request to speak to them before making order (Rec. 4.3.1). Onus on police officer to satisfy judicial officer of matters set out in Recommendation 4.3.2 e.g. whether investigation being conducted diligently and expeditiously etc. Application for detention warrant made on oath and supported by specified information (Rec. 4.3.3). Judicial officer may order further period being "the minimum period reasonably necessary for the police to complete their investigations, but no longer than eight hours (Rec. 4.4). Judicial officer to state reasons for approving further period of detention with reference to matters in Recommencation 3.3. Detention warrant to be tendered in court as condition of the admission of any evidence obtained by police during period of further detention.
(11) TIME–OUTS DURING PERIOD OF DETENTION	
Detention for a 'reasonable time'.	Similar to Commonwealth provisions (Rec. 3.6). Custody Officer to record.

TASMANIA	NEW SOUTH WALES
(12) CUSTODY OFFICER	
No recommendation for designated Custody Officer. Any officer having custody of an arrested person at a police station shall record in a custody book the time of arrival, the time when the arrested person came into custody, any transfer of custody, the time of commencement and ending of any questioning, the time of any further detention and the reason therefor, and the beginning and ending and the reason for any detention incommunicado (Rec. 2(d)).	Police to maintain comprehensive custody records of all arrested persons and all persons otherwise in police custody (Rec. 2.9). The introduction of a formal system of 'Custody Officers' to operate the proposed custodial detention scheme should be considered (Rec. 3.4). Responsibilities of Custody Officer (Rec. 3.4.2).
(13) ENSURING COMPLIANCE WITH THE PROVISIONS OF THE QUESTIONING REGIME	
Prosecutor shall bear the burden of satisfying the court that there was no arrest or unreasonable detention (Rec. 2(f)). Wilful detention without reasonable cause is an offence triable summarily by a magistrate. Penalty $5,000 or two years imprisonment (Rec. 2(i)).	Where evidence is obtained improperly or in contravention of a law or code of practice the evidence shall be presumed inadmissible (Rec. 8.4.1). Such evidence may only be admitted where desirability of admitting the evidence substantially outweighs undesirability of admitting the evidence having regard to manner in which evidence obtained (Rec. 8.4.2).

PART 4: OVERSEAS SCHEMES – NEW ZEALAND AND THE UNITED KINGDOM

NEW ZEALAND: CRIMINAL EVIDENCE: POLICE QUESTIONING (1992), LAW COMMISSION DISCUSSION PAPER

UNITED KINGDOM: POLICE AND CRIMINAL EVIDENCE ACT 1984

NEW ZEALAND	UNITED KINGDOM
WHO IS ENTITLED TO QUESTIONING SAFEGUARDS?	
The questioning safeguards (but not the time limits) apply when: (a) person formally arrested or could lawfully be arrested; or (b) police officer has grounds to suspect that person has committed an offence and the person (i) is at a police station; or (ii) has reasonable grounds to believe that he/she is being detained (s. 2).	Scheme applies when a person is brought to a police station under arrest or is arrested at the police station having attended there voluntarily (Code C, para. 3.1). Volunteer told of rights only when cautioned. Code C does not deal authoritatively with the rights of suspects prior to arrest. Note for Guidance 1A suggests that people voluntarily assisting with an investigation "should be treated with no less consideration... and enjoy an absolute right to obtain legal advice or communicate with anyone outside the police station".

NEW ZEALAND	UNITED KINGDOM
SAFEGUARDS **(1) THE CAUTION**	
Before questioning, police officer must caution person in following terms: You do not have to say or do anything unless you want to. If you do say or do anything, what you say or do may be given as evidence in court (s. 4). Caution need not be given in writing (s. 4(3)).	The caution must be administered by the police officer at such time as he has grounds to suspect a person has committed an offence and in any event when arresting him (Code C, para. 10.1). The caution is in the following terms: you do not have to say anything unless you wish to do so but what you say may be given in evidence. (Code C, para 10.4) If the person does not understand what the caution means, the officer should explain it in his own words. A person must be cautioned upon arrest for an offence unless it is impracticable to do so by reason of his condition or behaviour at the time or, he has already been cautioned immediately prior to arrest in accordance with para. 10.1 (Code C, para 10.3). If questioning is interrupted and restarted the officer must ensure that the person knows that the caution continues to operate and if there is any doubt the person should be cautioned again in full (Code C, para. 10.5).

NEW ZEALAND	UNITED KINGDOM
(2) RIGHT TO INTERPRETER	
If the person has a physical disability affecting his or her capacity to communicate orally, the police officer must inform the person that he or she has a right to have the assistance of an interpreter. Questioning must be deferred until the interpreter is present (s. 8).	Where a person has difficulty understanding English or there is doubt as to the person's hearing, an interpreter must be present for the interview except in urgent cases under Annex C (Code C, para. 13.2 and 13.5).
(3)(a) RIGHT TO COMMUNICATE WITH LAWYER	
After cautioning and before questioning, a police officer must inform the person of the right to consult and instruct lawyer and arrange/attempt for lawyer to be present during questioning (s. 5) If lawyer present, police officer to allow consultation and for lawyer to be present during questioning. If lawyer cannot be contacted despite reasonable attempts to do so or, where lawyer, having agreed to attend does not arrive within reasonable time (2 hours) police should be able to endeavour to question suspect.	A person who is in police detention shall be entitled, if he so requests, to consult a solicitor privately at any time (s. 58). A person who is at a police station voluntarily has the same right to legal advice as a person who is there under arrest (Code C, note 1A) The consultation can be either in person, on the telephone, or in writing (Code C, para. 6.1). Requests to see a solicitor must be recorded on the custody sheet (s. 58(2)). The request must be allowed as soon as practicable (s. 58(4)). In any case it must be allowed within 36 hours (s. 58(5)). When the Custody Officer authorises a person's detention in the police station he must be asked at that point to sign on the custody record indicating whether he wants legal advice. (Code C, para. 3.5) Police stations must advertise the right to free legal advice on posters with translations (Code C, para. 6.3).

NEW ZEALAND	UNITED KINGDOM
(3)(a) RIGHT TO COMMUNICATE WITH LAWYER ... CONT'D	
	At what point in time must someone at a police station be informed of the right to legal advice? (1) A person who comes to the station under arrest must be told immediately both orally and in writing (Code C, paras 3.1 and 3.2) (2) A person who comes to the police station voluntarily, if he asks about legal advice, must be given a written notice about legal advice (Code C, para. 3.14). There is no duty to inform him if he does not ask! (3) A person who comes to the police station voluntarily and is arrested there must then be told of his right to legal advice both orally and in writing (Code C, paras 3.1 and 3.2). (4) A person who comes to the station voluntarily and is then cautioned must then be given verbal notice of the right to legal advice (Code C, paras 3.11 and 10.2), and he should be given a copy of the notice explaining the arrangements for getting free legal advice (para. 3.15). A person who asks for legal advice should be given an opportunity to consult a specific solicitor, or the duty solicitor where a Duty Solicitor scheme is in operation. Failing this they should be given an opportunity of choosing a solicitor from a list of those willing to provide legal advice.

NEW ZEALAND	UNITED KINGDOM
(3)(a) RIGHT TO COMMUNICATE WITH LAWYER ... CONT'D	
	If this solicitor is unavailable he can choose up to two alternatives. If this is also unsuccessful the Custody Officer has discretion to allow further attempts until a solicitor has been contacted who agrees to provide legal advice (Code C, note 6B). Reminders of the right to legal advice must be given on commencement and re-commencement of interviews (Code C, para. 11.2), reviews of further detention (Code C, para. 15.3), and intimate search (Annex A, para. 2)
(3)(b) DELAY ACCESS TO LAWYER	
Police can defer granting the right to communicate with and consult lawyer where police officer believes on reasonable grounds that (a) immediate compliance with right will result in (i) accomplice of person taking steps to avoid apprehension; or (ii) concealment, fabrication or destruction of evidence or intimidation of a witness; or (b) questioning so urgent, having regard to danger of harm to some other person(s) (s. 6). If right to communicate with lawyer deferred that does not imply that questioning must be deferred (s. 6(2)). If right deferred, suspect must be allowed to seek advice from another lawyer (s. 6(3)).	Only where the suspect is being held in police detention in connection with a serious arrestable offence (s. 116) and there are reasonable grounds for believing that exercise of the right will lead to interference with or harm to evidence or witnesses or the alerting of others involved in such an offence; or the recovery of any property (s. 58(8); Code C s. 6; Annex B). Delay can also be authorised where the offence involves drug trafficking and the officer has reasonable grounds to believe the suspect has benefited from such trafficking and the recovery of the value of the proceeds will be hindered (Code C, Annex B, para. 2). The maximum period of delay is 36 hours (Code C, Annex B, para. 4).

NEW ZEALAND	UNITED KINGDOM
(4)(a) RIGHT TO CONTACT A FRIEND OR RELATIVE	
After cautioning and before questioning police officer must inform person he/she may communicate or attempt to communicate with friend or relative (s. 5). Defer questioning for reasonable time (2 hours). Provide reasonable facilities to enable person to carry out communication.	Person under arrest is entitled, if he requests, to have friend or relative told of his whereabouts as soon as practicable (s. 56(1); Code C, para. 5.1). This right is not specifically applied to persons attending a police station as volunteers though they can ask for this to be done. If such a person cannot be contacted there is provision for alternatives to be nominated (Code C, para. 5.1).
(4)(b) DEFER GRANT OF COMMUNICATION RIGHTS	
Similar to delay access to lawyer (s. 7).	Delay is only permissible in the case of serious arrestable offences (s. 116) and must be authorised by an officer of the rank of at least superintendent (s. 116(2)). A person who is still voluntarily at a police station is not covered by this requirement since he is deemed to be free to go if he pleases. However, there is no doubt he has a right to have someone informed of his whereabouts and this right is not subject to the provisions for delay. The grounds for delay are identical to the grounds for delaying access to legal advice under section 58 (Annex B). The suspect must be told if delay is authorised and the reasons for it, which must be noted on his custody sheet (s. 116(6). When the grounds for delay cease to apply the suspect must be permitted to exercise his right to have someone informed of his whereabouts (s. 116(9)).

NEW ZEALAND	UNITED KINGDOM
(5)(a) RIGHT OF FOREIGN NATIONAL TO COMMUNICATE WITH CONSULAR OFFICER	
After cautioning and before questioning police officer required to inform person who is not a New Zealand citizen that he/she may communicate with consular officer (s. 5). Defer questioning for reasonable time and provide reasonable facilities.	A citizen of an independent Commonwealth country or a foreign national may communicate at any time with his High Commission, Embassy or Consulate and must be informed of this right as soon as practicable (Code C, paras. 3.3 and 7).
(5)(b) DEFER RIGHT TO CONTACT CONSULAR OFFICER	
As for contacting lawyer (s. 6).	The exercise of these rights may not be interfered with even though Annex B applies (Code C, Note for Guidance 7A).
(6) SPECIAL RULES REGARDING ABORIGINES AND TORRES STRAIT ISLANDERS	
No specific provision.	No specific provision.

NEW ZEALAND	UNITED KINGDOM
(7) SPECIAL RULES REGARDING JUVENILES	
No specific provision.	Where a juvenile is detained at a police station the Custody Officer must inform the appropriate adult of his whereabouts as soon as practicable and ask the adult to attend at the police station (s. 57). This is in addition to the juvenile's right to have someone informed of his arrest (s. 56). The juvenile must be informed of the right to consult privately with the adult at any time (Code C, para. 3.19). A juvenile may be interviewed in the absence of an appropriate adult only where an officer of the rank of superintendent or above considers that delay will involve immediate risk of harm to persons or serious loss of or serious damage to property (Annex C, para. 1).
(8) "FREE TO LEAVE" WARNING	
Person not arrested but being questioned in a situation where the safeguards operate should be informed that they are free to leave (s. 3(b)).	Where a person who is not under arrest is cautioned before or during an interview he must at the same time be told that he is not under arrest, that he is not obliged to remain at the police station but that if he remains at the police station he may obtain free legal advice if he wishes.

NEW ZEALAND	UNITED KINGDOM
(9) TIME LIMIT ON INVESTIGATION PERIOD	
Person detained following lawful arrest may be questioned for period that is reasonable in the circumstances (up to 4 hours) if police officer believes on reasonable grounds questioning necessary to: • preserve or obtain evidence, or • complete investigation into offence or another offence for which police have good cause to arrest defendant (s. 9). In determining reasonable period regard shall be had to the number and complexity of matters (s. 9(2)). Time limit provisions apply only where the suspect has been formally arrested. No time limit should apply if there is good cause to suspect that a person has committed an offence but that person is not in custody and is free to go.	The only ground for detention prior to charge is where the Custody Officer reasonably thinks that such detention is "necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him" (s. 37(2)). The basic rule is that a person may not be detained without charge in police custody for more than 24 hours (s. 41(1)). Time commences from when the arrested person first arrives at the police station after his arrest (s. 41(2)). For a person who attends the police station voluntarily, time starts to run from the moment of his arrest. Where the arrested person is wanted by police in some other area time starts to run when he comes into the custody of the second police force or 24 hours, whichever is the earlier (assuming the first force do not question him). In the case of a person already under arrest who is then arrested for further offences (under s. 31) time runs from the first from the first offence for which he was brought into custody (s. 41(4)). Detention must be reviewed within the first 6 hours of detention and then at not more than 9 hour intervals (s. 40). Time is measured from the time that detention was first authorised.

NEW ZEALAND	UNITED KINGDOM
(10) EXTEND PERIOD OF INVESTIGATION	
Before the end of the four hour period, a police officer may apply to a commissioned officer for extension (s. 9(4)). An extension may be granted for a reasonable period not more than 4 hours if: (a) commissioned officer believes on reasonable grounds (i) further questioning necessary to preserve or obtain evidence or complete investigation into offence or another offence for which police have good cause to arrest defendant; and (ii) investigation being conducted properly and without delay; and (b) the person or lawyer has been given opportunity to make representations about the application. Only one extension under section 9(4). Before end of investigation period (s. 9(4)), a police officer may apply orally or in writing to District Court Judge for an extension (s. 10).	CONTINUED DETENTION: An officer of the rank of superintendent or above may authorise the detention of a person without charge beyond 24 hours and up to 36 hours where the person is under arrest for a serious arrestable offence, the investigation is being conducted diligently, and the detention is necessary to secure or preserve evidence relating to the offence or to obtain such evidence by questioning him (s. 42(1)). If authorisation for continued detention is given the suspect must be informed of the grounds of the decision which must be recorded in the custody record (s. 42(5)). The police must give the suspect, or his solicitor (or, in the discretion of the Custody Officer, other persons interested in his welfare) an opportunity to make oral or written representations (s. 42(6)). FURTHER DETENTION: Application to hold a suspect beyond the initial 36 hours must be made on oath and inter partes to a magistrate supported by an information from the police officer which must be supplied to the detainee in advance (s. 41). The tests for the magistrate are identical to those for the police officer considering further detention under section 42(1).

NEW ZEALAND	UNITED KINGDOM
(10) EXTEND PERIOD OF INVESTIGATION ... CONT'D	
The District Court Judge may grant an extension for a further period not exceeding 24 hours if satisfied that: (a) (i) offence punishable by maximum penalty not less than 14 years (ii) further questioning necessary to preserve or obtain evidence or complete investigation, and (iii) investigation being conducted properly and without delay; and (b) person or lawyer has had opportunity to make representations about application (s. 10(4)). DCJ can adjourn application for maximum of 18 hours during which suspect detained but not questioned (s. 10(5)). After extension and before further questioning, police officer must inform suspect of reason for questioning and again caution (s. 10(7)). Only one extension under this section (s. 10(8)).	An application for a warrant of further detention may be made at any time prior to the expiry of the 36 hours, or if it is not practicable for a court to sit when the 36 hours expires but it can sit within 6 hours of that time, up to 6 hours after the expiry of the 36 hours (s. 41(5)). This extra time is available only in special circumstances. When an application is refused the suspect must then immediately be either charged or released unless the unsuccessful application was made well before the expiry of the 36 hours (s. 41(15) and (16)). A solicitor acting in an application for a warrant of further detention must be given reasonable time to take instructions and prepare his argument. EXTENSION OF WARRANTS OF FURTHER DETENTION: The police can apply to a magistrate for one or more further extensions of the time period up to the limit of 96 hours (s. 44). The length of any such extension is in the discretion of the magistrate, except, no single extension can be for more than 36 hours. The application must be made at an *inter partes* hearing and the suspect is entitled to be legally represented. If the application is refused the suspect must be either charged or released but he can be held for the full period allowed by the previous application (s. 44(8)).

NEW ZEALAND	UNITED KINGDOM
(11) TIME–OUTS DURING PERIOD OF DETENTION	
Similar to Commonwealth provisions (s. 9(3)).	When a person in police detention is removed to hospital, any period of time in hospital or on the way there or back during which he is not being questioned shall not be included (s. 41(6)). See also discussion of section 41.
(12) CUSTODY OFFICER AND REGISTER	
No specific provision	A Custody Officer is to be at every designated police station (subs. 35 and 36). At other stations there must be someone able to take on the job if the need arises. Custody Officer must be at least of the rank of sergeant (s. 36(3)). An officer who is not a sergeant can perform the required functions at a designated station if the Custody Officer is not readily available (s. 36(4)). At designated stations the investigative and custodial functions should basically be distinct; however, this is not absolute (s. 36(5)). As soon as practicable after arrival at the police station after arrest the Custody Officer must consider whether there is sufficient evidence to justify a charge for the offence for which the person has been arrested (s. 36(10)). Section 38 establishes the principals on which the Custody Officer must decide whether to keep someone in custody after he has been charged. Section 39 sets out the responsibility of the Custody Officer for the proper treatment of detained persons.

NEW ZEALAND	UNITED KINGDOM
(13) ENSURING COMPLIANCE WITH THE PROVISIONS OF THE QUESTIONING REGIME	
Proposed improperly obtained evidence rule. Evidence obtained in consequence of breach of questioning provisions (s. 5(3)(b)) or unfairly (s. 5(3)(d) will be inadmissible unless the court considers exclusion of the evidence would be contrary to the interests of justice.	Any breach of the Codes of Practice amounts to a disciplinary offence. It does not mean that a breach will necessarily be penalised as a disciplinary offence. No doubt breaches of the Codes 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. A breach can only lead to criminal or civil proceedings if the breach is also a breach of the criminal or the civil law.

APPENDIX 11

THE ORIGINS AND DEVELOPMENT OF LEGAL RESTRICTIONS ON POLICE QUESTIONING OF SUSPECTS

The common law requirement to take arrested suspects directly before a magistrate, as expressed in the *Criminal Code* section 552 and *Justices Act 1886* section 69, stemmed from English procedure pre-dating professional policing in which magistrates supervised and conducted criminal investigations. In the second quarter of the nineteenth century, new police forces were established and developed, fundamentally altering the criminal justice system. Between the mid-nineteenth and mid-twentieth centuries, the respective roles of magistrates and police within the criminal justice system changed substantially. While magistrates confined themselves to a judicial role, the police took over the investigation of crime (eds Hay and Snyder 1989). As a vital part of attempts to delineate an expert 'professional' police role, crime investigation was given priority above other functions such as crime prevention and general service provision. Within crime investigation, emphasis was placed on obtaining confessions through custodial interrogation. This approach was encouraged subsequently by shifts in substantive criminal law towards requiring proof of subjective intention and changes in the law of evidence emphasising the prosecution's burden of proof.

Although police practice changed in response to these factors, the law regarding arrest and questioning did not. Police had no legal authority to question detained suspects. In fact, in the late nineteenth century, "it was said that there was a duty on the arresting constable not to ask questions of the arrested person" (NZLC 1992, p. 132).[1]

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1 For example, Lord Brampton's preface to *Vincent's Police Code*, one of the principal legal guides used by police, made clear that "When . . . a constable is about to arrest a person . . . or has a person in custody for a crime, it is wrong to question such a person touching the crime of which he is accused". The constable's duty was "simply to arrest and detain him in safe custody . . . For a constable to press an accused person to say anything with reference to the crime of which he is accused is very wrong" (quoted in Philips Commission 1981a, p. 162).

> This attitude was consistent with judicial distrust of police power, with lack of legal distinction between the evidential requirements for arrest and for charge, and with a concern that to allow suspects to be questioned while in custody would be to undermine their right against self-incrimination. (Dixon 1991, p. 10)

However, judicial practice became increasingly inconsistent and the law was in practice hypocritical: despite its unlawful origins, evidence of confessions was often admitted (see *R v Ibrahim* [1914] AC 599). This lack of correspondence between the rules of evidence and criminal procedure contributed to legal uncertainty and inconsistency in police practice.

It was in this context that, in 1912, the first Judges' Rules were issued (Abrahams 1964; Gooderson 1970; Philips Commission 1981b). The apparent uncertainty of the authors about their subject led to the production of rules which achieved the opposite of their original purpose: far from clarifying police powers, the Rules confused the matter, leaving vital issues to discretion and interpretation (Dixon 1991; Lidstone and Early 1982; Royal Commission on Police Powers and Procedure 1929, para 162). The meaning and intended effect of these Rules has since been the subject of "persistent controversy" (Philips Commission 1981a, p. 7).

The authors of the Rules apparently failed to appreciate that arrest and charge were separate acts requiring somewhat different levels of evidence. It was possible to interpret the rules as permitting the questioning of cautioned suspects, although the apparent intention had been to permit "questioning in custody only to clear up ambiguities in statements made prior to charge and custody" (Lidstone and Early 1982, p. 502). Emphasising the offence for which the suspect had been arrested allowed the unintended interpretation that questioning about other offences was acceptable. This in turn encouraged the use of holding charges. In 1929 the Royal Commission on Police Powers and Procedure (1929, para. 169) recommended the issuing of "a rigid instruction to the Police that no questioning of a person in custody, about any crime or offence with which he is or may be charged, should be permitted". Instead, what was produced was the 1930 Home Office explanatory circular which, far from clarifying the rules, compounded the problem by adding further uncertainty. Police practices in crime investigation continued to develop, with the Judges' Rules playing an increasingly marginal and symbolic role (Dixon 1991).

This situation was a result of a lack of basic knowledge of, and research into, policing practices; a tradition of neglect of criminal law and procedure; and a lack of concern for the working conditions of police and for police treatment of suspects. It was not until 1964, when a new version of the Rules was introduced, that the Judges' Rules became internally consistent and began to reflect police practice in England and Wales (Dixon 1991).

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APPENDIX 12

FREE LEGAL ADVICE IN POLICE STATIONS – COST ESTIMATES

In calculating the cost of providing free legal advice to suspects at police stations, it is necessary to determine:

- the total number of cases to which the scheme might apply
- the likely utilisation rate
- the likely cost per case.

TOTAL CASES TO WHICH THE SCHEME MIGHT APPLY

The proposed free legal advice scheme will be available only to persons who are:

- detained post-arrest for some purpose, rather than being taken to the watchhouse for processing; or
- 'voluntary attendees'.

Arrestees

The QPS does not generate reliable annual statistics on the number of people arrested. However, the number of arrestees processed annually can be estimated from two sources:

- the National Police Custody Survey undertaken in August 1992
- data on Magistrates Court and Children's Court appearances from the Australian Bureau of Statistics (ABS) publication, *Law and Order in Queensland*, 1991–92.

The National Police Custody Survey recorded details on all persons processed through Queensland watchhouses during that month. Of the 6,104 persons covered by the survey, 4,725 were there as the result of an arrest (unpublished data provided by QPS). On an annualised basis, this amounts to 56,700 arrests. (August is a 31 day month, but this is probably counter-balanced by the fact that more arrests are made in the summer months.)

For many offences, the police will have neither the desire nor the need to detain a person for further investigations once that person has been arrested. This is because the circumstances of the arrest will have afforded the police all of the evidence required: for example, the arrestee was found drunk; the arrest was for a driving offence; the police observed the act of offensive behaviour, and so on. Offence categories for which there is unlikely to be a need for pre-charge detention, in the sense that the term is used in this report, include:

- drunkenness
- drink driving and other traffic offences
- minor public order offences (e.g. offensive behaviour, obscene language)
- justice procedures (e.g. bail breaches, warrants).

According to the 1992 National Police Custody Survey, 53.3 per cent of all arrests processed through Queensland watchhouses were for these types of offences. If the annual total number of arrests is reduced by this amount, this leaves 26,479 arrests in which the use of a post-arrest detention power might have been a consideration, if one had been available.

As indicated, Magistrates Court appearance data can also be used to calculate the number of arrestees to whom the proposed scheme might apply. On the basis of data provided to the Commission by the QPS, as part of the Commission's review of police powers, it is estimated that, in around 90 per cent of cases in which criminal charges are laid, police proceed by arrest rather than summons. Hence, with a relatively minor statistical adjustment, appearances for criminal matters can be used as a surrogate measure of arrests.

In 1991/92, the most recent year for which data are available, there were 180,176 finalised appearances in the Magistrates Court and 4,965 in the Children's Court (unpublished data provided by ABS). These figures include cases which were subsequently committed to a higher court. Many of these appearances related to non-criminal matters, such as traffic charges, and to minor criminal matters

(e.g. drunkenness, public order offences) where the issue of post-arrest detention would probably not have arisen. Excluding appearances relating to drunkenness, traffic, drink driving or minor public order offences, or a justice procedure, the number of relevant appearances was:

Magistrates Court	27,707
Children's Court	3,787
	31,494

Allowing for the fact that summons procedure would have been used in around 10 per cent of these cases, the number of arrests calculated by this method is 28,345. This is very close to the estimate derived from the National Police Custody Survey data.

For the sake of the following discussion the number of arrests to which the proposed scheme might apply will be taken to be 27,500 – the approximate mid-point between the two estimates.

Voluntary Attendees

Under current police practices, it can be assumed that the bulk of 'voluntary attendees' eventually become arrestees. However, some people will be questioned as suspects and then allowed to go without any charges being laid. There is no Queensland data on voluntary attendees, but there is English evidence suggesting that, prior to the introduction of the *PACE Act 1984*, up to 20 per cent of suspects who were questioned were released without being charged (Philips Commission 1981a). On the basis of these studies, it is similarly assumed that the number of voluntary attendees in Queensland who are never arrested is equivalent to 20 per cent of the total number of arrestees (27,500), i.e. 5,500 cases.

Summary

The total number of cases to which the scheme might apply is the number of arrestees and the number of voluntary attendees (as estimated above). On 1991/92 data, this represents an estimated 33,000 cases.

UTILISATION RATE

Utilisation of free legal advice will be a function of two factors: the offer rate and the take–up rate.

- *The offer rate*. Under the proposed scheme, free legal advice would be available only to suspects who are voluntary attendees, or who the police wish to detain for some investigative purpose after an arrest had been made. Arrests for offences which are unlikely to require pre–charge detention have already been excluded from the analysis. However, within the remaining offence categories there will still be some instances where, on the facts of the case, pre–charge detention will not be required. For example, many people who are arrested for possession of drugs are found with the drugs on their person – in these cases, there will be little or no need to engage in extensive questioning of the person. In the absence of any data, it is very difficult to estimate the proportion of cases where the police will not wish to detain a person post–arrest, but 20 per cent of the total number of cases to which the scheme potentially might apply would seem to be a conservative estimate. On this basis, the offer rate can be assumed to be in the vicinity of 80 per cent.

- *The take up rate*. Evidence from the United Kingdom indicates that, for a variety of reasons, many suspects who are held by the police for questioning and other investigative purposes decline the offer of a lawyer.

  For the sake of the following calculations, it has been assumed that between 30–50 per cent of those who are offered free legal advice will take up the offer. However, a take–up rate of 30 percent is probably the more realistic estimate, at least for the initial years of the scheme. According to British research, it is still the case that only about one third of suspects request legal advice when it is offered to them. When the *PACE Act* scheme was first initiated, the take–up rate was only 24 per cent. On the evidence available, it is unlikely that the rate for Queensland would be much higher.

Summary

The offer rate and the take–up rate, when combined, give an overall utilisation rate of between 24 and 40 per cent (i.e. .8 x .3; .8 x .5), depending on the assumptions which are made about the take–up rate. On this basis, it can be assumed, on 1991/92 figures, that between 7,920 and 13,200 persons annually would make use of the free legal advice scheme.

COST PER CASE OF PROVIDING ADVICE

Characteristics of Proposed Scheme

There are several different ways in which a scheme of free legal advice could be operated, but for simplicity this discussion focuses on only one variant.

As detailed in the text of this report, it is assumed that the primary method of operating the proposed scheme will be through tendering arrangements with the private profession. Similar arrangements are currently being used to supply duty lawyer services to a number of Magistrates Courts in Queensland.

Costs

The cost per case of providing advice will depend upon a number of factors, including:

- the hourly rate charged to provide legal services
- the amount of travelling time required
- the length of time for which the suspect is questioned, or otherwise detained
- administrative overheads.

For the sake of this costing exercise, the following has been assumed:

- The hourly rate will be $73 an hour. This is the current rate at which duty lawyers are paid by the Queensland Legal Aid Commission. The rate has been more than sufficient to attract relatively experienced practitioners to tender for duty lawyer work. Further, there is potential for the comparatively low rate of payment to be compensated for by a considerable 'flow-on' of work. The rate of pay may be less attractive where attendance at the police station out of hours is required. However, this disincentive could be at least partly overcome by the use of a minimum call-out fee for out-of-hours work.

- On average, travelling time to and from the police station will amount to 30 minutes. Obviously, in some rural areas, travelling time will be longer, but this should be counter–balanced by the reduced time required in the larger population centres.

- On average, the amount of time which the lawyer will be required to spend with the suspect will be two hours. This assumption is based on the following considerations:

  * The limited research which has been conducted on this issue indicates that the majority of investigations can be completed within two hours after arrest. According to a small research project undertaken by the New South Wales Legal Aid Commission, 77 per cent of interviews with suspects took less than two hours to complete (1988, p. 24). A study undertaken in Scotland, where pre–charge detention is permitted for a maximum of six hours, found that the average period of detention was two hours 15 minutes.

  * Although there will be some cases where considerably more than two hours will be required, many high volume offences will require only a short record of interview. For instance, a shoplifter simply has to be questioned about whether he or she intended to take the goods without paying. Such questioning is unlikely to last more than a half to one hour unless there are exceptional circumstances.

- In addition to the cost of remunerating practitioners, the Legal Aid Commission will incur some overheads in administering the proposed scheme due to the need to arrange and oversee tenders, process requests for payment, and so on. It is assumed that administration costs will amount to 7.5 per cent of total payments to practitioners. A tendering system should help to keep costs down. Moreover, there would be no paper work associated with applying means or merit tests.

In summary, assuming an average travelling time of 30 minutes, an attendance time of two hours, a rate of payment of $73 an hour, and administrative overheads of 7.5 per cent, the average cost per case will be $196.20.

Total Cost of Proposed Scheme

The total cost of operating the scheme outlined above would be in the range of $1.55 – $2.59 million (rounded to the nearest $10,000) depending on the utilisation rate. This estimate assumes that:

- on 1991/92 figures, between 7,920 and 13,200 persons annually will make use of the scheme
- the average cost per case will be $196.20.

New South Wales Legal Aid Commission Study

In 1988 the New South Wales Legal Aid Commission undertook a feasibility study into the provision of advice for suspects at police stations. This study compared the cost of providing advice through a salaried scheme and a private profession scheme. The salaried scheme was costed using the then salary scale for legal officers employed by the Commission. No allowance was made for salary on–costs, or associated overheads (such as office space and administrative support). The private profession scheme was costed assuming an hourly rate of $72 – the fee paid to duty lawyers in New South Wales at that time. For both schemes, it was assumed that, on average, the lawyers would spend two hours per case, including travelling time. The conclusions of the study were that:

- The minimum cost of providing advice and assistance to 30 per cent of suspects, through a salaried scheme supplemented by private duty lawyers, would be $1.64 million. For 50 per cent of suspects the cost would be $2.67 million.
- The minimum cost of providing advice and assistance to 30 per cent of suspects, through a private profession scheme would be $3.67 million. For 50 per cent of suspects the cost would be $6.24 million.

The following observations should be made concerning these calculations:

- The cost of running the salaried scheme was significantly understated relative to the private scheme, because no allowance was made for on–costs and overheads in costing the salaried scheme. Furthermore, optimistic assumptions were made about the workloads of solicitors.

- The cost of running the private profession scheme was also under-stated, albeit to a lesser extent, because no allowance was made for administrative overheads.

- On the other hand, the cost of running both schemes was overstated by the methodology used to calculate the number of suspects. It appears that utilisation rates were calculated as a proportion of all criminal appearances in the Local Court. As noted above, in a substantial proportion of these cases, pre-charge detention would not have been necessary.

Notwithstanding these limitations, the estimates for the New South Wales private scheme are broadly comparable to those calculated for Queensland. Queensland's population is only 51 per cent of that of New South Wales. If the estimated cost of running the New South Wales private profession scheme is adjusted accordingly, the figure obtained is $1.9 million, assuming a utilisation rate of 30 per cent, or $2.53 million, assuming a utilisation rate of 40 per cent.

REFERENCES

ABS. *See* Australian Bureau of Statistics.

Australian Bureau of Statistics 1992, *Law and Order in Queensland 1991-92*, Final Issue.

New South Wales Legal Aid Commission 1988, *Feasibility Study into the Provision of Advice and Assistance for Suspects at Police Stations*, Legal Services Division.

APPENDIX 13

EXECUTIVE SUMMARY OF VOLUME I

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.

Published Reports/Papers of the Criminal Justice Commission

Date of Issue	Title	Availability	Price
May 1990	Reforms in Laws Relating to Homosexuality - an Information Paper	Out of Print	-
May 1990	Report on Gaming Machine Concerns and Regulations	In stock as at time of printing of this report	$12.40
Sept 1990	Criminal Justice Commission Queensland Annual Report 1989-1990	Out of Print	-
Nov 1990	SP Bookmaking and Other Aspects of Criminal Activity in the Racing Industry - an Issues Paper	Out of Print	-
Feb 1991	Directory of Researchers of Crime and Criminal Justice - *Prepared in conjunction with the Australian Institute of Criminology*	In stock as at time of printing of this report	No charge
March 1991	Review of Prostitution - Related Laws in Queensland - an Information and Issues Paper	Out of Print	-
March 1991	The Jury System in Criminal Trials in Queensland - an Issues Paper	Out of Print	-
April 1991	Submission on Monitoring of the Functions of the Criminal Justice Commission	Out of Print	-
May 1991	Report on the Investigation into the Complaints of James Gerrard Soorley against the Brisbane City Council	Out of Print	-
May 1991	Attitudes Toward Queensland Police Service - A Report (Survey by REARK)	Out of Print	-
June 1991	The Police and the Community, Conference Proceedings - *Prepared in conjunction with the Australian Institute of Criminology following the conference held 23-25 October, 1990 in Brisbane*	Out of Print	-

Date of Issue	Title	Availability	Price
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Sept 1991	Police Powers - an Issues Paper	In stock as at time of printing of this report	No charge
Sept 1991	Criminal Justice Commission Annual Report 1990/91	In stock as at time of printing of this report	No charge
Nov 1991	Report on a Public Inquiry into Payments made by Land Developers to Aldermen and Candidates for Election to the Council of the City of Gold Coast	In stock as at time of printing of this report	$15.00
Nov 1991	Report on an Inquiry into Allegations of Police Misconduct at Inala in November 1990	Out of Print	-
Dec 1991	Report on an Investigation into Possible Misuse of Parliamentary Travel Entitlements by Members of the 1986-1989 Queensland Legislative Assembly	Out of Print	-

Date of Issue	Title	Availability	Price
Jan 1992	Report of the Committee to Review the Queensland Police Service Information Bureau	Out of Print	-
Feb 1992	Queensland Police Recruit Study, Summary Report #1	In stock as at time of printing of this report	No charge
March 1992	Report on an Inquiry into Allegations made by Terrance Michael Mackenroth MLA the Former Minister for Police and Emergency Services; and Associated Matters	Out of Print	-
March 1992	Youth, Crime and Justice in Queensland - An Information and Issues Paper	Out of Print	-
March 1992	Crime Victims Survey - Queensland 1991 *A joint Publication produced by Government Statistician's Office, Queensland and the Criminal Justice Commission*	In stock as at time of printing of this report	$15.00
June 1992	Forensic Science Services Register	Out of Print	-
Sept 1992	Criminal Justice Commission Annual Report 1991/1992	In stock as at time of printing of this report	No charge
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Nov 1992	Criminal Justice Commission Corporate Plan 1992-1995	In stock as at time of printing of this report	No charge
Jan 1993	First Year Constable Study Summary Report #2	In stock as at time of printing of this report	No charge
May 1993	Report on a Review of Police Powers in Queensland Volume I: An Overview	In stock as at time of printing of this report	$15.00 per set
	Report on a Review of Police Powers in Queensland Volume II: Entry Search & Seizure	In stock as at time of printing of this report	
July 1993	Cannabis and the Law in Queensland A Discussion Paper	In stock as at time of printing of this report	No charge
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August 1993	Statement of Affairs	In stock as at time of printing of this report	No charge
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Nov 1993	Corruption Prevention Manual	In stock as at time of printing of this report	$30.00
Nov 1993	Report on a Review of Police Powers in Queensland Volume III: Arrest Without Warrant, Demand Name and Address and Move-On Powers	In stock as at time of printing of this report	$10.00

Date of Issue	Title	Availability	Price
Dec 1993	Recruitment and Education in the Queensland Police Service: A Review	In stock as at time of printing of this report	$10.00
Dec 1993	Corporate Plan 1993-1996	In stock as at time of printing of this report	No charge
Feb 1994	Murder in Queensland: A Research Paper	In stock as at time of printing of this report	No charge
March 1994	A Report of an Investigation into the Arrest and Death of Daniel Alfred Yock	In stock as at time of printing of this report	$10.00
April 1994	Report by the Honourable RH Matthews QC on his Investigation into the Allegations of Lorrelle Anne Saunders Concerning the Circumstances Surrounding her being Charged with Criminal Offences in 1982, and Related Matters: Volume I and Volume II	In stock as at time of printing of this report	$10.00

Further copies of this report or previous reports are available at 557 Coronation Drive, Toowong or by sending payment C/O Criminal Justice Commission to PO Box 137, Albert Street, Brisbane 4002. Telephone enquiries should be directed to (07) 360 6060 or 008 061611.

This list does not include confidential reports and advices to Government or similar.

- facilities to enable a person to shower, shave and change prior to going before the court, if the person has been at the station long enough for it to be reasonably required

- medical treatment for those who require it.

The Custody Officer should be the officer responsible for ensuring that such treatment is provided.

Ensuring that Proper Custody Records are Maintained

Police must be accountable for any action taken in respect of a person while the person is at a police station and not yet delivered into the custody of a judicial officer. To make police accountable for the treatment of the person detained and to enable the scheme to be monitored, the Custody Officer should be responsible for ensuring that a complete and comprehensive custody record is maintained. While the Commission is conscious of the widespread objection among operational police to any increase in paperwork, there can be no avoiding the need to keep records of the treatment of suspects while in police custody. Indeed the new Custody Manual obliges police to maintain comprehensive records. It is not envisaged that the record keeping requirements imposed on the Custody Officer will create any significant increase in record keeping, as discussed below.

Upon the suspect's arrival at the police station, the Custody Officer should be responsible for ensuring that the person's details are entered on the custody index. Where detention is authorised, the recording of all relevant times is to be carried out by the Custody Officer. The Custody Officer will also be responsible for ensuring that the matters currently required by the Custody Manual to be recorded in the custody index are entered, along with:

- the name and other details of the arresting officer, any accompanying officers, and the officer responsible for maintaining the custody record

- the grounds for detention for the purpose of investigation

- any property taken from the person

- communications by the person with friends, relatives, legal practitioners, interpreters, consular officials and others

- the arrival at the police station or otherwise of those contacted, and other visitors
- the nature and time of all investigative procedures involving the detained person, including interrogation, fingerprinting, and so on
- precise times of detention including any 'time–out' factors
- any factors that indicate that a high level of observation of the person being detained is required to ensure the safety of the person
- any applications for extension of the period of detention.

The QPS currently maintains a custody index into which numerous details are entered concerning persons in custody at watchhouses. The Commission understands that plans are under way to computerise the custody index throughout the State. This should result in a significant reduction in overall police time if the number of paper entries are minimised. Many of the responsibilities of the Custody Officer reflect those of the Officer in Charge of the Watchhouse into whose custody arrested people are delivered under the current law. However, because of the proposal for pre–charge detention, suspects may be kept in custody at police stations rather than at watchhouses. For this reason, it will be necessary for an officer at the station to be responsible for the custody. Under the Commission's proposed scheme, the additional requirements imposed upon the Custody Officer to enter details in the custody index will save the time of the Officer in Charge of the Watchhouse who will not have to duplicate the entries. The information can simply be accessed on the computer at the watchhouse.

22.2 Recommendation – The Role of the Custody Officer

The Commission recommends that the responsibilities of the Custody Officer should be specified in legislation. These responsibilities should include:

- **informing the suspect of his or her rights**
- **determining whether pre–charge detention is warranted**
- **authorising investigative procedures involving the suspect**

- **identifying and attending to any 'special needs' of the suspect**
- **ensuring that the suspect has medical assistance, rest and refreshment**
- **ensuring proper custody records are maintained.**

As far as possible the new requirements should be integrated with current QPS procedure.

CONCLUSION

In this chapter the Commission has recommended the introduction of a Custody Officer who has specific responsibilities and obligations in the pre–charge detention scheme. The Commission is aware of the significant amount of change that has been implemented within the QPS over the last few years and is conscious of the need to integrate its proposals as far as practicable with the current administrative arrangements. It is therefore important that, in drawing up the responsibilities of the Custody Officer at the police station, reference be made to the newly developed QPS Policies and Procedures Manual and, as far as is practicable, the new requirements and procedures be integrated with existing procedures.

CHAPTER TWENTY-THREE

ENSURING COMPLIANCE WITH THE SCHEME

INTRODUCTION

In the preceding chapters of this volume, the Commission has outlined a comprehensive legislative scheme to govern the conduct of police questioning and to deal with people in police custody. In developing the proposed scheme the Commission has been conscious of the need to have rules that are capable of being enforced. This chapter addresses the question of how to enforce these rights and duties. In considering this issue, the Commission agrees with the ALRC that: "[r]ights without remedies may be no more than rhetoric; duties without sanctions for their breach may as well not be imposed" (1975, p. 136).

The chapter:

- looks at the effectiveness of existing sanctions and assesses the extent to which enforcement will be made easier under the Commission's proposed scheme
- proposes that prosecutors and courts play a more active role in notifying the Commissioner of Police of breaches by police officers of the rules regulating the conduct of investigations
- discusses the need for tighter exclusionary rules to deal with evidence which has been unlawfully or improperly obtained
- recommends that there be a legislative requirement that all records of interview with suspects be electronically recorded.[11]

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11 The term 'electronically recorded' covers audio recording and video recording.

SANCTIONS FOR NON-COMPLIANCE

Available Sanctions

Chapter Three of Volume I of this report outlined the various options currently available if a police officer misuses or exceeds his or her powers (Commission 1993). An officer who fails to comply with rules regulating the conduct of investigations may be subject to three different types of legal action. These are:

- a civil action instituted by the person who suffered the abuse of power
- a criminal prosecution, if the breach constitutes a criminal offence
- disciplinary proceedings.

The following discussion briefly examines the effectiveness of each of these sanctions.

Civil Action

Civil action is a very expensive option and few of the people most frequently subjected to abuse of police powers are in a position to finance such an action, even if aware of the option of a civil suit. Further, such actions can take a long time to be determined by the courts. Even if a successful outcome is realised, it may be of little use to the person if criminal proceedings arising out of the investigation are, despite the misconduct, taken against him or her.[12]

Criminal Prosecution

It is often difficult to establish a convincing case to meet the required criminal standard of proof against those who abuse their powers. For instance, section 137 of the *Criminal Code* creates the offence of 'Delay To Take a Person Before a Court'. Experienced criminal practitioners have indicated that numerous Queensland courts have found that confessions have been obtained during periods of unlawful detention

12 While the Commission is of the view that such actions are not very effective as sanctions against police misbehaviour, it is of the view that existing rights to civil action should be preserved.

after arrest. Despite such claims, the Commission was unable to find any instance where a police officer was charged with an offence. Inquiries with the Office of the Director of Prosecutions also did not reveal any such cases.

Disciplinary Action

A review of complaints against police made to the Commission revealed very few allegations of unlawful detention. This could be explained partly by the fact that the law in the area has been so unclear. People who may have been subjected to a period of unlawful detention may not have been aware that the detention was unlawful, or that action could be taken against the officers concerned. This would not explain why those who challenge the evidence in court fail to also refer the matter to the Commission. However, an experienced lawyer has suggested that, in such cases, where the court admits the evidence and the person has been convicted, that person may have no further interest in pursuing the matter.

Improving Compliance

The problem of enforcement should be partially addressed by the Commission's proposed scheme, as the scheme will:

- provide a clear set of documented rules by which police must operate
- increase internal supervision and clarify lines of responsibility by designating a responsible and accountable Custody Officer
- facilitate the presence of lawyers, and other independent persons, at police stations.

However, these measures alone will not be sufficient to ensure compliance with the scheme. More active monitoring will also be required. The QPS needs to develop appropriate internal monitoring processes. In addition, greater external oversight is needed.

VICTORIA	COMMONWEALTH
(12) CUSTODY OFFICER	
No specific provision.	No specific provision.
(13) ENSURING COMPLIANCE WITH THE PROVISIONS OF THE SCHEME	
Tape recording of confessions and admissions (s. 464H).	Tape recording of confessions and admissions (s. 23V).

PART 2: EXISTING AUSTRALIAN LEGISLATION – SOUTH AUSTRALIA AND NORTHERN TERRITORY

SOUTH AUSTRALIA: SUMMARY OFFENCES ACT 1953
NORTHERN TERRITORY: POLICE ADMINISTRATION ACT 1978

SOUTH AUSTRALIA	NORTHERN TERRITORY
WHO IS ENTITLED TO QUESTIONING SAFEGUARDS?	
The scheme applies where a person is apprehended (s. 75), without warrant, on suspicion of having committed a 'serious offence' (s. 78). A 'serious offence' is defined as "an indictable offence or an offence punishable by imprisonment for two years or more" (s. 78(6)).	The scheme applies to persons taken into lawful custody (s. 137).
(1) THE CAUTION	
As soon as reasonably practicable after the apprehension of a person a police officer must inform the person of the right to refrain from answering any questions (s. 79a(3) and (1)). The person must also be warned that anything he or she says may be taken down and used in evidence (s. 79a(3)).	Before any questioning or investigation commences, the investigating officer must inform the person that he or she does not have to say anything, but anything the person does say or do may be given in evidence (s. 140). The warning is to be tape-recorded (s. 141).
(2) RIGHT TO INTERPRETER	
As soon as reasonably practicable after the apprehension of a person a police officer must inform the person that he or she is entitled to be assisted at an interrogation by an interpreter if English is not the person's native language and if he or she so requires (s. 79a(3) and (1); see also s. 83a).	No specific provision.

SOUTH AUSTRALIA	NORTHERN TERRITORY
(3)(a) RIGHT TO COMMUNICATE WITH LAWYER	
As soon as reasonably practicable after the apprehension of a person a police officer must inform the person that he or she is entitled to have a solicitor present during any interrogation or investigation to which the person is subjected while in custody (s. 79a(1) and (3)).	No specific provision.
(3)(b) DELAY ACCESS TO LAWYER	
No specific provision.	No specific provision.
(4)(a) RIGHT TO CONTACT A FRIEND OR RELATIVE	
Where a person is apprehended by a member of the police force the person is entitled to make, in the presence of a member of the police force, one telephone call to a nominated friend or relative to inform that person of his or her whereabouts (s. 79a(1)(a)). Where a person is apprehended on suspicion of having committed an offence the person is entitled to have a solicitor, friend or relative present during any interrogation or investigation to which the person is subjected while in custody (s. 79a(1)(b)). The person must be informed of these rights as soon as practicable after apprehension (s. 79a(3)).	Before any questioning or investigation commences, the investigating officer must inform the person in custody that he or she may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts (s. 140). The investigating officer must provide the person reasonable facilities to enable the person to make or attempt to make the communication.

SOUTH AUSTRALIA	NORTHERN TERRITORY
(4)(b) DEFER GRANT OF COMMUNICATION RIGHTS	
The member of the police force who is in charge of the investigation may decline to permit the person in custody to make a telephone call to a friend or relative, or a friend or relative to be present at an interrogation or investigation if the police officer has reasonable cause to suspect that communication between the person in custody and that particular person would result in an accomplice taking steps to avoid apprehension or would prompt the destruction or fabrication of evidence (s. 79a(2)).	If the investigating officer believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence or the questioning or investigation is so urgent having regard to the safety of other people that it should not be delayed, then the investigating officer must defer the questioning and investigation involving the direct participation of the person for a time that is reasonable in the circumstances (s. 140).
(5)(a) RIGHT OF FOREIGN NATIONAL TO COMMUNICATE WITH CONSULAR OFFICER	
No specific provision.	No specific provision.
(5)(b) DEFER RIGHT TO CONTACT CONSULAR OFFICER	
No specific provision.	No specific provision.
(6) SPECIAL RULES REGARDING ABORIGINES AND TORRES STRAIT ISLANDERS	
No specific provision.	No specific provision.