CRIMINAL JUSTICE
COMMISSION

REPORT ON
A REVIEW OF POLICE POWERS
IN QUEENSLAND

VOLUME V:
ELECTRONIC SURVEILLANCE
AND OTHER INVESTIGATIVE
PROCEDURES

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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 V.

Yours faithfully

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FOREWORD

This is the fifth volume in the Criminal Justice Commission's report on police powers in Queensland which has been prepared in response to a recommendation of Mr Fitzgerald QC in the Report of the Commission of Inquiry (1989).

This volume contains recommendations relating to the police use of listening devices and other forms of electronic surveillance, the taking of body samples, fingerprinting powers, rules and procedures governing eyewitness identification, police powers to preserve crime scenes, and strategies for promoting compliance with the Commission's proposed scheme of police powers. The recommendations have been made after considerable research and contain proposals which the Commission believes are reasonable and 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.

With the release of this volume the Commission's review is now complete with the exception of the area of telecommunications interception powers. It has been decided to deal with this topic in a separate report because it raises distinct legal and policy issues. The Commission anticipates that this report will be finalised in the reasonably near future.

To assist the reader, Appendix 16 of this volume reproduces the Executive Summary of Volume I. This 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 is available 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.

The writing and production of this volume was overseen by Susan Johnson, the Assistant Director of the Research and Co-ordination Division. Her co-authors were Sonia Caton, Tony Keyes and Michele Rosengren. Mary Burgess, Dennis Budz and Clare Smith also provided valuable assistance in the latter stages. The Commission is grateful to all of these people for the high quality of their work and their ability to work cheerfully under considerable pressure. The Commission particularly wishes to acknowledge the contribution of Susan Johnson, who has been responsible for the police powers project since the outset.

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
Research and Co-ordination

CONTENTS

VOLUME V:

ABBREVIATIONS

ALRC	Australian Law Reform Commission
Coldrey Committee	Consultative Committee on Police Powers of Investigation in Victoria
Commission or CJC	Criminal Justice Commission
FCAN	Field Court Attendance Notice
Gibbs Committee	Review Committee of Commonwealth Criminal Law (Australia)
LRCC	Law Reform Commission of Canada
Lucas Inquiry	Committee of Inquiry into the Enforcement of Criminal Law in Queensland
NCA	National Crime Authority
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
NZLRC	New Zealand Law Reform Committee
PACE Act	*Police and Criminal Evidence Act 1984* (United Kingdom)
Philips Commission	Royal Commission on Criminal Procedure (England and Wales)
QPS	Queensland Police Service
QAILS	Queensland Association of Independent Legal Services
Sturgess Inquiry	Inquiry into Sexual Offences Involving Children and Related Matters
Vagrants Act	*Vagrants, Gaming and Other Offences Act 1931*

SUMMARY OF RECOMMENDATIONS: VOLUME V

CHAPTER TWENTY-FOUR: LISTENING DEVICES AND OTHER FORMS OF ELECTRONIC SURVEILLANCE

24.1 Recommendation – Which Judges May Hear Listening Device Applications?

The Commission recommends that the judges of the Supreme Court continue to be solely responsible for hearing and determining listening device applications.

24.2 Recommendation – Rank of Officer Who May Apply for a Listening Device Warrant

The Commission recommends that an officer of the QPS of the rank of Inspector or above be authorised to apply for a warrant to install a listening device.

24.3 Recommendation – Offences for Which Listening Device Warrants May Be Sought

The Commission recommends that warrants for listening devices be available only in respect of:

- an offence under Part II of the *Drugs Misuse Act* punishable by 20 years or more imprisonment
- an indictable offence punishable by imprisonment for a period of seven years or more where the conduct constituting the offence involves or would involve, as the case requires:
  - the serious risk of loss, or the loss of, a person's life
  - serious risk of, or serious, personal injury

- serious damage to property in circumstances endangering the safety of a person
- trafficking in drugs
- serious fraud
- serious loss to the revenue of the State or Commonwealth
- official corruption

- An indictable offence punishable by imprisonment for a period of seven years or more and which satisfies the following criteria:
  - two or more offenders and substantial planning and organisation are involved
  - the offence involves, or is of a kind which ordinarily involves, the use of sophisticated methods and techniques
  - the offence is committed, or is of a kind which is ordinarily committed, in conjunction with offences of a like kind.

24.4 Recommendation – Grounds for Determining Whether to Issue a Warrant

The Commission recommends that a judge, in considering an application for a listening device warrant, must first be satisfied that there are reasonable grounds for suspecting that a specified offence has been, is being, or is about to be, committed.

The Commission recommends that the judge must also have regard to the following factors before issuing the warrant:

- the gravity of the matters being investigated
- the extent to which the privacy or safety of any person is likely to be interfered with
- the practicality and likelihood of obtaining evidence of the offence by other less intrusive means

- the extent to which the prevention, detection or investigation of the offence in question is likely to be assisted

- all previous warrants or extensions thereto sought or granted in connection with the investigation in question.

This information must be provided to the judge in affidavit form as part of the application documents (subject to the urgent application provisions).

24.5 Recommendation – Power to Authorise Entry Onto Premises

The Commission recommends that a judge, upon issuing a warrant, have the power to authorise entry onto premises for the purpose of installation, servicing, relocation and/or retrieval of a listening device.

24.6 Recommendation – Power to Authorise to Pass Through, Over, etc. Any Other Place

The Commission recommends that the judge, upon issuing a warrant for the use of a listening device, may authorise the passing through, from, over and along any other place for the purpose of entering premises specified in warrant.

24.7 Recommendation – Power to Authorise the Use of Reasonable Force

The Commission recommends that:

- the judge, upon issuing a warrant, may authorise the use of such force against property as is reasonably necessary for the purpose of carrying out anything authorised by the warrant
- the judge may also authorise the use of reasonable force against any person in the course of effecting an entry or exit of the premises, where it is necessary for the protection of the police officer or the protection of others
- where the force is to be used against a person or the property of a person then present, the police officer shall warn that person that force is going to be used, unless it is impracticable to give such a warning
- provision be made for compensation to the owner for any damage to property.

24.8 Recommendation – Power to Authorise the Use of Assistance

The Commission recommends that the judge, upon issuing a warrant, may authorise the use of such assistance as is reasonably necessary to effect the warrant.

24.9 Recommendation – Power to Authorise Entry by Subterfuge

The Commission recommends that the judge, upon issuing a warrant, may authorise entry to premises by such means as are reasonably necessary to effect entry, including the use of subterfuge.

24.10 Recommendation – Power to Authorise Extraction of Electricity

The Commission recommends that the judge, upon issuing a warrant, may authorise the extraction of electricity from the mains supply where it is reasonably necessary in order to operate the listening device.

24.11 Recommendation – Power to Authorise Others to Use or Assist with Listening Device

The Commission recommends that:

- the power to authorise police and/or civilians to assist in effecting the purposes of the warrant be conferred on the applicant officer who is an Inspector or higher ranking officer
- all authorisations be in writing, stating the name of the person authorised, the task for which the person is authorised (e.g. installation, monitoring, translating etc.), the date of authorisation, and the name and signature of the authorising person
- copies of the authorisations be given to those authorised and the originals retained on file for inspection by the proposed inspecting agency (see Recommendation 25.3).

24.12 Recommendation – Use of Listening Devices Without Prior Judicial Approval

The Commission recommends against allowing for the use of listening devices without prior judicial approval.

24.13 Recommendation – Provision for Emergency Warrants

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

24.14 Recommendation – Provision for Telephone Applications

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

24.15 Recommendation – Record-keeping Requirements for Emergency Warrants

The Commission recommends that strict record-keeping requirements apply to the granting of emergency warrants and that telephone application provisions be made consistent with provisions in other States for such applications, unless there are strong reasons to depart from these provisions.

24.16 Recommendation – Maximum Period of Warrant

The Commission recommends that:

- there be a statutory maximum period of 28 days for the validity of a warrant
- the judge specify the period, up to that maximum, for which the warrant is to be valid
- the judge direct that if the investigation ceases prior to that time, use of the listening device is to cease
- if an investigation ceases prior to the specified period, an officer of the rank of Inspector or above, authorised by the Commissioner, issue a written notice cancelling the use of the listening device.

In respect of emergency permits and telephone warrants, the Commission recommends that the statutory maximum period of validity should be 48 hours.

24.17 Recommendation – Applications for Extension of Warrant

The Commission recommends that:

- an extension of a warrant be for a specified period not exceeding 28 days, or until the investigation ceases, whichever is the earlier
- on an application for an extension the following material be put before the judge:
  - information addressing all the criteria required to be addressed upon an application for a warrant in the first instance
  - particulars of any change in circumstances and new information relevant to the granting of the application
  - whether any information relevant to the offence was obtained under the original warrant and, if so, a brief description of that information
  - all previous documentation put before the judge in relation to the granting of the original warrant in relation to the investigation in question and any subsequent extensions
  - a statement by the applicant that all matters both supportive of and adverse to the application have been included in the application.

24.18 Recommendation – Requirements Governing Application Procedures and Content of Warrant

The Commission recommends the adoption of legislation which sets out the requirements necessary for an application and that the following matters be addressed in the application and be specified in the warrant:

(a) the offence in respect of which the warrant is granted

(b) the name of the person whose conversations may be recorded or listened to, to the extent that such persons can be identified

(c) the period during which the warrant is to be in force

(d) the grounds upon which the warrant is to be issued

(e) the name of the person to whom the warrant is to be issued

(f) the premises on/in which a device is to be used

(g) particulars of any application for a warrant to use a listening device in relation to the person or premises named in the present application

(h) the time within which the person authorised to use the device is required to report back to the court

(i) whether the authorisation is to install, service, relocate and/or retrieve a device

(j) whether entry is authorised for that purpose

(k) whether entry of premises adjoining the specified premises for the purpose of gaining entry is authorised

(l) whether there is authority to use force if necessary for the purpose of installation, etc.

(m) whether there is authority to use such assistance as is necessary for the purpose of installation etc.

(n) a requirement for the device to be retrieved

(o) any other conditions and restrictions (for example, in relation to privileged conversations).

The warrant must also state the date of issue and the name of the issuing judge.

24.19 Recommendation – Protection of Legal Professional Privilege

The Commission recommends that:

- specific legislative recognition be given to legal professional privilege by providing that no private conversations are to be listened to or recorded at the office or residence of a legal representative, or any other place ordinarily used by legal representatives for the purpose of consultation with clients, unless the court is satisfied that there are reasonable grounds to believe that the legal representative, any other person practising with him or her, employed by him or her, or any other such legal representative or member of the legal representative's household, has been or is about to become a party to an offence in respect of which the warrant is sought

- the judge have a discretion to order whatever other conditions he or she thinks are in the public interest to protect confidential conversations, including a requirement that the conversations be live monitored, or that specified steps be taken to ensure as far as possible that privileged conversations are not recorded

- legislation require that, where there are grounds to suspect that privileged communications will be intercepted, that fact be disclosed in the application to obtain the warrant.

24.20 Recommendation – Installation of Visual Surveillance Devices in Private Property

The Commission recommends that:

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

- the warrant requirements which apply to listening devices apply equally to visual surveillance devices.

24.21 Recommendation – Vehicle Tracking Devices

The Commission recommends that:

- where a tracking device is of a basic type which simply emits a signal to assist in locating and tracking a vehicle and is to be attached to the outside of a vehicle on public property, use of the device be authorised in writing by an officer of the rank of Inspector or higher

- where the installation of the device involves entry to the vehicle or entry onto private premises, or the device is of a type that stores data or has a listening device capability, the device not be used without the authority of a judge of the Supreme Court

- the warrant requirements which apply to listening devices apply equally to tracking devices.

CHAPTER TWENTY-FIVE: RECORD-KEEPING AND REPORTING REQUIREMENTS

25.1 Recommendation – Requirement to Report Back to the Judge Who Issued the Warrant

The Commission recommends that legislative provision be made requiring the applicant for a listening device warrant to report to the judge who issued the warrant within two weeks after the retrieval of the device and that the report contain the following information:

- the names of the persons whose conversations were recorded or listened to, or whose movements were monitored, if those persons are known

- the period during which the device was used, including details of any previous extensions and/or circumstances of cancellation

- particulars of any other warrants for devices granted for the same offence

- particulars of the premises or place where the device was installed or used

- particulars of the general use made, or to be made, of the information or evidence obtained by use of the device
- particulars of the installation, servicing, relocation and/or retrieval of the device.

25.2 Recommendation – Production of an Annual Report

The Commission recommends that:

- an annual report on the use of electronic surveillance devices be tabled in Parliament by the Minister responsible for the legislation
- the report be prepared or audited by the Ombudsman or some other independent body (see Recommendation 25.3)
- the report include the information listed on p. 803.

25.3 Recommendation – Provision for Independent Auditing

The Commission recommends that the Ombudsman, or some other independent body, be charged with conducting regular inspections to ensure records and registers relating to electronic surveillance are being maintained and stored in accordance with the Act.

25.4 Recommendation – Purposes for Which Information Obtained by the Use of Surveillance Devices Can Be Disclosed

The Commission recommends that:

- legislation authorising the use of surveillance devices include a provision which states the purposes for which material obtained from the use of a surveillance device can be disclosed to persons other than those authorised under the warrant
- a written record be kept of what information has been disclosed to what person and for what purpose

- these records be available for scrutiny by the proposed inspecting agency (see Recommendation 25.3).

25.5 Recommendation – Destruction and Storage Requirements

The Commission recommends that:

- all records, whether in writing or otherwise, of any information obtained by the use of a surveillance device pursuant to a warrant, be destroyed unless required for a permitted purpose as outlined in Recommendation 25.4

- the Commissioner of Police be required to cause the destruction of records and that compliance with the destruction requirements be the subject of independent oversight

- pending destruction, the records be kept in a secure place with access restricted to those authorised to deal with such records.

25.6 Recommendation – Notification of a Person that He or She Has Been the Subject of Electronic Surveillance.

The Commission recommends that:

- there be a legislative requirement that, upon a report back to the judge, the judge may, in his or her discretion, direct that the persons who were the subject of the surveillance, or are to be charged arising out of the investigation, be notified of the fact of the surveillance

- a discretion be conferred on the judge to refuse to make the order for notification if to do so would be likely to jeopardise a current or future investigation

- the applicant for the warrant be given the opportunity to be heard prior to the judge directing notification.

CHAPTER TWENTY-SIX: BODY SEARCHES AND EXAMINATIONS

26.1 Recommendation – Consent to an Examination Prior to Arrest

The Commission recommends that the safeguards in section 259 of the *Criminal Code* should also apply to persons not under arrest who have consented to an examination.

26.2 Recommendation – Video-taping of Consent to an Examination

The Commission recommends that where a person consents to a procedure, either prior to or following arrest, such consent be audio or video recorded, where practicable. Where that is not practicable, consent should be in writing.

26.3 Recommendation – Restriction of Section 259(3) of the *Criminal Code* to Post-arrest Situations

The Commission recommends that the power to take body samples and conduct examinations under section 259(3) of the *Criminal Code* be available only in relation to persons who have been arrested.

26.4 Recommendation – Offences for which Section 259(3) of the *Criminal Code* Should Be Available

The Commission recommends that the powers under section 259(3) of the *Criminal Code* be available only in respect of a person in lawful custody upon a charge of committing an indictable offence. A magistrate, in considering whether to authorise an examination or procedure under that section, should also have regard to

- the intrusive and/or humiliating nature of the procedure
- the seriousness of the offence

- the age and health of the suspect
- the degree of the suspect's alleged involvement in the offence.

26.5 Recommendation – Power to Transport a Person in Custody to Have a Procedure Undertaken

The Commission recommends that section 259 of the *Criminal Code* include a power to take the person in lawful custody a reasonable distance at the request of the medical practitioner or dentist to have a procedure undertaken.

26.6 Recommendation – Suspect's Right to Be Heard in an Application Under Section 259 of the *Criminal Code*

The Commission recommends that section 259 of the *Criminal Code* be amended to provide specifically that the person receive prior notice of an application under that section and be allowed the right to be heard, to call evidence and to be legally represented (unless the magistrate orders otherwise).

26.7 Recommendation – Searches Under Section 17 of the *Drugs Misuse Act*

The Commission recommends that the safeguards applying to the conduct of intrusive procedures under section 259 of the *Criminal Code* also apply to intrusive procedures conducted under section 17 of the *Drugs Misuse Act.*

26.8 Recommendation – Power to Search a Person in Custody

The Commission recommends that section 259(1) of the *Criminal Code* be amended to authorise the police to search a person in custody upon a charge of committing an offence and seize items with which the person may seek to harm himself or herself or other persons.

CHAPTER TWENTY-SEVEN: FINGERPRINTS AND OTHER PARTICULARS

27.1 Recommendation – Power to Take Fingerprints

The Commission recommends that there be a single statutory power to fingerprint a person for the purposes of:

- maintaining complete criminal records or
- the investigation of the offence for which the person was arrested, summonsed or issued with a Field Court Attendance Notice (FCAN).

This power should be exercisable only:

- following the arrest of the person or the issue of a summons or an FCAN to the person
- upon the order of a court at the time of the person's appearance before the court in answer to a charge, summons or FCAN, or
- upon the order of the court after the person has been found guilty of an offence by a court.

The power should be available in respect of the following offences:

- indictable offences (contained in the *Criminal Code* or other statutes)
- offences contained in the proposed Summary Offences Act which carry a prescribed penalty which includes imprisonment
- offences contained in the *Regulatory Offences Act* which, if repeated, may result in the person being charged under the *Criminal Code* and
- offences in other statutes which, upon repeat conviction, require the imposition of a mandatory term of imprisonment.

27.2 Recommendation – Police Officers Authorised to Take Fingerprints

The Commission recommends that all police officers should have the power to take fingerprints within the limits defined by the Commission's recommendations.

27.3 Recommendation – Destruction of Fingerprints

The Commission recommends that the police be required to destroy the fingerprint records of a person automatically upon the expiration of a specified period after the person is not found guilty of the charge or if the person has not been charged or the charge is not proceeded with. Automatic destruction should apply to all hard copy records of fingerprints and entries on any electronic databases.

27.4 Recommendation – Independent Oversight of Destruction

The Commission recommends that an independent monitoring body be responsible for ensuring compliance with the destruction regime.

27.5 Recommendation – Fingerprinting of Juveniles

The Commission recommends that:

- There be no power to fingerprint juveniles below the age of 10 years.
- In the case of juveniles aged 10 to 15 years, the consent of the juvenile and the parent or guardian be required before fingerprinting can take place. Where consent is refused, a Children's Court order must be obtained. Further, an independent person should be present when the juvenile is printed.
- Where a court order is required, the court should take account of the following factors in deciding whether to order fingerprinting:
  - the seriousness of the circumstances surrounding the commission of the offence

- the alleged degree of participation by the child in the commission of the offence
- the age of the child.

- In the case of juveniles aged 15 years and over, the adult provisions should apply, but an independent person should be required to be present when the prints are taken.

27.6 Recommendation – Destruction of Juvenile's Fingerprint Records

The Commission recommends that the fingerprint records of a juvenile be destroyed automatically if the juvenile is not found guilty or the police do not proceed with the charge.

The Commission further recommends that:

- where a juvenile has been found guilty of one or more offences but does not have a conviction recorded against him or her, and
- the juvenile has not been found guilty of an offence as an adult

the fingerprint records of the juvenile be destroyed upon the expiration of five years from the date of sentence or from the expiration of the sentence for the last offence of which the juvenile was found guilty.

27.7 Recommendation – The Power to Take Other Particulars

The Commission recommends that the single statutory power to take fingerprints and the associated destruction requirements also apply to the taking of photographs. The Commission further recommends that the proposed Custody Officer, or Officer–in–Charge of the station, be authorised to order the taking of footprints or toeprints, voiceprints or handwriting samples, where:

- a person has been arrested or issued with an FCAN or summons for an offence
- a print or sample is necessary to assist in the investigation of the offence.

27.8 Recommendation – Use of Reasonable Force

The Commission recommends that, except in the case of voiceprints and handwriting samples, police be able to exercise such force as is reasonably necessary to obtain the particulars required.

CHAPTER TWENTY-EIGHT: IDENTIFICATION BY EYEWITNESSES

28.1 Recommendation – Suspect's Participation in an Identification Parade

The Commission recommends that a suspect not be compelled to participate in an identification parade.

28.2 Recommendation – Participation of Members of the Public in an Identification Parade

The Commission recommends that:

- participation in an identification parade continue to be on a voluntary basis only
- to encourage participation, a scheme be developed whereby participants in an identification parade are paid a suitable fee for their assistance.

28.3 Recommendation – Requirement to Conduct an Identification Parade

The Commission recommends that:

- the police be required to conduct an identification parade provided that it is practicable to do so, where identification is in issue and the suspect is prepared to co-operate

- where it is not practicable to hold an identification parade, the attempts made and the reasons why it was not practical be recorded in the Custody Index.

28.4 Recommendation – Use of Methods Other than Identification Parades

The Commission recommends that where it is impractical to conduct an identification parade, the police conduct a group identification or photographic identification.

28.5 Recommendation – Video-taping of Identification Procedures

The Commission recommends that police be required to video-tape any identification procedure involving an eyewitness.

28.6 Recommendation – Legislation Governing Identification Procedures

The Commission recommends that the regulation of identification procedures be the subject of legislation.

CHAPTER TWENTY-NINE: CRIME SCENE PRESERVATION

29.1 Recommendation – Preserving a Crime Scene in a Public Place

The Commission recommends that:

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

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

29.2 Recommendation – Entry to Private Property to Preserve a Crime Scene

The Commission recommends that police be empowered to enter private property without a warrant to preserve the scene of a crime where they have reasonable grounds to suspect that:

- an offence carrying a maximum of seven years imprisonment or more has been committed on the property, and

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

29.3 Recommendation – Preserving a Crime Scene on Private Property

The Commission recommends that:

- police be empowered to give reasonable directions as are necessary to preserve the scene of a crime on private property

- the lawful occupier or his or her invitees not be excluded unless they refuse to comply with those directions

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

CHAPTER THIRTY: ENSURING COMPLIANCE WITH THE COMMISSION'S PROPOSED SCHEME

30.1 Recommendation – Exclusion of Unlawfully or Improperly Obtained Evidence

The Commission recommends that a legislative provision be introduced in Queensland which provides:

Evidence that was obtained:

(a) improperly or in contravention of the law; or

(b) in consequence of an impropriety or of a contravention of the law

is not to be admitted in a criminal proceeding unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Without limiting the matters that the court may consider, in determining whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in this way, the following matters are to be taken into account:

- the probative value of the evidence
- the importance of the evidence in the proceeding
- the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding
- the gravity of the impropriety or contravention
- whether the impropriety or contravention was deliberate or reckless
- whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights

- whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention
- the difficulty (if any) of obtaining evidence without impropriety or contravention of an Australian law.

PART I

CHAPTER TWENTY-FOUR

LISTENING DEVICES AND OTHER FORMS OF ELECTRONIC SURVEILLANCE

INTRODUCTION

Over the last 30 years, covert electronic surveillance has become an increasingly important tool in the investigation of sophisticated and complex crime. The term 'electronic surveillance' refers to a range of devices that are used to covertly record or monitor sounds, images, movement, signals or data. The capabilities of these devices are continually evolving, making it difficult to compile a definitive list of devices employed. However, the main technologies used include: radiating or radio frequency devices and receivers (often referred to as *listening devices*); non-radiating devices (e.g. wired surveillance systems, including *telephone intercepts* and concealed microphones); optical surveillance devices such as cameras and video recorders, closed circuit television, night vision devices and satellite based technology; various forms of sensor technology; and, vehicle location systems such as tracking devices.

The focus of this chapter is on the three forms of electronic surveillance most frequently used by police in Queensland. These are:

- listening devices
- visual surveillance devices (particularly video) and
- vehicle location systems or tracking devices.

At the national level, and in some other States, telecommunications interception is also an important form of surveillance. However, Queensland law enforcement agencies do not currently have the power to intercept telephone conversations. As this is an area governed by Commonwealth rather than State legislation, and different policy questions are involved, issues relating to telecommunications interception will be dealt with in a separate report.

The bulk of this chapter deals with listening devices, as these are arguably the most intrusive form of surveillance used by police. Listening devices are also the only surveillance devices which are currently subject to detailed legal regulation in

Queensland. The latter sections of the chapter consider the need for controls on the use of visual surveillance and tracking devices. The following chapter will deal more generally with the issue of the safeguards which should apply to the use of electronic surveillance.

The submissions received by the Commission indicated that there is substantial community support for the use of covert surveillance by police in limited circumstances. However, there was also broad agreement that the use of such methods must be subject to enforceable safeguards and accountability mechanisms. The Commission is confident that the recommendations contained in this volume adequately address these concerns.

SCOPE OF THE REVIEW

In the course of undertaking this review, the Commission has identified a number of broader privacy issues. These include the increasing use of video/photographic monitoring and recording by individuals and organisations, the practice of tape recording of private conversations where the other party is unaware that he or she is being recorded ('participant monitoring'), and the growing public availability of various types of eavesdropping devices. It has not been possible to deal with such issues in this report, as the focus has been specifically on issues relating to police powers. The Commission also does not have the statutory authority to undertake a general review of privacy law, as its jurisdiction is restricted to "researching, generating and reporting on proposals for reform of the criminal law . . ." (s. 23(3) of the *Criminal Justice Act 1989*). However, there is a need for some body, such as the Law Reform Commission, to undertake a general review to determine whether privacy rights are adequately protected under current State law, having regard to the increased use and availability of surveillance technology in the general community. The Commission would be willing to make a detailed submission to any such inquiry.

LISTENING DEVICES: THE CURRENT LEGISLATIVE FRAMEWORK

A "listening device" is defined in the *Invasion of Privacy Act 1971* as "any instrument, apparatus, equipment, or device capable of being used to overhear, record, monitor or listen to a private conversation simultaneously with its taking place" (s. 4). Broadly, the Act prohibits the use of listening devices except in defined circumstances (see p. 750). Queensland was one of the first States to legislate to control the use of listening devices. Other States and Territories have since introduced listening device

legislation that is similar in effect. However, the legislation in most of those jurisdictions is more detailed and specific, as Appendix 14 reveals.

There are presently four Queensland statutes which authorise the use of listening devices. These are the *Invasion of Privacy Act*, the *Drugs Misuse Act 1986*, the *Commissions of Inquiry Act 1950* and the *Criminal Justice Act*. However, members of the Queensland Police Service (QPS) cannot apply for listening device warrants under the *Commissions of Inquiry Act* or the *Criminal Justice Act* unless they have been seconded to or employed by a Commission of Inquiry or the Criminal Justice Commission and are authorised by the Chairperson to apply to the court for a warrant.[1]

The powers under the latter two Acts will not be closely scrutinised in this review, given the specialised context in which they are used and the fact that they are not accessible to police officers in the normal course of duty.

The *Invasion of Privacy Act 1971*

Until the enactment of the *Drugs Misuse Act*, Queensland police relied exclusively on provisions within the *Invasion of Privacy Act* to apply for authority to use listening devices. The *Invasion of Privacy Act* is unique in Australia in that it deals with a range of privacy related issues (including the licensing and control of credit reporting agents and private inquiry agents) as well as regulating the use of listening devices. All other States and Territories have enacted legislation specific to listening devices.

A "private conversation" is defined as:

> any words spoken by one person to another person in circumstances that indicate that those persons desire the words to be heard or listened to only by themselves or that indicate that either of those persons desires the words to be heard or listened to only by themselves and by some other person, but does not include words spoken by one person to another person in circumstances in which either of those persons ought reasonably to expect the words may be overheard, recorded, monitored or listened to by some other person, not being a person who has the consent, express or implied, of either of those persons to do so. (s. 4)

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1 In the case of the Commission, the Chairperson may delegate the power to a Director (see s. 140(1) of the Criminal Justice Act).

It is an offence to use a listening device to overhear, record, monitor or listen to a private conversation unless the person using the device:

- is a party to the conversation
- is a member of the police service acting in the performance of his or her duty, who has been authorised in writing to use the device by a prescribed police officer under and in accordance with the approval in writing of a judge of the Supreme Court.[2]

Hearing aids used by the hearing impaired, and similar devices, are specifically exempted by the Act (s. 42).

Persons who unintentionally overhear a private conversation by means of a telephone (e.g. crossed wires), and some Commonwealth employees in specified circumstances, are also protected. A private conversation which has come to the knowledge of a person as a result of the use of a listening device, in contravention of the Act, is inadmissible in civil or criminal proceedings.

The Act requires that the application be made in accordance with the Supreme Court Rules. Insofar as no procedure is prescribed by the Rules, the procedure will be as directed by the judge.

In deciding whether or not to grant a warrant, the judge must consider:

- the gravity of the matters being investigated
- the extent to which the privacy of a person will be interfered with
- the extent to which the prevention or detection of the offence is likely to be assisted.

The Act provides that no notice or report of the application shall be published; the application hearing is to be made in the absence of the person to whom it relates and is not to be open to the public and records of the application are to be available only at the direction of the judge of the Supreme Court. The matters to be addressed in a warrant are not prescribed in the legislation.

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2 The "approval" in writing of a judge of the Supreme Court shall be referred to as a 'warrant' or an 'authorisation' throughout the text.

The Act does not provide a specific power of entry to premises to install, service, or retrieve a listening device. However, a warrant may be granted subject to any conditions, limitations and restrictions that the judge sees fit to impose in the public interest. In the past it was assumed that entry to a specified premises was legal if it was authorised by the warrant, but this is no longer the case. As a result of the recent High Court decision in *Coco v The Queen* (1993–1994) 179 CLR 427 (*Coco's Case*), any evidence of private conversations obtained by use of a listening device which has been installed by entry onto private premises without the prior consent of the owner/occupier will be viewed by the courts as being illegally obtained and ruled inadmissible. This decision has effectively made it impossible in most situations to use listening devices under the *Invasion of Privacy Act.*

The communication and publication of information obtained through the use of a listening device is prohibited, unless the nature of the communication or publication falls within defined exceptions. The exceptions include the communication or publication by an authorised police officer, who was not a party to the conversation, in the performance of his or her duty [s. 43(6)].

There is no provision in the Act for a maximum time limit for warrants, nor is there any provision for telephone warrants in urgent circumstances, or the extension or revocation of a warrant.

With respect to reporting requirements, the Act states that the Commissioner of Police must:

- cause the Registrar to be informed of the authorisation as soon as practicable but no later than seven days after the grant of a warrant
- cause a record to be kept of all authorisations
- furnish to the Registrar a report of each authorisation at not more than one month intervals, containing such particulars as the Registrar may from time to time require of the use of any listening device [s. 43(5)].

These requirements are less stringent than those imposed by comparable Commonwealth and State legislation (see Appendix 14). The public is not entitled to any records or statistics concerning the use of listening devices obtained under the Act.

Most other Australian jurisdictions also require that the application be made to a judge of the Supreme Court. The exceptions are Tasmania, which allows for a magistrate to hear applications and issue warrants, and Western Australia, which is the only jurisdiction which does not require an application to be made to a judicial officer. Section 4 of the Western Australia *Listening Devices Act 1978* enables the Commissioner or Senior Assistant Commissioner of Police, or an officer of the rank of Inspector or above appointed by the Commissioner of Police, to authorise in writing the use of listening devices.

The public submissions generally agreed that there should be strict safeguards controlling the exercise of the power to install and use listening devices. Most submissions argued that listening devices should be used only after the issue of a warrant by a judge of the Supreme Court or, at the very least, a District Court Judge. The Queensland Law Society argued that warrants should only be issued by a judge of the Supreme Court.

The QPS argued that District Court Judges should also be authorised to issue warrants. According to the QPS, this would make it easier for police to get access to a judge. However, the Commission can see no compelling reason to change the present law. The demand for judges to hear applications for listening devices and other surveillance devices does not appear to have exceeded the capacity of the Supreme Court. Figures contained in the Director of Prosecutions Annual Report for 1993 (1994, p. 56) show that in 1993 13 applications to install devices were made by the Office of the Director of Prosecutions on behalf of the QPS. In addition, there were 18 applications made by the Commission in 1993, of which nine were for warrants to use listening devices and the other nine were for extensions relating to some of those warrants. Hence, a total of 31 applications were made during the year: an average of two for each judge of the Supreme Court based in Brisbane.

These figures on the number of applications made pre-date the High Court's judgement in *Coco's Case*. It might be argued that the Full Court judgement of McPherson J[3] identified problems with the *Invasion of Privacy Act* concerning the authority to enter premises to install a device and this limited the use of devices under that Act. However, the available data do not support this conclusion. Eight devices were authorised under the *Invasion of Privacy Act* in 1993 compared to five in 1991 and only three in 1990 (Director of Prosecutions 1994, p. 56). On this basis, it would seem unlikely that there would be a significant increase in the number of applications if police are granted a power of entry in respect of listening devices (see Recommendation 24.5).

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3 Handed down on 10 May 1991. Reported in [1994] 1 Qd R 469 at 481–482.

District Court Judges may be based more widely across the State, but in practice most, if not all, listening device applications are made in Brisbane. Furthermore, if there is a need for an application to be made from somewhere further afield, Recommendation 24.14 provides for telephone applications to be made in the case of an emergency.

The judges of the Supreme Court have been hearing applications for listening devices since the passing of the *Invasion of Privacy Act* in 1971. The Supreme Court Registry has established procedures for dealing with the sensitive material involved in the making of such applications and the granting of warrants. While the Commission recognises that the District Court Judges could develop similar expertise and the District Court Registry could implement similar procedures to the Supreme Court, there does not appear to be a need for such duplication at this stage.

It is important to monitor the situation to ensure that the Supreme Court does not become overwhelmed with applications. However, given the time, effort and expense associated with the use of listening devices, it is unlikely that there will be a significant increase in their use in the foreseeable future.

24.1 Recommendation – Which Judges May Hear Listening Device Applications?

The Commission recommends that the judges of the Supreme Court continue to be solely responsible for hearing and determining listening device applications.

What Rank of Officer Should Be Authorised to Apply for A Warrant to Install a Listening Device?

The 'applicant' for a warrant will generally be the officer who is responsible for deposing to the affidavit upon which the application is based. The *Report of a Commission of Inquiry Pursuant to Orders in Council (Queensland)* (1989) said in relation to this issue that:

> . . . the right even to seek such powers from the Judiciary should be restricted to those who can be expected to use discrimination. Not all personnel should be able to exercise special powers. In some cases an internal control, such as an investigator seeking the permission of a superior to ask for such powers, should be required even before an application is made. (1989, p. 179)

Queensland legislation specifies the ranks of police officers who may apply for a listening device warrant. The *Invasion of Privacy Act* currently provides that an application may be made by the Commissioner, Assistant Commissioner or authorised Inspector or higher ranking officer. When Supreme Court approval is granted, that officer can authorise in writing any member of the QPS to use the device [s. 43(2)]. The *Drugs Misuse Act* currently provides that an application may be made by a police officer of the rank of Inspector or above (s. 25).

In the application proceedings the applicant may be represented by a lawyer. In practice, the Office of the Director of Prosecutions reviews all QPS requests to apply for a warrant and appears on behalf of all QPS applicants for listening device warrants. According to the Director of Prosecutions Annual Report (1994, p. 55), it is the role of the Director to consider the evidence advanced by the police and advise whether authority to use a listening device should be applied for.

None of the submissions raised a problem with the requirement that an officer of the rank of Inspector or above should be authorised to apply for a warrant. In practice, it will generally be an officer of this rank or above who will be in charge of an operation and, therefore, will normally be best placed to be the applicant.

24.2 Recommendation – Rank of Officer Who May Apply for a Listening Device Warrant

The Commission recommends that an officer of the QPS of the rank of Inspector or above be authorised to apply for a warrant to install a listening device.

For What Offences Should Listening Device Warrants Be Available?

The majority of the public submissions to the Commission favoured limiting the availability of listening devices to serious offences. Many of the submissions did not define 'serious offence'. Others differed in the proposed definition of those offences for which the power should be available. For example, one submission proposed that the power should be available only for those offences carrying a maximum term of imprisonment of five years, whereas another proposed only those offences carrying a maximum period of 14 years imprisonment.

Currently the *Invasion of Privacy Act* allows an application to be made in respect of "an offence" with no further qualification [see s. 43(3)(c)]. This theoretically allows

an application to be made for a warrant to use a listening device even in relation to minor offences. However, there is a requirement in the Act that a judge must take into account such matters as the gravity of the offence when determining whether or not to issue a warrant.

The *Drugs Misuse Act* allows applications for warrants only in respect of offences in Part II of the Act which are punishable by 20 years or more imprisonment (e.g. trafficking, possession, supply). Before making the application there must be reasonable grounds to suspect that the offence has been, is being, or is about to be committed (s. 25).

The *Criminal Justice Act* does not specify particular offences for which an application for a listening device warrant can be made. It allows an application to be made if there are reasonable grounds for suspecting that the use of the listening device may disclose information relevant to the subject matter of an investigation by the Commission.

As indicated, the Office of the Director of Prosecutions appears on behalf of the QPS in respect of all applications for listening devices. In practice, such an application will not be made unless the offence under investigation is very serious, such as murder or armed robbery (Director of Prosecutions 1994, p. 55). Consequently, judges of the Supreme Court have only issued warrants in relation to serious offences.

In 1993, listening device warrants were issued under the *Invasion of Privacy Act* for investigations involving the following offences:

- murder
- major theft, corruption and fraud involving approximately $6,000,000
- an armed robbery/attempted murder in which the victim was shot and severely beaten
- counterfeiting, major fraud and extortion (Director of Prosecutions 1994, p. 56).

Warrants issued under the *Drugs Misuse Act* in 1993 were all for the offence of trafficking in a dangerous drug (Director of Prosecutions 1994, p. 56).

Most of the warrants issued under the *Criminal Justice Act* in 1993/94 were for investigations out of which people were charged with offences of murder, accessory

after the fact to murder and official corruption. Other warrants were issued in respect of matters which are currently under investigation (CJC 1994a, p. 39).

Consistent with the approach taken throughout this report, the legislation conferring police powers should be as clear and precise as practicable in the definition of those powers. Thus the Commission considers that the proposed listening device legislation should specify the offences or categories of offences for which warrants should be available.

Some States have imposed limits on the types of offences for which listening device warrants can be sought. The relevant provisions in New South Wales, Tasmania and the Northern Territory are all couched in similar terms. Broadly, they restrict the availability of warrants to indictable offences and offences prescribed under the Acts. Neither South Australia, Victoria nor Western Australia limit the types of offences for which warrants may be sought.

The most detailed provision specifying categories of offences for which a warrant may be sought is that contained in the Commonwealth *Telecommunications (Interception) Act 1979* (Cwlth), concerning telephone interception warrants (see Appendix 14). In general terms, the Act limits the availability of warrants to major drug offences and indictable offences carrying a maximum of seven years imprisonment or more where the conduct constituting the offence involves one or more of the following:

- the serious risk of loss, or the loss of, a person's life
- serious risk of, or serious, personal injury
- serious damage to property in circumstances endangering the safety of a person
- trafficking in drugs
- serious fraud
- serious loss to the revenue of the Commonwealth or of a State.

The Commission considers that a similar classification should be used to define the offences for which listening device warrants should be available. The Commission has consistently taken the view that the more intrusive police powers should be available only in relation to indictable offences carrying a maximum of seven years imprisonment or more. Because of the particularly intrusive nature of listening

devices, it is appropriate that they be limited to those offences where there are serious circumstances surrounding the offence.

There are two areas in which the Act's classification of offences is deficient – organised crime and official corruption. The Commission considers that offences carrying a maximum of seven years or more imprisonment, committed in circumstances that indicate an organised crime dimension, are serious offences. Furthermore, they are often committed in circumstances where there is no identifiable 'victim' or 'complainant'. This makes them particularly difficult to detect and investigate without the availability of electronic surveillance.

Similarly, offences which involve official corruption are very serious offences as they undermine the integrity of the public administration and the community confidence in public administration. However, these offences may not always fall into the category of offences outlined under the *Telecommunications (Interception) Act*. There are many instances of official corruption that may not involve serious fraud or serious loss of revenue to the State or Commonwealth – for example, the payment of bribes to a public officer in order to gain a government contract. Often these offences may not have an identifiable 'victim' or 'complainant'. As with organised crime, such offences may only be detected and effectively investigated if there are listening device powers available.

The Commission proposes to include these categories of offences as offences for which a listening device warrant can be sought. The definition of what constitutes an offence involving organised crime offence is based upon section 4 of the *National Crime Authority Act 1994*.

24.3 Recommendation – Offences for Which Listening Device Warrants May Be Sought

The Commission recommends that warrants for listening devices be available only in respect of:

- **an offence under Part II of the *Drugs Misuse Act* punishable by 20 years or more imprisonment**

- **an indictable offence punishable by imprisonment for a period of seven years or more where the conduct constituting the offence involves or would involve, as the case requires:**

  - **the serious risk of loss, or the loss of, a person's life**

  - **serious risk of, or serious, personal injury**

  - **serious damage to property in circumstances endangering the safety of a person**

  - **trafficking in drugs**

  - **serious fraud**

  - **serious loss to the revenue of the State or Commonwealth**

  - **official corruption**

- **An indictable offence punishable by imprisonment for a period of seven years or more and which satisfies the following criteria:**

  - **two or more offenders and substantial planning and organisation are involved**

  - **the offence involves, or is of a kind which ordinarily involves, the use of sophisticated methods and techniques**

  - **the offence is committed, or is of a kind which is ordinarily committed, in conjunction with offences of a like kind.**

Matters a Judge Should Have Regard to When Determining Whether or Not to Issue a Warrant

Reasonable Grounds

The *Drugs Misuse Act* requires a judge to be satisfied that there are reasonable grounds for suspecting that a person has committed, is committing, or is about to commit, a Part II offence punishable by 20 years imprisonment or more. There is no such specific requirement in the *Invasion of Privacy Act*. An application under that Act must be related to a specific offence because it requires the judge to have regard to "the extent to which *the prevention or detection of the offence in question* is likely to be assisted" [emphasis added]. This would seem to indicate that the application can be made only in relation to an offence that has been, is being or is about to be committed. However, the Act does not specifically require that there be reasonable grounds for suspicion.

The Fitzgerald Inquiry firmly stated its view that, before any warrants are issued in respect of intrusive powers such as electronic monitoring, the applicant should be required to satisfy the judge that there are reasonable grounds for suspecting that the person may have committed an offence and that the warrants are necessary (1989, p. 179).

Legislation in the majority of other jurisdictions contains similar requirements (see Appendix 14). New South Wales, Tasmania and Victoria all require the applicant to satisfy the issuing authority that there are reasonable grounds for a suspicion or belief that an offence has been, is about to be, or is likely to be, committed. The Northern Territory similarly requires a reasonable belief that an offence has been, is being or is about to be, or is likely to be, committed. Neither South Australia nor Western Australia explicitly state such a requirement.

The Commission, throughout its review of police powers, has taken the position that legislation should clearly state the level of suspicion of which the court must be satisfied before it can authorise a warrant. As with the other police powers recommended in earlier volumes of this review, the Commission proposes that the court should be satisfied that there are reasonable grounds to suspect that the person

has committed, is committing, or is about to commit, an offence specified in Recommendation 24.3.[4]

Other Factors

Having been satisfied as to this first test, a judge must consider other factors before issuing a warrant. Currently, both the *Invasion of Privacy Act* and the *Drugs Misuse Act* require a judge to have regard to:

- the gravity of the matters being investigated
- the extent to which the privacy of any person is likely to be interfered with
- the extent to which the prevention or detection of the offence in question is likely to be assisted.

These factors impose some broad limitations upon the availability of listening devices. However, the Commission considers that three additional criteria should be added to help ensure that listening devices are used only where appropriate.

First, an important issue which should be considered by the judge is the extent to which the safety of any person is affected or likely to be affected by the use of the listening device. For instance a judge, although concerned about the privacy implications of the entry and installation of a listening device, may be satisfied that it is safer than an alternative strategy, such as the use of an undercover operative.

Second, the judge should also be required to consider the extent to which evidence of the offence could be obtained by other less intrusive means. For example, if other less intrusive methods have been tried and failed or would clearly not be effective or practical, there would be a stronger case for using a listening device. The Victorian, South Australian and Northern Territory Listening Device Acts require a judge to be satisfied that the information could not appropriately be obtained by alternative means. The Commonwealth *Telecommunications (Interception) Act* has a similar requirement. The Australian Law Reform Commission (ALRC), the Law Reform Commission of

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4 It should be noted that the Parliamentary Criminal Justice Committee did not endorse the Commission's recommendation that the test for the exercise of most police powers should be 'reasonable grounds for suspicion'. The Committee considered that, in some cases, the test should be 'reasonable grounds for belief'. However, for reasons stated in earlier volumes, the Commission prefers the former test.

Canada (LRCC) and the Royal Commission on Criminal Procedure (England and Wales) (Philips Commission) have all recommended that a warrant authorising the use of electronic surveillance should only be granted when other investigative procedures have been tried and failed or would be impracticable.

Third, many of the other States have a legislative requirement that the judge hearing the application should have regard to all previous warrants sought or granted in connection with the investigation in question. This approach is consistent with the Commission's recommendation in respect of search warrant applications (see Recommendation 8.4 in Volume II of this report). The *Telecommunications (Interception) Act* requires that the history of applications in relation to a particular telephone service, and the results of such applications, be included in an affidavit in support of an application relating to that service and person.

As a matter of practice, Queensland judges already consider many of these factors in determining whether or not to issue a warrant. Even before the matter is taken before a judge, the Office of the Director of Prosecutions considers the seriousness of the offence, the grounds for believing that the use of the device will yield vital evidence and the availability of practical alternatives to the use of the device (1994, p. 55). In essence, the Commission's proposal will give formal legislative recognition to a set of criteria that have developed as a matter of practice.

24.4 Recommendation – Grounds for Determining Whether to Issue a Warrant

The Commission recommends that a judge, in considering an application for a listening device warrant, must first be satisfied that there are reasonable grounds for suspecting that a specified offence has been, is being, or is about to be, committed.

The Commission recommends that the judge must also have regard to the following factors before issuing the warrant:

- **the gravity of the matters being investigated**
- **the extent to which the privacy or safety of any person is likely to be interfered with**
- **the practicality and likelihood of obtaining evidence of the offence by other less intrusive means**

- **the extent to which the prevention, detection or investigation of the offence in question is likely to be assisted**

- **all previous warrants or extensions thereto sought or granted in connection with the investigation in question.**

This information must be provided to the judge in affidavit form as part of the application documents (subject to the urgent application provisions).

What Ancillary Powers Should Be Available in Relation to the Installation of a Listening Device?

There are two major questions here:

- what ancillary powers may be required?

- should these powers accrue automatically upon issue of a warrant, or should the judge have to specifically authorise their use?

Currently the *Invasion of Privacy Act* confers on the issuing judge the power to specify any conditions, limitations and restrictions he or she thinks fit in the public interest. However, it follows from the High Court decision in *Coco's Case* that this does not authorise a condition that overrides fundamental common law rights. Any ancillary powers must therefore be clearly spelt out in the legislation.

The various types of ancillary powers which need to be considered are:

- entry for the purpose of installation, servicing, relocation and/or retrieval

- right to pass through, from, over and along any other place for purpose of entering premises specified in warrant

- right to use reasonable force against persons and against property

- right to use such assistance as is necessary

- entry by subterfuge

- extraction of electricity.

Entry for the Purpose of Installation, Servicing, Relocation and/or Retrieval

Until recently, it was taken for granted that entry to a specified premises, pursuant to a warrant issued under the *Invasion of Privacy Act*, was lawful so long as the warrant contained a condition authorising entry for the purpose of installation, repair, servicing or retrieval. This issue was recently the subject of litigation before the High Court in *Coco's Case*. In that case, the court was required to determine whether section 43(2)(c) conferred authority on a judge of the Supreme Court to authorise entry onto premises for the purpose of installing and maintaining listening devices in circumstances where that entry otherwise would have constituted an unlawful trespass. The High Court decided that the Act did not confer this authority.

Section 43(1) of the Act makes it an offence to use "a listening device to overhear, record, monitor or listen to a private conversation". Section 43(2) provides that section 43(1) does not apply where the device is used by a police officer under and in accordance with an approval in writing given by a judge of the Supreme Court.

Section 43(3) provides, among other things, that a judge may grant approval subject to such conditions, limitations and restrictions as are specified in the approval and as are in the judge's opinion necessary in the public interest.

In *Coco's Case*, the High Court ruled that the *Invasion of Privacy Act* did not grant a right of entry for any purpose, and there were no grounds upon which one could be implied. Accordingly, the Act does not confer power on a judge to authorise entry onto premises in order to install and maintain a listening device in circumstances where that entry otherwise would have constituted a trespass (pp. 438–441 per Mason CJ etc.). The court also held that any evidence obtained through a listening device so installed was inadmissible, as it had been unlawfully obtained (p. 445 per Mason CJ etc.).

In contrast to the *Invasion of Privacy Act*, the *Drugs Misuse Act* has specific provisions authorising entry for the purpose of installing, servicing or retrieving a listening device.[5] The powers that may be authorised in a warrant under the *Drugs Misuse Act* include the power to:

> (a) enter or re-enter at any time the place specified in the warrant
>
> (c) pass through, from, over and along any other place for the purpose of making that entry or re-entry.

The legislation in Victoria [*Listening Devices Act 1969*, s. 4A(3)], New South Wales [*Listening Devices Act 1984*, s. 16(3)] and Tasmania [*Listening Devices Act 1991*, s. 17(3)] requires that if the court grants a warrant authorising the installation of a listening device, it must authorise entry for the purpose of installation and retrieval. Northern Territory legislation requires the judge to authorise entry for the purpose of installation, relocation, repair and retrieval of the device [*Listening Devices Act 1990*, s. 4(6)]. South Australian legislation allows a judge to authorise entry and allows the judge to impose conditions upon the time and manner of entry [*Listening Devices Act 1972*, s. 6(7)(b)].

In the absence of a clear statutory right of entry, the police will encounter real difficulties in installing a listening device. It is rarely possible to obtain the consent of the owner or occupier because, in the majority of cases, the owner/occupier of the premises is the 'target' – the person whose conversation it is desired to record. Seeking this person's consent prior to the installation of a listening device would make the installation of the listening device pointless.

The inability of police to enter private premises to install a listening device has substantially reduced the usefulness of the *Invasion of Privacy Act*. The Commission recognises that the installation, servicing, relocation and retrieval of a listening device will frequently require entry onto premises in circumstances that would otherwise constitute a trespass. However, if the judge has considered the application and has agreed to issue a warrant for the use of the device, then the judge has clearly considered that the circumstances of the case justify the intrusion into a person's privacy. In such a case the judge should also have authority to consider whether an infringement of the person's property rights is justified. If so, then the judge should be able to authorise entry onto premises for the purpose of installation, servicing, relocation and retrieval.

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5 See s. 27 authorising the use of any powers of entry as would be available under s. 18 of the Act.

24.5 Recommendation – Power to Authorise Entry Onto Premises

The Commission recommends that a judge, upon issuing a warrant, have the power to authorise entry onto premises for the purpose of installation, servicing, relocation and/or retrieval of a listening device.

Right to Pass Through, From, Over and Along Any Other Place for Purpose of Entering Premises Specified in Warrant

Entry to premises for the purpose of installing, servicing, etc. a listening device often must be made in a manner that avoids detection by the occupier. Therefore the usual public entry is not appropriate in some cases. In some cases, the only safe and effective manner of entry that is available may involve an infringement of the property rights of others unconnected to the surveillance. For instance, the safest and least observable means of entry to a building may be via the rooftop of an adjoining building. In recognition of such situations, the *Drugs Misuse Act* currently allows a judge of the Supreme Court to issue a listening device warrant that authorises an officer to pass through, from, over and along any place for the purpose of entering premises specified in the warrant.[6]

The Commission has consistently taken the view that, wherever practicable, the infringement of a person's rights should not take place without the explicit authority of a judge. Thus, while the right to pass over property may be necessary in order to ensure the safe and effective carrying out of the warrant, it should require the authorisation of the judge. This proposal is in line with a provision currently contained in the Northern Territory listening device legislation.

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6 Sections 27 and 18(4)(c) of the *Drugs Misuse Act*. Obviously, as there is no entry provision in the *Invasion of Privacy Act*, there is no right to pass through, from, over and along other property for the purpose of entry.

24.6 Recommendation – Power to Authorise to Pass Through, Over, etc. Any Other Place

The Commission recommends that the judge, upon issuing a warrant for the use of a listening device, may authorise the passing through, from, over and along any other place for the purpose of entering premises specified in warrant.

Right to Use Reasonable Force Against Persons and Property

A general provision under the *Drugs Misuse Act* authorises the police to use such force as is reasonably necessary to do a thing authorised by the Act [s. 53(2)]. Where it is proposed that force be used against a person or the property of a person then present, the police officer shall warn that person that he or she proposes to use force, unless it is impracticable to give such a warning [s. 53(3)].

Under the *Invasion of Privacy Act* it is an offence to enter a dwelling house by use of force [s. 48A(1)], whether or not the person in lawful occupation has consented to the entry itself, unless the entry was:

- authorised, justified or excused by law, or
- bona fide for the protection or succour of any person therein, or
- the preservation or protection of the dwelling house. [s. 48A(2)]

Obviously, if there is no power to enter, there can be no authority to use force for that purpose.

Given that most listening devices must be installed covertly, a power of entry can be effective only if it carries with it a power to use reasonable force for the purpose of entry. Thus the Commission proposes that the legislation allow the court to authorise the use of reasonable force for the purpose of entry. In most respects such force will be used only against property. Although it will be rare that such force will be used, where it is used the owner of property should be compensated for any damage caused.

The more difficult issue is the use of reasonable force against persons. Such a power may be necessary, for example, to protect a police officer who is detected in the course of installing/servicing/relocating/retrieving a device. The LRCC recommended that a police officer should not be entitled to use force against any person for the purpose of effecting entry or exit, except as necessary to protect himself or others

(LRCC, 1986, p. 49). It is unlikely that such a situation will arise, save in exceptional circumstances. This is because it is in the best interests of the police to plan and effect entry when there is no-one present who could pose a threat. However, in order to ensure the safety of the police officers and others, the Commission endorses the LRCC's recommendation that the judge should be able to authorise the use of reasonable force against any person where it is necessary for the protection of the police officer or other people. Before force is to be used against a person, the police officer must warn the person, where practicable, that force is going to be used.

24.7 Recommendation – Power to Authorise the Use of Reasonable Force

The Commission recommends that:

- **the judge, upon issuing a warrant, may authorise the use of such force against property as is reasonably necessary for the purpose of carrying out anything authorised by the warrant**

- **the judge may also authorise the use of reasonable force against any person in the course of effecting an entry or exit of the premises, where it is necessary for the protection of the police officer or the protection of others**

- **where the force is to be used against a person or the property of a person then present, the police officer shall warn that person that force is going to be used, unless it is impracticable to give such a warning**

- **provision be made for compensation to the owner for any damage to property.**

Right to Use Such Assistance as is Necessary

There may be circumstances where the police require the assistance of others in order to execute a warrant; for instance, a locksmith may be required to assist in effecting entry to the premises. The *Drugs Misuse Act* permits an officer to use "such assistants, animals, vehicles and equipment as the police officer considers necessary" to do anything which the officer is authorised by the Act to do [s. 53(1)]. No specific right to use assistance exists under the *Invasion of Privacy Act*. Instead, the Act confers on the issuing judge the power to specify any conditions he or she thinks fit

in the public interest. Where permission by the owner has been obtained to install a listening device and therefore there is authority to enter, the judge, under this general provision, could arguably authorise the use of assistance as long as it did not abrogate a common law right.

It will often be difficult to determine in advance the type of assistance that may be necessary to execute a warrant, as the activities of the target may be unpredictable. For this reason the Commission considers that a provision allowing the judge to authorise the use of such assistance as is reasonably necessary should be expressly included in the legislation. This will enable the judge to exercise some control over who can assist, while allowing sufficient flexibility so as not to inhibit the operation.

24.8 Recommendation – Power to Authorise the Use of Assistance

The Commission recommends that the judge, upon issuing a warrant, may authorise the use of such assistance as is reasonably necessary to effect the warrant.

Entry by Subterfuge

Section 48A of the *Invasion of Privacy Act* states that, subject to certain defences, it is an offence to gain entry to a dwelling house by force, deceit, trick or device, false and fraudulent representations or threats and intimidation. It is irrelevant that the consent of the owner or occupier has been obtained. This is a general provision in the Act that aims at protecting the privacy of a person in his or her dwelling house. Perhaps unintentionally, this prohibition would appear to prevent police from entering a dwelling house to install a device by such means as pretending to be pest control or other workers.

An example of where entry was gained by this method was presented in *Coco's Case*, where police masqueraded as employees of Telecom for the purpose of gaining entry.[7] Police officers have indicated that this method of entry may, in some circumstances, be a far safer means of effecting entry than by using covert means.

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7 This was said to be in breach of s. 75(b) of the *Crimes Act 1914*, which makes it unlawful to falsely represent oneself to be a Commonwealth officer for the purpose of doing an act by pretending to be such an officer. This issue was not determined because the entry was found to be invalid on other grounds. The matter was only referred to by Toohey J at 452.

In the Commission's view, it is important that the question of whether police can use subterfuge to effect entry be resolved. The Commission doubts that entry by subterfuge is any more intrusive than covert entry, and accepts that the use of subterfuge may allow a safer entry. On this basis, the Commission considers that, where necessary, the judge should be able to authorise a manner of entry that involves subterfuge.

24.9 Recommendation – Power to Authorise Entry by Subterfuge

The Commission recommends that the judge, upon issuing a warrant, may authorise entry to premises by such means as are reasonably necessary to effect entry, including the use of subterfuge.

Extraction of Electricity

Another issue recently highlighted in *Coco's Case* is the possibility that the extraction of electricity used to power a listening device may constitute an offence under section 408 of the *Criminal Code* – that is, fraudulent appropriation of power. Although the court did not have to decide the matter, Mr Justice Toohey (p. 459) said:

> [I]t is difficult to conceive that the abstraction of electricity over a period of almost 200 hours could amount to anything other than a substantial trespass.

Coco's Case decided that clear legislative authorisation of an act that would otherwise constitute a trespass is necessary to enable the police to carry out that act lawfully.

Listening devices can be powered by batteries, thus eliminating the need to extract electricity. The Commission understands that this has become the practice since the decision in *Coco's Case*. However there are two problems with this procedure. First, the power generated by a battery is often not sufficient if it is necessary to broadcast a signal any great distance or through a thick concrete floor or wall. The quality of the transmission diminishes as the signal has to travel further. Electrically powered devices drawing on mains supply transmit much better quality signals over greater distances than battery operated devices. More importantly, the battery powered devices operate for limited periods and further entries to the premises may be necessary to service the device and replace the batteries. This means that the danger associated with the use of battery powered devices is much greater than the danger associated with the use of a device drawing on mains supply.

For these reasons, the Commission considers that there should be a legislative provision stating that the judge may authorise the extraction of electricity from the mains supply where it is considered reasonably necessary for the effective operation of the listening device. In such cases, arrangements should be made to ensure that the law enforcement agency bears the cost of the electricity which it uses.

24.10 Recommendation – Power to Authorise Extraction of Electricity

The Commission recommends that the judge, upon issuing a warrant, may authorise the extraction of electricity from the mains supply where it is reasonably necessary in order to operate the listening device.

Should the Issuing Judge or the Applicant Officer Be Empowered to Authorise Others to Use or Assist with the Listening Device?

This section concerns the issue of who may be authorised under the warrant to install or use a listening device and monitor conversations.

The *Drugs Misuse Act* simply provides that a police officer authorised under the Act to do a particular thing (i.e. install a listening device and intercept conversations), may use such assistants and equipment as is considered necessary to do that thing (s. 53). There is no requirement for specific authorisations.

The *Invasion of Privacy Act* states that a listening device may be used by:

(i) a member of the police force acting in the performance of his duty if he has been authorized in writing to use a listening device by –

(a) the Commissioner of Police
(b) an Assistant Commissioner of Police; or an officer of police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorize the use of listening devices

under and in accordance with an approval in writing given by a judge of the Supreme Court in relation to any particular matter specified in the approval.

It would appear that a commissioned officer, once issued with a warrant, is competent to authorise in writing other officers of the QPS to use the listening device without further authority from the judge.

Listening device legislation in New South Wales and Victoria requires the warrant to specify the names of all persons who may use a listening device on the applicant's behalf. Northern Territory listening device legislation provides that, after a warrant has been issued, a Superintendent or higher ranking officer may authorise persons other than the applicant to use a listening device pursuant to the warrant. The legislation also specifically states that persons authorised in this manner are also authorised under the warrant [see s. 4(8)(a)(ii) and s. 4(9)].

It is clear that most Acts have provisions detailing mechanisms for the authorisation of staff to use listening devices. The issue is simply whether the specific people must be named in the warrant or whether the applicant or some other senior officer can authorise others to use the listening device after the warrant has been obtained.

While the Commission considers that the number of people authorised to use the device should be restricted as far as possible, it is often difficult to identify, at the time of making the application, the people whose assistance will be required to monitor the device. For example, a couple of people may be nominated to monitor the device over a period of weeks, but, for a reason such as sickness, one of the persons may no longer be able to conduct the monitoring. Other unforeseen difficulties may arise where the conversation necessitates the involvement of a civilian interpreter.

The Commission considers it more practicable to require only that the applicant be named in the warrant. He or she should then be empowered to authorise others to assist in effecting the purposes of the warrant. It is impractical to go back to the judge every time there is a need for a further authorisation which was not foreshadowed in the first instance. The Inspector or higher ranking officer should be able to authorise the persons provided that:

- there is some defined mechanism for appointing selected persons to assist in effecting the warrant
- such appointments are restricted to as few people as are necessary
- records of the persons appointed are maintained.

Such authorisations should be made in writing and subject to inspection by the inspecting agency.

24.11 Recommendation – Power to Authorise Others to Use or Assist with Listening Device

The Commission recommends that:

- **the power to authorise police and/or civilians to assist in effecting the purposes of the warrant be conferred on the applicant officer who is an Inspector or higher ranking officer**

- **all authorisations be in writing, stating the name of the person authorised, the task for which the person is authorised (e.g. installation, monitoring, translating etc.), the date of authorisation, and the name and signature of the authorising person**

- **copies of the authorisations be given to those authorised and the originals retained on file for inspection by the proposed inspecting agency (see Recommendation 25.3).**

What Provision Should be Made for the Use of Listening Devices in Urgent Circumstances?

In some instances, the police may need to move very quickly to install a listening device. In these circumstances, it would clearly be impractical to require the police to first go through all the procedures described in this chapter. There are three basic approaches to dealing with such situations:

- allow use without prior judicial approval for a limited period of time

- provide for emergency warrants to be issued through an expedited court procedure

- provide for warrants to be granted over the telephone in an emergency.

Each of these options will be considered below.

Use of Listening Devices Without Prior Judicial Approval for a Limited Period of Time

The QPS and the Police Union both submitted that police should have the authority to use a listening device without prior judicial approval in an emergency. The Police Union stated that use in this manner should be restricted to a maximum period of 48 hours. The QPS did not make any mention of a time limit.

The Tasmanian *Listening Devices Act* allows for the use of a listening device without prior authorisation, if there are reasonable grounds to believe that the immediate use of the device is necessary to obtain evidence or information of an imminent threat of serious violence to persons, substantial damage to property or a serious narcotics offence. A report must be furnished to the Chief Magistrate within three days of first using the device. Where the Chief Magistrate finds the interception was not justified, he or she may order that use of the device cease immediately and direct the person who used the listening device to supply a person whose private conversation has been listened to with such information regarding the use of the device as the Chief Magistrate may specify.

The New South Wales *Listening Devices Act* allows for emergency use on the same grounds as Tasmania. The Attorney–General must be immediately advised of the use and a full report must be furnished to the Attorney–General within seven days. New South Wales has a similar requirement for notification to the suspect if the use was unjustified or unnecessary.

The Northern Territory *Listening Devices Act* allows use of a listening device without a warrant for any threat of violence which, if carried out, could cause the death of or grievous harm to a person or for the investigation of a serious drug offence where immediate use of the device is necessary to obtain information. However, an application for a warrant must be brought before the court within 24 hours.

Listening devices are highly intrusive. Thus there is a strong argument for limiting their availability to cases where there is prior judicial approval. In a practical sense, the amount of time that it takes to organise the installation of a listening device should be sufficient to allow for an emergency application to be made via telephone (see below).

24.12 Recommendation – Use of Listening Devices Without Prior Judicial Approval

The Commission recommends against allowing for the use of listening devices without prior judicial approval.

Emergency Warrants Issued Through an Expedited Court Procedure

Currently the *Drugs Misuse Act* (s. 26) provides for the issue of emergency permits upon the personal application of a police officer of the rank of an Inspector or above. In determining the application, the matters that the judge should have regard to are the same as for an ordinary warrant. However, the judge must also be satisfied that circumstances exist which would justify the issue of a warrant and that the interception should commence before an application could, with all practical diligence, be obtained in the usual way. (The usual way requires that the application be in affidavit form – see s. 28 of the *Drugs Misuse Act*).

Emergency permits are enforceable for a maximum of 48 hours. The judge may order a shorter period. A report must be furnished by the applicant to the Commissioner of Police at the first reasonable opportunity. Enquiries with the QPS revealed that the emergency provisions are rarely used.

The *Invasion of Privacy Act* does not have emergency permit provisions. The Queensland Law Society submitted that the procedure for obtaining a warrant should be as painstaking as possible. However, the Society recognised that an expedited procedure for obtaining warrants in urgent circumstances may be required. The Society stated that the procedure should provide for very short limits after which the warrant should expire, unless a full and detailed application, supported by sworn evidence, is made in the intervening period.

The Commission agrees that there is a need for special rules in urgent circumstances. However, it prefers the expedited court procedure or telephone applications (see below) to the option of allowing the use of devices without a warrant.

24.13 Recommendation – Provision for Emergency Warrants

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

Telephone/Fax/Radio Applications

Tasmania, New South Wales and the Northern Territory all provide for applications for listening devices to be made by telephone, fax etc. where it is impracticable to obtain a warrant in the normal course. South Australia also makes provision for telephone applications in urgent circumstances. The Victorian legislation does not provide for telephone applications. The *Telecommunications (Interception) Act* also includes detailed provisions allowing for telephone applications to be made in urgent circumstances.

The expedited court procedure recommended above is the preferred alternative in emergency circumstances. However, there may be circumstances where it may not be practicable for the applicant to appear in person – for example, if he or she is in a geographically isolated place. Such a situation is likely to be rare because most applications are made in Brisbane, where most technical surveillance teams are based. Nonetheless, it is possible that an application or an extension application may need to be made, in an emergency, from a place where there is no judge of the Supreme Court available. In these rare instances, the Commission considers that provision for telephone applications should be made. Such applications should be made in this form only as a means of last resort, but this is preferable to allowing the use of a device without judicial approval.

24.14 Recommendation – Provision for Telephone Applications

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

Records of Urgent Applications

Where applications are made either by expedited court procedure or by telephone, the legislation should require the applicant and the judge to record in writing:

- the name of the applicant
- the name of the judge
- the time and date of the application
- the urgent circumstances justifying the procedure
- the reasons for granting or refusing the application
- where granted, the terms of the warrant.

The applicant should be required to provide all the information which must be provided in an application proceeding in the usual way. There are currently provisions in Acts such as the *Domestic Violence (Family Protection) Act 1989* which detail the procedure for making telephone applications. A similar detailed procedure should be drawn up for applications for listening device warrants.

24.15 Recommendation – Record-keeping Requirements for Emergency Warrants

The Commission recommends that strict record-keeping requirements apply to the granting of emergency warrants and that telephone application provisions be made consistent with provisions in other States for such applications, unless there are strong reasons to depart from these provisions.

The Maximum Time Period for which a Warrant May Be Issued and Provision for Extensions

At present neither the *Invasion of Privacy Act* nor the *Drugs Misuse Act* specify a maximum period for enforceability of a warrant, except in respect of emergency permits under the *Drugs Misuse Act* which are enforceable for a maximum of 48 hours or such shorter period as the judge orders. In practice, judges commonly issue

warrants for periods up to a maximum of 28 days. There are no specific extension provisions in either Act.

Listening device legislation in most other Australian jurisdictions provides a statutory maximum period for which the warrant can be issued. The various time limits are set out below:

New South Wales	maximum 21 days, previous warrants no bar to further warrants; telephone warrants for 24 hours
Victoria	maximum 21 days, previous warrants no bar to further warrants
Northern Territory	maximum 21 days, two extensions for up to 21 days each; time limits for telephone warrants appear to be the same as normal warrants
South Australia	maximum 90 days, warrant may be renewed
Tasmania	maximum 60 days, previous warrants no bar to further warrants; telephone warrants 24 hours
Western Australia[8]	no statutory maximum.

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

In determining what the statutory maximum period should be, the Commission has had regard to the fact that Queensland is a large State. Once a warrant for a device has been issued, it can sometimes take one or two weeks just to find an opportunity to install the device due to the distance it may be necessary to travel from Brisbane to the target's premises. Another consideration is that police may need to wait some time before the premises are vacant. However, in the interests of accountability it is important to limit the period as much as practicable. Taking account of these factors,

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8 Western Australian legislation does not require a warrant for the use of a listening device, but merely authorisation by a specified senior police officer.

the Commission has concluded that 28 days should be the statutory maximum period (subject to the extension provisions recommended below). As noted above, current practice is for warrants to be issued for a maximum of 28 days.

With respect to emergency warrants and telephone warrants, the maximum period of validity should be considerably shorter. The *Drugs Misuse Act* currently provides for emergency permits to be valid for a maximum period of 48 hours. The Commission considers that this is a sufficient period to enable the applicant to make a further application for a warrant. Accordingly, it is proposed that emergency permits and telephone warrants should be valid for a maximum period of 48 hours.

The court should specify a period, up to a maximum of 28 days (or 48 hours), for which the particular warrant is to be valid. In specifying the period, the order should allow for use of the listening device for a stated number of days (or hours) or until such time as the investigation ceases or the grounds justifying the issue of a warrant cease to exist, whichever is the earlier. If the investigation ceases prior to the specified period, an officer of the rank of Inspector or above, authorised by the Commissioner, is to issue a written notice cancelling the use of the listening device. Written instruments of cancellation are to be retained for inspection by the inspecting agency.

24.16 Recommendation – Maximum Period of Warrant

The Commission recommends that:

- **there be a statutory maximum period of 28 days for the validity of a warrant**
- **the judge specify the period, up to that maximum, for which the warrant is to be valid**
- **the judge direct that if the investigation ceases prior to that time, use of the listening device is to cease**
- **if an investigation ceases prior to the specified period, an officer of the rank of Inspector or above, authorised by the Commissioner, issue a written notice cancelling the use of the listening device.**

In respect of emergency permits and telephone warrants, the Commission recommends that the statutory maximum period of validity should be 48 hours.

Applications for Extension

The Commission recognises that there will be some cases where the monitoring may be required for longer than the proposed statutory maximum period of 28 days. To deal with such cases, there should be provision for an application to be made to extend the warrant. An extension application should be made prior to the expiration of the original warrant. Extensions should also be subject to the 28 day maximum. This system will enable the judge to review the use of the listening device on a regular basis.

To facilitate accountability, the information specified in the recommendation below should be put before the court in any application for an extension. After considering this information the judge, if granting the application, may vary the terms of the warrant accordingly.[9] Where the judge refuses an application for extension, the warrant should expire upon the date nominated in the warrant, unless the warrant is revoked.

24.17 Recommendation – Applications for Extension of Warrant

The Commission recommends that:

- **an extension of a warrant be for a specified period not exceeding 28 days, or until the investigation ceases, whichever is the earlier**
- **on an application for an extension the following material be put before the judge:**
  - **information addressing all the criteria required to be addressed upon an application for a warrant in the first instance**
  - **particulars of any change in circumstances and new information relevant to the granting of the application**

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9 It is unlikely, in practice, that there would be a need to vary the terms of the warrant at any other time If that need does arise, an application for variation of the warrant may be made in accordance with the Supreme Court Rules.

- **whether any information relevant to the offence was obtained under the original warrant and, if so, a brief description of that information**

- **all previous documentation put before the judge in relation to the granting of the original warrant in relation to the investigation in question and any subsequent extensions**

- **a statement by the applicant that all matters both supportive of and adverse to the application have been included in the application.**

APPLICATION FOR AND CONTENTS OF THE WARRANT

The Application Procedure

There is a clear need for a standard set of rules to apply to applications for listening device warrants. Currently, the requirements for applications are basically those prescribed by the Supreme Court Rules.[10] These rules require, among other things, that the application be supported by an affidavit that contains statements of the deponent and any further evidence as the judge requires. The application must also be made in the absence of the person to whom it relates (i.e. the target), and the proceedings must not be open to the public. No notice or report of the application shall be published and no record of the application or any order or approval shall be available for search except by direction of a judge of the Supreme Court.

The above procedure was commented upon by Mr Justice Dowsett in his judgement in *R (a solicitor) v Lewis (1987)* 2 Qd R 710 at 712–713:

> It is obvious that if the surveillance is to be effective, it is necessary that full effect be given to this provision for secrecy. Surveillance would be useless if the subject thereof were aware of its occurrence. On the other hand, it has long been a principle of our judicial system that in general, it operates in public, publicity in this sense being a safeguard against abuse. Similarly, the requirement in the statute that the application for approval be made ex parte also deprives the procedure of a traditional safeguard. In judicial proceedings, it is almost invariably necessary that all parties likely to be directly affected by any order be served and heard prior to any such order

10 See s. 43(4) of the *Invasion of Privacy Act* and s. 28(1) of the *Drugs Misuse Act*.

being made. Once again, one must accept that such a procedure in the case of proposed surveillance would render that surveillance useless.

In summary, the legislation therefore offers to the citizen protection against unauthorised intrusion into his private conversations but makes provision for exceptions in certain well-defined cases. The legislation however, deprives the Court and affected parties of the traditional right enshrined in the rules of natural justice that all affected parties be heard prior to the making of an order. The legislation also deprives the Court and the community of the traditional protection of publicity.

As noted by His Honour, the value of a covert investigation would be lost if the application procedure was open to the public. The Commission is of the view that current provisions in relation to this should remain unchanged.

However, practitioners who have been involved in the making of applications have called for a standardised procedure which sets out the matters which should be addressed in an affidavit in support of an application. Such an approach would promote consistency and help ensure that applications addressed all of the matters it is considered necessary to put before a judge in an application of this kind. The Queensland Law Society argued that obtaining a warrant should be as "painstaking as possible". A legislative requirement that certain issues be addressed in the supporting affidavit will go some way to achieving an appropriate standard.

The legislation in most other States provides that the application is to be based on or supported by sworn information. For example, the Northern Territory *Listening Devices Act* (s. 4) sets out in detail the requirements of the application. The main features of the section are:

- the applicant must swear on oath that there are reasonable grounds for believing that an offence has been, is being, is about to be, or is likely to be committed and that the use of the listening device is necessary

- the application must set out or have attached to it a written statement of the grounds on which the issue of the warrant is sought

- the applicant (or some other person) must give any further information required by the court, either orally or by affidavit.

The section also provides that where the court issues a warrant, it shall record in writing the grounds on which it relied to justify the issue of the warrant. The Listening Devices Regulations in Schedule 1 provide a standard form for both the Application and the Warrant authorising use of the listening device.

The *Telecommunications (Interception) Act* also has detailed requirements (ss. 40–44). For instance, it states that the affidavit accompanying the application must set out the period for which the warrant is requested and why it is considered necessary for it to be in force for that period; the number of previous applications, if any, made for warrants which relate to the telecommunication service or the person to whom the application relates; and the number of warrants issued on such applications; and the use made of the information obtained under such warrants. The Act also allows for an application to be made by telephone in urgent circumstances [s. 40(2)(b)].

Over time, the agencies that make applications under the *Invasion of Privacy Act* and the *Drugs Misuse Act* have developed fairly standard procedures. However, it would be much clearer to the judges and to the applicants if the legislation was to state the requirements for applications. Accordingly, the Commission recommends the adoption of a legislative provision which sets out the requirements necessary for an application similar in terms to the Northern Territory *Listening Devices Act* (s. 4).

Contents of the Warrant

A related issue is whether legislation should specify what information must be contained in the warrant. Currently, under the *Invasion of Privacy Act* and the *Drugs Misuse Act*, this is left to the judge's discretion – i.e. the warrant may be granted "subject to such conditions, limitations and restrictions as are necessary in his opinion in the public interest".

Legislation in other States outlines the requirements of the warrant. In the Commission's view the same approach should be taken in Queensland. The *Telecommunications (Interception) Act* requires that the warrant be in a prescribed form (s. 49). It is desirable for warrants to conform to a uniform standard to:

- enable those who subsequently act in pursuance of the warrant to clearly understand its limits
- assist record-keeping
- enable the court in subsequent proceedings to ascertain what action was previously authorised and the grounds that were relied upon.

Requiring specific matters to be included in the warrant necessitates those matters being addressed in the application. This assists the applicant and the court to turn their minds to the particular issues which have to be addressed.

A review of legislative provisions in other States reveals a range of matters that are required to be specified in the warrant (see attached tables for more details as to particular schemes). Taking account of other jurisdictions' requirements, and the recommendations made in this chapter, the Commission has concluded that the matters listed in the recommendation below should be required to be specified in the warrant. Several of these matters could be collapsed into a pro-forma paragraph in the warrant.

24.18 Recommendation – Requirements Governing Application Procedures and Content of Warrant

The Commission recommends the adoption of legislation which sets out the requirements necessary for an application and that the following matters be addressed in the application and be specified in the warrant:

(a) the offence in respect of which the warrant is granted

(b) the name of the person whose conversations may be recorded or listened to, to the extent that such persons can be identified

(c) the period during which the warrant is to be in force

(d) the grounds upon which the warrant is to be issued

(e) the name of the person to whom the warrant is to be issued

(f) the premises on/in which a device is to be used

(g) particulars of any application for a warrant to use a listening device in relation to the person or premises named in the present application

(h) the time within which the person authorised to use the device is required to report back to the court

(i) whether the authorisation is to install, service, relocate and/or retrieve a device

(j) whether entry is authorised for that purpose

(k) whether entry of premises adjoining the specified premises for the purpose of gaining entry is authorised

(l) whether there is authority to use force if necessary for the purpose of installation, etc.

(m) whether there is authority to use such assistance as is necessary for the purpose of installation etc.

(n) a requirement for the device to be retrieved

(o) any other conditions and restrictions (for example, in relation to privileged conversations).

The warrant must also state the date of issue and the name of the issuing judge.

LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege[11] is not addressed in any State listening device legislation. However in practice, many listening device warrants have a condition that recording cease upon the commencement of a conversation between a legal representative and his or her client.

The Queensland Law Society strongly submitted that legal professional privilege should be statutorily protected. It cited the recent case of *R (a solicitor) v Lewis* (1987) 2 Qd R 710 in which a privileged conversation between a solicitor and his client were recorded by means of a listening device in a police station. Mr Justice Dowsett declared that the monitoring and recording of the conversation was a breach of confidence. His Honour referred to legal professional privilege in his judgement and found that the recording had gone beyond the terms of the warrant. His Honour found that even if the legal representative himself is suspected "more than a mere allegation of actual misconduct is necessary to justify the receipt of a privileged

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11 Legal professional privilege only attaches to communications (and documents) made for the sole purpose of giving or receiving legal advice or for use in actual or anticipated litigation (*Baker v Campbell* (1983) 153 CLR 52; *Grant v Down* (1976) 136 CLR 674). It does not attach to communications for a fraudulent or criminal purpose (*Attorney-General v Kearney* (1985) 59 ALJR 749).

communication between a solicitor and client in the absence of a waiver of that privilege" (p. 725).

His Honour also observed with respect to interviews between the solicitor and the client:

> The confidentiality of these interviews is not based upon any strict rule of law. Apart from the *Invasion of Privacy Act*, there are no criminal sanctions attaching to the act of wilfully overhearing such a conversation . . .
>
> [C]ourts of equity have offered some protection when privileged documents have come into the hands of other parties in breach of confidence. (p. 762)

However, His Honour did not have to consider the law in "this difficult area" because of a concession by one of the parties.

One way of maintaining the privacy of privileged conversations is to impose a requirement that recording cease upon the commencement of a privileged conversation. However, this may be difficult to enforce because recording equipment is not always 'live monitored', that is, there is not necessarily a person listening to the conversation as it is being recorded. In such cases, any privileged conversation recorded would have to be erased at the first reasonable opportunity. Alternatively, it could be arranged for live monitoring to occur when it was suspected that privileged conversations may take place, but it may be very difficult to predict when such conversations are likely to occur. To require live monitoring as a matter of course would significantly increase the costs of listening device use.

The Canadians have given more consideration to this issue than others. Their scheme provides a useful reference point for addressing what is clearly an important issue. The Canadian *Criminal Code* states that no authorisation may be given to intercept a private communication at the office or residence of a solicitor, or any other place ordinarily used by a solicitor for the purpose of consultation with clients, unless the judge is satisfied that there are reasonable grounds to believe that the solicitor, any other person practising with him or her, employed by him or her, or any other such solicitor or member of the solicitor's household, has been or is about to become a party to an offence.

The LRCC recommended that, in addition to the above provision, a judge be permitted by statute to impose conditions to protect confidential communications (i.e. doctor/patient, spousal). Some of the conditions proposed were:

- a device be live monitored at all times
- warrants contain a term that, so far as possible, steps be taken to ensure that confidential communications are not intercepted or recorded
- where there are grounds to suspect that privileged communications will be intercepted, that fact should be disclosed in the application to obtain the warrant
- where the interception is to occur in a solicitor's office etc. reasonable steps are to be taken to ensure that privileged communications between solicitors and their clients are not intercepted or recorded (LRCC 1986, p. 39).

Some Queensland judges will not issue listening device warrants without such a condition that conversations between a party and his or her legal adviser not be monitored or recorded included. The following recommendation is an attempt to ensure this type of condition is attached to listening device warrants, where appropriate.

24.19 Recommendation – Protection of Legal Professional Privilege

The Commission recommends that:

- **specific legislative recognition be given to legal professional privilege by providing that no private conversations are to be listened to or recorded at the office or residence of a legal representative, or any other place ordinarily used by legal representatives for the purpose of consultation with clients, unless the court is satisfied that there are reasonable grounds to believe that the legal representative, any other person practising with him or her, employed by him or her, or any other such legal representative or member of the legal representative's household, has been or is about to become a party to an offence in respect of which the warrant is sought**

- **the judge have a discretion to order whatever other conditions he or she thinks are in the public interest to protect confidential conversations, including a requirement that the conversations be live monitored, or that specified steps be taken to ensure as far as possible that privileged conversations are not recorded**

- **legislation require that, where there are grounds to suspect that privileged communications will be intercepted, that fact be disclosed in the application to obtain the warrant.**

OTHER FORMS OF ELECTRONIC SURVEILLANCE

As noted in the Introduction, there are other forms of electronic surveillance used by the police such as optical surveillance and tracking devices. However, there has been little regulation of these other devices. In December 1993 the Commonwealth Attorney–General's Department reviewed the development of legislation in other States and reported:

> No Australian jurisdiction has yet enacted legislation governing the use of tracking devices or optical surveillance devices, apart from the Commonwealth in respect of ASIO's use of video devices and Queensland for the limited purposes of investigating State offences under the *Drugs Misuse Act 1986* (Qld). Thus, at present, the main constraints on the use of these devices for law enforcement purposes is to be found in the general law, for example in the tort of trespass. (Commonwealth Attorney–General's Department 1993, p. 6)

Optical surveillance devices and tracking devices differ from listening devices in that there is no legislative prohibition of their use generally. Bearing in mind that police do not need power to do something that is not prohibited by law, it would appear unnecessary to confer on police a power to use these forms of electronic surveillance. However, in practice the use of these forms of surveillance by police often involves a trespass, for example, to install a video surveillance camera in private premises or to attach a tracking device to a vehicle. It is this aspect that requires specific authority.

Visual Surveillance Devices

The ALRC (1980) concluded that there was a case for controlling the use of visual surveillance devices. The Multi-Jurisdictional Working Party[12] into Covert Video Surveillance (1993) also considered that there was a strong case for regulating the use of these devices. The Working Party recognised that the scope for the use of optical surveillance devices is virtually unlimited. For example, such devices are used by owners of property such as banks, convenience stores, service stations and shopping centres. The Working Party acknowledged that, while there are legitimate privacy concerns regarding this issue, these were more properly the subject of a broad privacy review. The Working Party confined its focus to the covert entry into private premises by law enforcement personnel to install visual surveillance devices. In relation to this issue, the Working Party proposed a uniform scheme to regulate such entry in the same manner as entry to install a listening device. The Commission similarly has confined its coverage to this issue.

The *Drugs Misuse Act* is the only statute in Queensland in which reference is made to the use of visual surveillance devices. A "visual surveillance device" is defined as any instrument, apparatus, equipment or device capable of being used to record and monitor images simultaneously with their taking place.

As noted above, there is no general prohibition against the use of these devices as long as they have no listening device capability. The legislation enables the installation of such devices in private premises (including motor vehicles) for the purpose of investigating offences under Part II of the *Drugs Misuse Act*. Otherwise such activity would constitute an unlawful trespass unless prior permission of the lawful owner or occupier of the premises had been obtained.

The Act provides for warrants to be issued authorising the use of visual surveillance devices, in the same manner as warrants are issued authorising the use of listening devices under that Act (s. 25). Provisions relating to the issuance of emergency permits (s. 26), a power of entry (s. 27), and reporting procedures (s. 29A) are also identical to those applying to the use of listening devices. There is no regulation of the storage or destruction of irrelevant records and images which have been recorded.

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12 This Working Party was chaired by Victoria in consultation with all jurisdictions. The Working Party received submissions from the Australian Federal Police, New South Wales Police, Western Australia Police, South Australia Police, Northern Territory Police, Tasmania Police, Queensland Police, New Zealand Police and the National Crime Authority. The Working Party was formed as a consequence of a resolution from the 1992 Australasian Crime Conference.

The use of video surveillance devices is not confined to any particular category of offences in Queensland, otherwise than by liability for trespass. However, the availability of ancillary powers such as the power to enter to install such devices is limited to offences under Part II of the Act. The Commission considers that such powers should be extended to the other serious offences referred to in Recommendation 24.3, provided that they are subject to the same warrant requirements as listening devices.

24.20 Recommendation – Installation of Visual Surveillance Devices in Private Property

The Commission recommends that:

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

- **the warrant requirements which apply to listening devices apply equally to visual surveillance devices.**

Tracking Devices

Tracking devices are vehicle location systems magnetically attached to, or installed in vehicles or other moveable things. The capacities of tracking devices now range from rather simple devices which assist in location and tracking of a vehicle (through the generation of a recurrent radio signal), to tracking devices with listening device capabilities. Some devices are able to store positioning data for periods up to one month. This is then subjected to sophisticated computer analysis to reveal the vehicle's movement over that period.[13] No physical surveillance is necessary to determine the subject's movements.

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13 This information can be superimposed on street maps displayed on a computer screens, thereby providing an accurate indication of a vehicles movements in that time. – p. 8, The Privacy Committee of NSW, Issues Paper No. 62, August 1990.

The *Drugs Misuse Act* provides that if an officer reasonably suspects

> (a) that a crime defined in Part 2 has been, is being or is about to be committed; and
>
> (b) that –
>
> (i) the dangerous drug with which the offence is concerned is in or on anything that is moveable (other than an aircraft); or
>
> (ii) a person involved or suspected to be involved in the commission of the offence is in or on any vehicle (other than an aircraft),

the officer concerned must provide a report to the Commissioner of Police at the first reasonable opportunity concerning the use of the device. The Commissioner is in turn required to bring the report to the attention of the Minister administering the Act (s. 24). There is no requirement for records obtained by way of a tracking device to be destroyed.[14]

No other statute regulates the use of tracking devices. Provided that the attachment or installation does not "interfere with" the motor vehicle (see *Traffic Act 1949*, s. 60), or otherwise involve a trespass, there would appear to be no prohibition on the use of such devices.

In the Commission's view, where the installation of a tracking device requires entry onto private property or entry into a vehicle, a warrant should be required. This is consistent with the approach proposed above in relation to video surveillance.

Where the device to be used does no more than emit a signal which assists police in following a vehicle, and is simply attached by magnet to the outside of a vehicle that is on public property the authority of an Inspector of police or an officer of higher rank should be sufficient. The decision to use such a device is often made at short notice in the course of protracted physical surveillance. In this situation, it is often not practicable to obtain a warrant. Furthermore, the attachment of such a device in these circumstances will not involve entry onto private premises or entry into a vehicle. Where the use of such a device is authorised by an Inspector or above, a written record of such authority should be required. The reporting and recording requirements outlined in the next chapter should also apply in such cases.

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14 This is currently the Minister for Police and Minister for Corrective Services.

The more sophisticated devices that record movements for prolonged periods, or which also have listening device capabilities, should not be used without prior judicial authority. Where police wish to use such devices the warrant provisions outlined for listening devices should apply.

The Commission considers that the provisions authorising the use of tracking devices should be extended to cover other offences than just serious drug offences. As was recommended with respect to visual surveillance devices, the provisions should enable police to use these devices in respect of the serious offences recommended in respect of listening devices. While this appears to broaden the use of tracking devices, the balancing factor is that warrants will be required in respect of all but a very limited category of cases.

24.21 Recommendation – Vehicle Tracking Devices

The Commission recommends that:

- **where a tracking device is of a basic type which simply emits a signal to assist in locating and tracking a vehicle and is to be attached to the outside of a vehicle on public property, use of the device be authorised in writing by an officer of the rank of Inspector or higher**

- **where the installation of the device involves entry to the vehicle or entry onto private premises, or the device is of a type that stores data or has a listening device capability, the device not be used without the authority of a judge of the Supreme Court**

- **the warrant requirements which apply to listening devices apply equally to tracking devices.**

CONCLUSION

This chapter has focussed on police powers to use listening devices and other forms of electronic surveillance. The key recommendations which have been put forward are that:

- Police powers in this area be set down in a single set of statutory provisions.

- As at present, only judges of the Supreme Court be able to hear and determine listening device applications, upon the application of a police officer of or above the rank of Inspector.

- Warrants only be available where the judge is satisfied that there are reasonable grounds for suspecting that a specified serious offence has been, is being, or is about to be committed.

- The legislation specify the factors which the judge is to have regard to before issuing the warrant, including the gravity of the matters being investigated, the extent to which the privacy or safety of any person is likely to be interfered with, and the practicability and likelihood of obtaining evidence of the offence by other less intrusive means.

- The judge, in issuing a warrant, be empowered to authorise:

  - entry on to premises for the purposes of installing, servicing, relocating and/or retrieving a listening device

  - passage through, or over any other place for the purpose of entering such premises

  - the use of reasonable force against persons or property

  - the use of such assistance as is necessary to effect the warrant

  - entry by subterfuge

  - the extraction of electricity.

- Listening devices not be available without prior judicial approval under any circumstances. However, provision should be made for an expedited court procedure to be available in emergencies and, where necessary, for warrant applications to be made by telephone, fax, etc.

- The maximum statutory period for which a warrant can be granted be 28 days, or 48 hours for emergency permits and telephone warrants. Upon further applications, a warrant may be extended for a maximum specified period up to 28 days.

- The legislation set down standard requirements relating to applications and the content of warrants.

- Specific legislative recognition be given to legal professional privilege.

- The warrant requirements which apply to listening devices apply equally to visual surveillance devices where these devices are installed in private property.

- Where a vehicle tracking device stores data, or has a listening device capability, it not be used without the authority of a judge of the Supreme Court. (The use of basic types of tracking devices may be authorised by an officer of the rank of Inspector or higher.)

CHAPTER TWENTY-FIVE

RECORD-KEEPING AND REPORTING REQUIREMENTS

INTRODUCTION

The previous chapter outlined the State legislation dealing with listening devices and other forms of electronic surveillance. It showed that the privacy protections included in current legislation are minimal. That chapter proposed a number of changes to procedures for obtaining warrants and to the grounds upon which warrants can be issued. This present chapter addresses the need for stricter provisions for reporting, recording and inspecting information concerning the use of listening devices, visual surveillance devices and tracking devices. The chapter focuses predominantly upon listening devices as there is very little legislation addressing the other forms of surveillance. However, the recommendations are to be taken to apply, where practicable, to all forms of surveillance conducted pursuant to a warrant (or, as proposed in the case of tracking devices, with the authority of an Inspector of police).

The specific recommendations relate to:

- reports to the judge who issued the warrant
- reports to the public on the use of electronic surveillance devices
- independent auditing of records
- disclosure of information obtained from listening devices
- the destruction of records
- notification of persons who have been the subject of electronic surveillance.

REPORTS TO THE JUDGE WHO ISSUED THE WARRANT

Under the *Invasion of Privacy Act 1971* there is no requirement for the applicant to report back to the judge upon the expiration of a listening device warrant. However, as a matter of practice, judges nearly always include in the warrant a condition that:

> As soon as practicable after . . . pm on the . . . /. . . /94 (the applicant) shall lodge with my associate an affidavit sworn by him or her deposing to the facts and circumstances concerning the installation and removal of the listening devices.

A similar condition is usually imposed upon warrants issued under the *Drugs Misuse Act 1986*, although there is no requirement in the Act for such a report to be made.

As a matter of practice, the Commission reports back to the judge under the *Criminal Justice Act 1989*, the *Drugs Misuse Act* and the *Invasion of Privacy Act*. A reporting condition similar to that above is included in the draft order in all cases.

The time period designated in the order is usually within two weeks of the retrieval of the device. The time period is designated as running from the retrieval of the device rather than the expiration of the warrant. This is necessary so as to enable the applicant to swear to compliance with all conditions of the warrant, including those relating to the retrieval.

Tasmanian listening device legislation requires that, within three months of the expiration of the warrant, a report must be filed with the Chief Magistrate. The report must specify if a device was used pursuant to a warrant and, if so:

- the names of the persons whose conversations were recorded or listened to, if these persons are known
- the period during which the device was used
- particulars of the premises or place the device was installed or used
- particulars of the general use made or to be made of the information or evidence obtained by use of the device
- particulars of any other warrants for listening devices granted for the same offence (*Listening Devices Act 1991*, s. 19).

New South Wales requires a written report to be furnished to the court, including the same information as required under Tasmanian legislation. The court may direct that

any record of evidence or any information obtained by the use of the listening device be brought to the court and kept in the custody of the court. The information may only be made available to any person upon the order of the court.

The provision of reports to the judge who issues the warrant assists the court to develop a broader knowledge of the use of devices and makes the applicants more accountable for the use of these devices. The current practice in Queensland of requiring such reports should therefore be formalised and embodied in legislation. The information listed above should be included in the report, as well as details of extensions and/or cancellations. The Commission understands that the Supreme Court has strict security procedures in place to protect the confidentiality of these reports.

25.1 Recommendation – Requirement to Report Back to the Judge Who Issued the Warrant

The Commission recommends that legislative provision be made requiring the applicant for a listening device warrant to report to the judge who issued the warrant within two weeks after the retrieval of the device and that the report contain the following information:

- **the names of the persons whose conversations were recorded or listened to, or whose movements were monitored, if those persons are known**
- **the period during which the device was used, including details of any previous extensions and/or circumstances of cancellation**
- **particulars of any other warrants for devices granted for the same offence**
- **particulars of the premises or place where the device was installed or used**
- **particulars of the general use made, or to be made, of the information or evidence obtained by use of the device**
- **particulars of the installation, servicing, relocation and/or retrieval of the device.**

REPORTS TO THE PUBLIC ON THE USE OF DEVICES

"Public disclosure provides an important check on any indifference to privacy interests within an otherwise secret process" (ALRC 1983, Vol. 2, p. 67).

Under the *Invasion of Privacy Act*, reports must be provided to the Registrar, who is defined under the Act as the chief executive officer of the department which has responsibility for administering the Act. Such reports are, in practice, provided to an officer within the Department of Emergency Services and Consumer Affairs. They include only notification of the fact that a listening device warrant was issued. The officer acknowledges receipt of the reports and files them. There is no public report produced from the information.

Under the *Drugs Misuse Act*, reports are to be provided to the Commissioner of Police, who is to report to the responsible Minister (currently the Minister for Police and Minister for Corrective Services) upon the use of a tracking device (s. 24) and a listening or visual surveillance device pursuant to a warrant or emergency permit (s. 29A). Inquiries with the QPS revealed that there is no central registry process for keeping records of the reports to the Minister. There is no requirement that the Minister table a report in Parliament. Apparently the information is kept on individual investigation files.

There are no standardised criteria to be addressed in the reports. There is also no central agency for receiving the reports and no obligation upon the Registrar or Commissioner of Police or Minister to prepare publicly available annual reports concerning the use of listening or other surveillance devices. However, the Office of the Director of Prosecutions has begun including a table concerning the QPS applications for listening devices in its *Annual Report*. The table contains information on:

- the number of applications made
- the date of the authority
- the Act under which the application is made
- the duration of authorised use of the listening device
- the offence under investigation.

The Report also includes a table outlining the number of cases in which a listening device was authorised and those in which a surveillance device was authorised. The Commission, in its 1993/94 *Annual Report* at pages 38–39, has provided similar information concerning applications by the Commission and authorisations for the use of listening and surveillance devices.

South Australian listening device legislation requires the Commissioner of Police to provide the Minister with an annual report in relation to applications for warrants; telephone applications; renewal applications; applications that include a request to enter premises; how many applications were made; how many were refused or withdrawn; how many were successful; the average length of time for which warrants were in force; the average length of time of renewal warrants; how many arrests were made during the year; how many arrests were made fully or partly on the basis of information obtained by the use of the listening device; and how many people were found guilty as a consequence of those prosecutions. The Minister is required to table a report before both Houses of Parliament containing, among other things, the information provided by the Commissioner of Police.

Victorian legislation requires a report to be made to the Minister administering the *Police Regulation Act 1958*. The report must detail whether the listening device was used pursuant to a warrant; if so, the names of persons whose conversations were listened to or recorded; the time over which the device was used; the general use made or to be made of the evidence or information gathered by the device; and particulars of any other warrants granted in relation to the same offence. There is no requirement for this to be included in an annual report to Parliament.

At the Commonwealth level, stringent reporting requirements are placed upon agencies using telephone intercepts and most of the information provided is subsequently published in an annual report (see Appendix 14).

Because information about the use of electronic surveillance devices is so dispersed, it is very difficult for members of the public to assess the use of such devices or the operation of the legislation. The production of a publicly available annual report provides for a more comprehensive analysis of the effectiveness of the legislation. It also brings the matter to the attention of the Parliament annually and allows an opportunity for debate on the issue. However, an annual report can only be an effective accountability mechanism if it includes sufficient information to reveal a true

picture of the use of electronic surveillance devices. The sort of information which should be included is listed below. The list is based broadly upon the requirements of the *Telecommunications (Interception) Act 1979* (Cwlth):

- the number of applications granted, refused, extended, revoked or withdrawn in respect of ordinary, emergency and telephone warrants, for each category of offence
- the number of investigations in which devices were used which resulted in people being charged wholly, or partly, on the basis of information obtained from the listening device
- a statistical profile of the length of warrants and actual period of time for which the device was used
- the number of prosecutions instituted in which information obtained by the use of the listening device was tendered in evidence, for each category of offence
- the number of people found guilty as a consequence of those prosecutions, for each category of offence
- the total costs during the year of listening device use pursuant to warrants
- the same information in relation to joint operations
- the number of persons notified of the fact of surveillance (see Recommendation 25.6)

25.2 Recommendation – Production of an Annual Report

The Commission recommends that:

- **an annual report on the use of electronic surveillance devices be tabled in Parliament by the Minister responsible for the legislation**
- **the report be prepared or audited by the Ombudsman or some other independent body (see Recommendation 25.3)**
- **the report include the information listed above.**

SHOULD RECORD-KEEPING BE THE SUBJECT OF INDEPENDENT AUDITING?

The only legislation governing the use of electronic surveillance that allows for independent auditing is the *Telecommunications (Interception) Act*. In those States that have telephone interception powers, these auditing requirements must be complied with. For example, the *Telecommunications (Interception) (New South Wales) Act 1987* requires specified records to be maintained by each eligible authority (s. 4 and s. 5). The State Ombudsman is charged with inspecting these records at least twice during each financial year in order to ascertain the extent of compliance with record-keeping obligations. The Ombudsman then reports to the Federal Minister about the results of those inspections. The Ombudsman is given wide-ranging compulsory powers to ensure that he or she can fulfil this responsibility. It is an offence to refuse or fail to co-operate with the Ombudsman.

The auditing of records is an essential part of ensuring compliance with the strict requirements of the legislation. In conjunction with the record-keeping requirements, the auditing requirements operate to protect privacy interests. The nature of electronic surveillance devices as investigative tools makes it essential that applications for devices are heard in the absence of the party who is to be monitored. Furthermore, such devices are used without the knowledge of the party being monitored. Thus the person who is subjected to the use of the power is not in a position to challenge the legality of the use or the extent of compliance with the terms and conditions of the warrant. For these reasons an independent body should be responsible for auditing the records and reporting on the extent to which police comply with the proposed requirements under the Act.

There has been some discussion at the Commonwealth level as to whether the appropriate body to fulfil this role is the Ombudsman or the Privacy Commissioner.[15] There is no Privacy Commissioner in Queensland. However, the Ombudsman, or some other independent agency, if sufficiently resourced, would be able to fulfil the role.

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15 See, for example, Attorney-General's Department 1991, *Review of Telecommunications (Interception) Act 1979*, Canberra.

25.3 Recommendation – Provision for Independent Auditing

The Commission recommends that the Ombudsman, or some other independent body, be charged with conducting regular inspections to ensure records and registers relating to electronic surveillance are being maintained and stored in accordance with the Act.

RESTRICTIONS UPON DISCLOSURE OF INFORMATION OBTAINED BY USE OF A SURVEILLANCE DEVICE

Most listening device legislation prohibits the use of information obtained directly or indirectly by use of a listening device, except in specified circumstances. In respect of information obtained by the lawful use of a listening device, section 43(6) of the *Invasion of Privacy Act* prohibits an authorised police officer who was not a party to the private conversation from communicating or publishing the substance or meaning of that conversation except in the performance of his or her duty.[16] The *Drugs Misuse Act* adopts the provisions of the *Invasion of Privacy Act* (s. 29). The *Criminal Justice Act* prohibits a person who was not a party to the private conversation from communicating the text, substance or meaning of the conversation that was recorded by the use of a listening device used for the purposes of the Commission to anyone except the Chairperson, or a person nominated by the Chairperson for that purpose (s. 83). This provision would allow the Chairperson to nominate transcribers or, where necessary, interpreters, to receive tapes or records of the conversations.

The aim of provisions such as section 83 of the *Criminal Justice Act* is to minimise the number of people who are allowed to hear private conversations which have been monitored or recorded by use of a listening device, while at the same time recognising the operational requirements of a law enforcement agency. The *Invasion of Privacy Act* provision is broader in that it does not require people to be authorised to have the recorded conversations communicated to them – it simply allows for communication by an authorised police officer in the performance of duty.

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16 See also s. 45(2)(c) where, in the case of an authorised police officer who is a party to a private conversation, there is no requirement that the communication or publication be in the performance of his or her duty.

In the Commission's view, legislation should require that the QPS keep written records of the people authorised to have communicated to them any material obtained through the use of a surveillance device. Such a requirement will:

- help ensure that people do not receive such information unless it really is necessary
- reinforce the philosophy that someone should not have information unless he or she needs to know
- assist the proposed inspecting agency (see above) to discharge its monitoring responsibilities.

To help determine when it is legitimate to provide material to another party there needs to be a provision which specifically prescribes the circumstances in which such information can be communicated, made use of, recorded, or given in evidence.

A suitable model is section 9(3) of the Northern Territory *Listening Devices Act 1990* which prescribes the following purposes:

(a) the investigation or prosecution of an offence;

(b) a proceeding for the confiscation or forfeiture of property or for the imposition of a pecuniary penalty;

(c) a proceeding for the taking of evidence on commission for use in Australia or New Zealand;

(d) a proceeding for the extradition of a person to or from Australia or a State or Territory of the Commonwealth;

(e) a police disciplinary proceeding;

(f) any other investigation or proceeding (not being a proceeding by way of a prosecution for an offence) in so far as it relates to alleged misbehaviour, or alleged improper conduct, of a member of a police force or an officer of the Territory, the Commonwealth, a State or another Territory of the Commonwealth.

The proposed inspecting agency will be able to carry out its monitoring role more effectively if there are specifically defined purposes for which communication can be made, and if there are written records of what information was communicated to which persons for what purpose.

25.4 Recommendation – Purposes for Which Information Obtained by the Use of Surveillance Devices Can Be Disclosed

The Commission recommends that:

- **legislation authorising the use of surveillance devices include a provision which states the purposes for which material obtained from the use of a surveillance device can be disclosed to persons other than those authorised under the warrant**

- **a written record be kept of what information has been disclosed to what person and for what purpose**

- **these records be available for scrutiny by the proposed inspecting agency (see Recommendation 25.3).**

WHAT PROVISION SHOULD BE MADE FOR THE DESTRUCTION OF RECORDS?

The destruction of records obtained by the use of a listening device pursuant to a warrant issued under the *Invasion of Privacy Act* or the *Drugs Misuse Act* is governed by section 47 of the *Invasion of Privacy Act*. This section states that:

> The Commissioner of Police shall, as soon as practicable after it has been made, cause to be destroyed so much of any record, whether in writing or otherwise, of any information obtained by the use of a listening device . . . as does not relate directly or indirectly to the commission of an offence.

A similar requirement should apply to all information obtained as a result of electronic surveillance.

There are three issues to be resolved:

- the basis for determining what records should be destroyed and when they should be destroyed
- who should be responsible for ensuring destruction
- how security of records can be maintained prior to destruction.

There should be a prima facie rule that all records of information obtained by the use of a listening device be destroyed. The obvious exception is where the information is to be used for a permitted purpose (see Recommendation 25.4).

There are a variety of schemes in place in other jurisdictions under which the destruction takes place at the direction of the Minister, the court, the Commissioner of Police, or some other senior police officer. Currently the authority for destruction rests with the Commissioner under the *Invasion of Privacy Act*. In practice, the Commissioner delegates this task to a Superintendent. There appears to be no reason to change this practice given the proposal for independent auditing.

In the Commission's view, there should be some independent oversight to ensure that there is compliance with the destruction provisions. This role should be carried out by the Ombudsman, or another independent agency established to carry out the recommended auditing role.

There is a need for records of destruction to be maintained – e.g. a certificate of destruction similar to that issued for destruction of dangerous drugs.

Currently there is no provision under the *Invasion of Privacy Act* or the *Drugs Misuse Act* for records awaiting destruction, or those not required to be destroyed, to be stored in a secure place with access restricted to authorised persons. By contrast, South Australian legislation requires all records of information obtained to be kept in a secure place that is not accessible to those not entitled to deal with the information. Given the privacy concerns associated with the information obtained by electronic surveillance, the Commission considers that there should be a similar requirement spelt out in Queensland legislation.

25.5 Recommendation – Destruction and Storage Requirements

The Commission recommends that:

- **all records, whether in writing or otherwise, of any information obtained by the use of a surveillance device pursuant to a warrant, be destroyed unless required for a permitted purpose as outlined in Recommendation 25.4**

- **the Commissioner of Police be required to cause the destruction of records and that compliance with the destruction requirements be the subject of independent oversight**

- **pending destruction, the records be kept in a secure place with access restricted to those authorised to deal with such records.**

SHOULD A PERSON BE TOLD THAT HE OR SHE HAS BEEN THE SUBJECT OF ELECTRONIC SURVEILLANCE?

An important issue concerning surveillance devices is whether the target of such devices should be notified after the event that they have been surveilled. There are currently no notification provisions in the relevant Queensland legislation. However the Tasmanian and New South Wales listening devices Acts include notification provisions.

In Tasmania, the Chief Magistrate, upon receiving reports concerning the use of devices with or without a warrant, may direct that a person be notified of the use of the listening device if the Chief Magistrate is satisfied that the use was an unnecessary interference with the privacy of the person concerned. In deciding the question, the Chief Magistrate is to have regard to the evidence or information obtained by the use of the listening device. The person who used the listening device has a right to be heard before such a direction is made. The Chief Magistrate, if making a direction, is to specify what information is to be provided to the person (see ss. 6, 7 and 20 of the *Listening Devices Act* Tasmania).

The notification provision obviously depends upon a requirement that there be a report back to the court on the use of a listening device. Section 19 of the Tasmanian *Listening Devices Act* requires a report to be filed with the Chief Magistrate within three months of the expiration of the warrant. The Chief Magistrate of Tasmania has

informed the Commission that there have been no notifications ordered under this provision.

In New South Wales, the court which issues the listening device may, if satisfied that the use of the device was not justified and was an unnecessary interference with the privacy of the person concerned, direct that the person who was the subject of the surveillance be informed of the use of the device.

The main arguments for a notification requirement are that it would:

- impose an added discipline on law enforcement agencies to exercise great care in deciding whether to apply for warrants
- facilitate greater accountability
- ensure that any person charged with an offence is aware of *all* material in the hands of the prosecution.

The main arguments against such a requirement are that it could:

- cause unnecessary distress and concern to any innocent person who might be notified, as the police would generally not be able to divulge any details about the operation
- compromise present or future investigations, especially if the person notified was associated with other suspects
- be impractical, given that some investigations involve a number of telecommunication interception targets and several current overlapping criminal operations.

The Commission accepts that a mandatory notification requirement creates substantial difficulties. However, these potential problems could be overcome by giving the judge a discretion to determine whether a person should be notified. This could be done by adopting a provision giving a judge a discretion to decide whether notification should be ordered. Such a provision would require the question of notification to be considered when the report was made to the judge according to Recommendation 25.1. The applicant for the warrant should be given an opportunity to be heard at this stage. The judge should be granted a discretion not to order notification where to do so would be likely to jeopardise a current or future investigation. On the other hand, the fact that a person has been, or is likely to be, charged with an offence as a result of the investigation should be a factor in favour

of ordering notification, even if the prosecution does not intend to make use of information obtained from the listening device.[17]

The fact of notification, or the order preventing notification on particular grounds, should be recorded. This information should be included with any other records which are to be subject to an inspection by the Ombudsman or other independent agency. The number of cases in which persons are notified should also form part of the annual report to Parliament (see above).

25.6 Recommendation – Notification of a Person that He or She Has Been the Subject of Electronic Surveillance.

The Commission recommends that:

- **there be a legislative requirement that, upon a report back to the judge, the judge may, in his or her discretion, direct that the persons who were the subject of the surveillance, or are to be charged arising out of the investigation, be notified of the fact of the surveillance**

- **a discretion be conferred on the judge to refuse to make the order for notification if to do so would be likely to jeopardise a current or future investigation**

- **the applicant for the warrant be given the opportunity to be heard prior to the judge directing notification.**

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17 The LRCC, in its Working Paper on Electronic Surveillance, referred to an unreported Canadian case of *R v McLeod*, Ont. C.A., April 13, 1982, where charges were laid but the Crown did not seek to rely on wiretap evidence and therefore the accused did not receive a notice. In that case, one of the accused on a charge of murder relied on the defence of alibi. He was a member of a motorcycle gang and unknown to him the gang's clubhouse was wiretapped. It was only after the conviction on appeal and by purely fortuitous circumstances that his counsel learned that tapes existed of his conversation the night of the killing, which tended to support his alibi. As a result, his conviction was set aside and a new trial ordered based on this fresh evidence (p. 4).

CONCLUSION

This chapter has reviewed record-keeping and reporting requirements in relation to the use of listening devices and other forms of electronic surveillance. It has been shown that there are insufficient accountability mechanisms and privacy protections in the present legislation. The Commission considers that these deficiencies should be addressed by the following means:

- requiring, as a matter of law, that the applicant provide a detailed report to the judge within two weeks after the retrieval of the device
- requiring the Minister responsible for the legislation to provide a detailed annual report to Parliament on the use of listening devices and other forms of electronic surveillance in Queensland
- providing for the Ombudsman, or some other independent agency, to conduct regular audits of records and registers
- specifying in legislation the purposes for which information obtained from a surveillance device may be disclosed to another person, and requiring records to be kept of any disclosures
- adopting and enforcing strict controls over the destruction and storage of any information obtained from surveillance devices
- giving judges the discretion to order that a person who has been the subject of electronic surveillance be notified of the fact.

It is clear from both this chapter and the previous chapter that the law and procedure governing the use of electronic surveillance by police officers is inconsistent and imprecise. As with many other areas of police powers, the legislation has developed in a piecemeal manner, in response to particular problems. The recommendations made by the Commission in these two chapters are designed to bring consistency and clarity to the law by imposing standardised requirements upon applications for electronic surveillance device warrants, the use of those devices pursuant to warrants, and record-keeping and reporting procedures.

As indicated at the outset of this discussion, the Commission considers that the legislation dealing with police powers to use listening, optical surveillance and tracking devices, should be consolidated in order to simplify the law in this area and to make it more accessible to police and to members of the public. This could be done either by creating a separate Act governing electronic surveillance or by incorporating it as a specific part of a Police Powers Act.

PART II

CHAPTER TWENTY-SIX

BODY SEARCHES AND EXAMINATIONS

INTRODUCTION

In the criminal investigation process there are a wide range of powers available to police to conduct searches and examinations (including medical examinations) of suspects and persons who have been arrested.[18] Some of these investigative procedures are relatively simple and safe, but others involve a significant invasion of privacy, or use of a specialised medical procedure. The procedures range from simple body inspection and external substance removal tests, to internal substance removal tests. This chapter focuses primarily on the more intrusive powers such as:

- the power pursuant to section 259(3) of the *Criminal Code* to conduct an examination (including a medical examination) of a person in custody, including to examine body orifices, and to take samples
- the power to conduct body cavity searches in relation to drug offences (s. 17 of the *Drugs Misuse Act 1986*).

This chapter considers:

- the investigative uses of body searches and examinations
- issues relating to section 259(3) of the *Criminal Code*
- body cavity searches under section 17 of the *Drugs Misuse Act*
- the power to search a person in custody.

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18 This report has previously considered pre-arrest search and seizure powers in the more general sense (CJC 1993a, p. 297).

Investigative Uses of Body Searches and Examinations

Examinations and searches of suspects may be used as part of a criminal investigation for the following purposes (Gibbs Committee 1991, p. 72):

- To obtain samples from the suspect's body as physical evidence, including samples of hair and body fluids such as blood, saliva, urine and semen. The appropriate procedure for obtaining such samples varies depending upon the type of sample required. The purpose of collecting samples is to determine if they match with material found at a crime scene, or on a victim's person, clothing etc.

- To observe and record the features of the suspect's body as physical evidence. This purpose includes observing and photographing features such as bruises or other injuries which may subsequently heal, thereby causing the evidence to be lost. It can also involve more intrusive procedures such as the taking of a dental impression.

- To search the suspect's body for foreign material relating to the offence for which the person has been arrested and to seize any such material found. Some material may be easily obtained, such as dirt, hair, skin, blood or other material which may have accumulated under a fingernail. Other material, for instance concealed drugs, may be much more difficult to detect and may require an internal search of the person's body orifices.

The use of investigative techniques of the type described above raise a number of legal and social policy issues. Determining these issues involves balancing two broad competing interests:

- the need to identify and bring to justice those who commit criminal offences

- the need to ensure that individuals are not subjected to unlawful or unfair treatment.

THE POWER TO EXAMINE A PERSON IN CUSTODY AND TAKE SAMPLES UNDER SECTION 259 OF THE *CRIMINAL CODE*

At common law there is no power to compel a suspect to provide a sample of his or her blood, hair, saliva or other bodily matter. Any use of physical force to obtain such a sample, whether exercised by police or by a doctor acting at the behest of the police, would constitute an assault (New Zealand Law Reform Committee (NZLRC) 1978, p. 4).

In Queensland, the common law has been displaced by legislative provisions conferring powers on police relating to the conduct of examinations of a person and the taking of body samples. The most comprehensive provision is contained in section 259(3) of the *Criminal Code* which was inserted in its present form by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989*, pursuant to recommendations of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (the Lucas Inquiry) (1977) and the Inquiry into Sexual Offences Involving Children and Related Matters (the Sturgess Inquiry) (1985, pp. 72–74). In 1989 the Consultative Committee on Police Powers of Investigation in Victoria (the Coldrey Committee) (1986) described the provision as "arguably the most comprehensive in Australia" (p. 75).

Section 259(3) contains broad powers to examine and obtain biological samples from the body surface and orifices of a suspect post–arrest. Prior to arrest, a person may consent to a police officer's request to conduct an examination or take a sample. The safeguards contained in section 259 do not operate in such cases.

Section 259(3) provides:

> When a person is in lawful custody upon a charge of committing an offence–
>
> (a) a legally qualified medical practitioner, acting in good faith and at the request of a police officer, or a person acting in good faith in aid of and at the direction of that medical practitioner, may do such of the following as may afford evidence as to the commission of the offence:–
>
> (i) examine the person of the person in custody, including the orifices of his body;
>
> (ii) take samples of his blood saliva or hair;
>
> (iii) require him to provide a sample of his urine;
>
> (iv) collect from his person, including the orifices of his body, any substance or thing if collecting the substance or thing would be unlikely to cause bodily harm to that person if he co–operates therewith;

(b) a legally qualified dentist, acting in good faith and at the request of a police officer, or a person acting in good faith in aid of and at the direction of that dentist, may do such of the following as may afford evidence as to the commission of the offence:–

(i) examine the mouth of the person in custody;

(ii) take samples of his saliva;

(iii) take dental impressions from him.

Section 259 also provides that:

- the written consent of the arrestee is required or, in non–consensual situations, the authorisation of a magistrate [259(4)]

- where a magistrate has authorised a procedure, a copy of the magistrate's order is to be given to the arrestee and he or she is to be informed of its contents, prior to conducting the procedure [259(1)]

- the arrestee has the right to have two persons of his or her choice present and must be informed of this right [259(4)]

- where practicable, a portion of the biological sample and the results of any test conducted with respect to the sample or thing taken is to be provided to the person who has undergone the procedure [259(15) and (16)]

- the use of reasonable force is permitted [259(17)]

- where it is not practicable to make an application in the manner prescribed the application may be made and the approval of the magistrate obtained via electronic means [259(5) and (8)].

Issues for Consideration

Section 259(3) is an important provision in the criminal investigation process. None of the submissions received by the Commission argued for the removal of those powers. However, several changes were suggested, including:

- the safeguards in section 259(4) should apply to persons who consent to an examination prior to arrest

- where a suspect consents to an examination, this should be video/audio recorded, where practicable

- the power set down in section 259(3) should be available in pre-arrest situations
- the power set down in section 259(3) should only be available in respect of persons arrested for serious offences
- police should be given a clear statutory power to transport the person in custody to another place for a procedure to be undertaken
- legislation should clearly state that a suspect has the right to be heard on the application.

The following discussion considers each of these issues in turn.

Pre-Arrest Consent Procedure

Section 259(4) of the *Criminal Code* outlines the procedure for a suspect in lawful custody to consent in writing to a proposed examination. Taken in conjunction with the safeguards proposed in Volume IV of this report for the treatment of persons in custody, these procedures should ensure that a person who is in custody will be able to make a properly informed choice about whether he or she should agree to an examination.

However, as indicated, the provisions in section 259 do not apply to suspects who have not been arrested. A person who is not under arrest may consent to a police officer's request to conduct an examination or take a sample, but if he or she does so the safeguards contained in section 259 do not operate. For example, there is no requirement that the consent be in writing, or that the person be given a portion of any sample taken, or that the person be informed that he or she is entitled to have two persons present at the examination.

Consistent with the position adopted by the Commission in Volume IV, a person who is at a police station and co-operating with police should be entitled to the same protections as a person in custody. The Commission is therefore of the view that the safeguards embodied in section 259 should also apply to a person not under arrest who consents to a procedure.

26.1 Recommendation – Consent to an Examination Prior to Arrest

The Commission recommends that the safeguards in section 259 of the *Criminal Code* should also apply to persons not under arrest who have consented to an examination.

Recording of Consent

Currently, section 259(4) of the *Criminal Code* provides that, where a person who has been arrested consents to a procedure, that consent must be given in writing. Given the limited writing skills of some suspects, the Commission does not regard written consent as an adequate safeguard in all cases. Consistent with the approach taken in Volume IV, the Commission proposes that consent should be audio or video recorded, where practicable. Where a person is in police custody, there will nearly always be facilities for audio/video recording available. In the case of a person who has not been arrested and may not be at a police station, it may be impractical to require the audio/video recording of consent. In such cases, consent in writing should be obtained.

26.2 Recommendation – Video-taping of Consent to an Examination

The Commission recommends that where a person consents to a procedure, either prior to or following arrest, such consent be audio or video recorded, where practicable. Where that is not practicable, consent should be in writing.

Should Section 259(3) Operate Pre-Arrest?

The QPS argued that the power to obtain a body sample under section 259 is not as useful as it could be because it is restricted to arrested persons. "Effectively, this means that until sufficient evidence is uncovered to provide a basis for an arrest, i.e. reasonable suspicion, and the arrest is made, the provisions of this very useful

evidence gathering section cannot be used" (QPS 1991, p. 66) The QPS argued for the extension of the power to pre-arrest situations on the following grounds (1991, p. 66):

- Evidence gained as a result of a medical examination of a suspect may tend to show that the suspect is responsible for the offence. If so, a 'serious offence' may well be solved far more quickly, thereby lessening the opportunity for a dangerous offender to re-offend prior to apprehension.

- The results from a pre-arrest examination might well corroborate a suspect's claim that he or she is innocent. Should this be the case, the arrest of an innocent person could have been avoided.

Currently, section 259 requires that a suspect be arrested before any procedures are undertaken. Under the *Criminal Code*, a person can only be arrested if a police officer believes on reasonable grounds that the person has committed an offence. The Commission has previously recommended that the standard for arrest should be 'reasonable grounds to suspect'.

The Lucas Inquiry recommended that a power to take samples from a person pre-arrest should be available where a police officer believed on reasonable grounds that the person was implicated in the commission of a 'serious offence' (1977, pp. 168-172).[19] The Inquiry recommended that the power to take samples should extend to persons under pre-arrest detention.

The majority of the NZLRC (1978) recommended pre-arrest investigative testing primarily on the basis that: "if the procedure applied only to the post-arrest situation, the Police might be tempted to make precipitate arrests to obtain [evidence] which may in fact exclude the suspect" (para. 27, p. 14). However, the test which the NZLRC said must be satisfied before this power could be exercised was similar to that which applies in an arrest situation. Specifically, the NZLRC recommended that a police officer should be able to apply to a Magistrate for an order authorising the conduct of an examination of a suspect or the obtaining of samples where:

- there were reasonable grounds to believe an offence had been committed

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19 In the Committee's opinion, the power should extend to indictable offences defined as crimes under the *Criminal Code*, and drug offences as they then were under s. 130 of the *Health Act 1937* (p. 141).

- there were reasonable grounds to suspect that a specified person had committed that offence

- there were reasonable grounds to believe that relevant material or evidence would result which would assist in determining the guilt or innocence of the person suspected of having committed that offence.

The extension of the section 259 power to pre-arrest situations was opposed in a number of submissions made to the Commission, including those of the Bar Association of Queensland, the Director of Prosecutions, the Queensland Law Society, the Queensland Association of Independent Legal Services, the Youth Affairs Network of Queensland and the Juvenile Advocacy Service. For example, the Queensland Law Society said:

> Whilst not doubting the potential value to police of any evidence gained from such searches, it is an unreasonable infringement of the liberties of the citizen charged with no wrong to be forced to submit to highly personal body searches which may do no more than reinforce an inference of his or her innocence.

The Coldrey Committee in Victoria recommended that the powers which it proposed should only be available where there were

> reasonable grounds to believe that the suspect in respect of whom the order is sought has committed the offence under investigation. (This is the standard required for an arrest). . . . Any less stringent threshold test is likely to be nebulous and inchoate and have the capacity to interfere with the liberty and privacy of members of the community in such a way as to be unjust, harsh, and oppressive in its operation. (Coldrey Committee 1989, p. xiii)

However, this particular recommendation of the Coldrey Committee was not adopted in all respects (see below).

A pre-arrest power was also opposed by the Sturgess Inquiry, although it recommended that adverse evidentiary inferences could be drawn against persons who declined to consent to pre-arrest procedures (1985, pp. 81–82).

In considering the question of a pre-arrest power, there are two distinct but related issues:

- what level of suspicion should be required before an examination can be ordered?

- should there be a provision for pre-arrest detention?

In the Commission's assessment, police should not be able to carry out such intrusive procedures unless they have reasonable grounds to suspect that the person has committed an offence. This conclusion is based on the following considerations:

- No other jurisdiction in Australia uses a lesser standard. Victoria is the only jurisdiction in Australia which gives police a general power to conduct forensic procedures prior to arrest (*Crimes Act (Vic.) 1958* ss. 464K–464ZK). The Victorian legislation requires a police officer to suspect on reasonable grounds that the person has committed an indictable offence. In Queensland the test for arrest proposed by the Commission is also 'reasonable grounds to suspect'.

- The requirement that the standard of suspicion be the same as that for arrest is an essential protection against unjustified intrusion upon the freedom of the individual. The existence of a mere suspicion in the mind of an investigating police officer cannot provide sufficient justification for carrying out such procedures.

Although the threshold test for arrest must be satisfied, should it be necessary to actually effect an arrest? One suggestion is that the power could be exercised under some form of pre-arrest detention, as proposed by the majority of the NZLRC (1978), and as is now the position in Victoria. However, the Commission does not agree with this approach. If a person does not agree to the conduct of an examination, the only way of carrying it out is to deprive the person of his or her liberty for a period of time and, possibly, subject the person to the use of force. As the Commission noted in Volume IV:

> It is artificial to call a deprivation of liberty a 'detention' rather than an 'arrest'; a citizen is either free to go or is not free. . . . 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. (CJC 1994b, p. 685)

The Commission therefore considers that police should be able to apply to use the intrusive powers in section 259(3) only in relation to a person who has been arrested.

26.3 Recommendation – Restriction of Section 259(3) of the *Criminal Code* to Post-arrest Situations

The Commission recommends that the power to take body samples and conduct examinations under section 259(3) of the *Criminal Code* be available only in relation to persons who have been arrested.

For What Offences Should the Power under Section 259(3) Be Available?

The powers under section 259 are currently available in respect of any offence. They are not limited to serious offences, or even to offences under the *Criminal Code*. The types of searches and examinations that can be conducted and samples that can be taken vary widely in intrusiveness. For example, the power under section 259(1) is simply a power to search a person. At the other extreme are the powers under section 259(3), including the power to take blood samples and examine body orifices.

Few would argue against a power to search a person in custody being available in respect of any offence. However, a number of people have argued that the intrusive powers under section 259(3), involving intimate body searches and samples, should be limited to more serious offences.

The Queensland Watchdog Committee submitted that a power to conduct intimate searches should be available only in respect of drug trafficking offences. A member of the Queensland Law Society argued that such a power should be available only in respect of certain offences "e.g. murder, rape, etc." The QPS's submission pointed out that "in practice, a medical or dental examination would only be approved for the more serious offences such as murder, rape and serious assault".

Throughout its report, the Commission has recommended that the more intrusive police powers be limited to the more serious offences. Consistent with that approach the Commission considers that the powers under section 259(3) should be available only in relation to indictable offences. It is difficult to define a more specific category of offences to which this section should apply, because of the wide range of procedures that may be authorised under the section. For example, the examination could involve no more than the removal of a hair from a person's head. At the other extreme, it could involve an intrusive and humiliating examination of the genitalia and the taking of swabs.

The most appropriate way to determine whether the particular procedure is justified in relation to the indictable offence involved, is to require the magistrate to determine it on a case by case basis. In considering an application for an examination under section 259(3), the magistrate is currently required to consider only whether the examination is likely to afford evidence of an offence. In the Commission's view, the magistrate should also have regard to the following factors:

- the intrusiveness of the procedure and/or the degree of humiliation entailed
- the seriousness of the offence
- the age and health of the suspect
- the degree of the suspect's alleged involvement in the offence.

This will enable a more informed judgement to be made as to when a person should be subjected to intrusive and/or humiliating examinations against his or her will.

26.4 Recommendation – Offences for which Section 259(3) of the *Criminal Code* Should Be Available

The Commission recommends that the powers under section 259(3) of the *Criminal Code* be available only in respect of a person in lawful custody upon a charge of committing an indictable offence. A magistrate, in considering whether to authorise an examination or procedure under that section, should also have regard to

- **the intrusive and/or humiliating nature of the procedure**
- **the seriousness of the offence**
- **the age and health of the suspect**
- **the degree of the suspect's alleged involvement in the offence.**

Power to Transport the Person in Custody to Another Place for a Procedure to Be Undertaken

Section 259 does not authorise the transport of a suspect to another place for a procedure to be undertaken. The potential difficulties imposed by this omission are illustrated by a police officer who referred to the following case in a submission to the Commission:

> Three persons were charged with offences of rape. An order under section 259 . . . was obtained . . . As the examining doctor considered the conditions at the watchhouse were unsanitary, he refused to examine the persons until they were moved to a surgery.
>
> At the subsequent trial, the judge refused to admit the evidence of the examinations as the section [259] did not permit the removal of persons from watchhouses for the purposes of examination.

The Criminal Code Review Committee (1992, pp. 123–126, 264) proposed retention of the provision currently contained in section 259, but with the addition of a power to take the arrestee a reasonable distance to have the procedure undertaken.

Having regard to the limited facilities currently available in watchhouses, the Commission endorses the recommendation of the Criminal Code Review Committee that there be a power to take a prisoner a reasonable distance in order to have a procedure undertaken.

26.5 Recommendation – Power to Transport a Person in Custody to Have a Procedure Undertaken

The Commission recommends that section 259 of the *Criminal Code* include a power to take the person in lawful custody a reasonable distance at the request of the medical practitioner or dentist to have a procedure undertaken.

The Application Procedure and the Suspect's Right to Be Heard

The powers under section 259 are exercisable only with the written consent of the person or with the approval of a magistrate [s. 259(4)] on the application of a police officer [s. 259(5)].

The application must be made by a police officer under oath and in the prescribed form. An affidavit of the investigating officer must also be attached and handed to the bench.[20] Section 257(6) stipulates that the magistrate must be satisfied that the person to whom the act is to be done is in lawful custody upon a charge of committing an offence; there are reasonable grounds for believing that the doing of the act may afford evidence as to the commission of the offence; and the person in custody has been informed of his right to have present two persons of his choice while the act is being done.

The Queensland Council for Civil Liberties submitted that the suspect should receive notice of the application and have a right to be heard. It is unclear whether such a right exists at present. The then President of the Council submitted at the public hearings into Police Powers that in at least two cases clients of his firm had sought the right to representation at the hearing of the application and the magistrate has ruled that the law as it now stands does not give such a right. The Commission has been advised by the Chief Stipendiary Magistrate that defendants are usually represented and it is very uncommon for the application to be opposed. Nevertheless an example was given of a recent application before Mr Mitchell SSM where the application was opposed and dismissed.[21]

The taking of body samples is an intrusive and sometimes humiliating procedure. The Commission considers that, to ensure procedural fairness, the legislation should clearly state that the person to be examined must receive notice of the application; have the right to appear and be heard on the application and be represented by counsel or a solicitor; and have the right to call evidence.

Where the application is made by telephone or similar facility, the arrestee should be notified and the arrestee or his or her legal representative should have an opportunity to make a submission.

In very rare circumstances, there may be a need to conduct the examination and/or take the sample quickly. In such circumstances, the delay required in order to await the arrival of a legal representative may cause the evidence to be lost or destroyed. In these cases, the police should make the application to the magistrate and the suspect should have a right to address the magistrate. If the magistrate is satisfied that

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20 See Forms No. 1 of Part 1 Section VII of the Criminal Practice Rules of 1900. Different procedures are prescribed with respect to an application by telephone or a similar facility [s. 257(8) and (9)]. The Chief Stipendiary Magistrate has advised that the provisions are not frequently used.

21 This matter involved a rape case where identity was not an issue.

the circumstances are so urgent as to justify proceeding with the application in the absence of a legal representative (if one has been requested by the suspect), the magistrate may so order.

26.6 Recommendation – Suspect's Right to Be Heard in an Application Under Section 259 of the *Criminal Code*

The Commission recommends that section 259 of the *Criminal Code* be amended to provide specifically that the person receive prior notice of an application under that section and be allowed the right to be heard, to call evidence and to be legally represented (unless the magistrate orders otherwise).

THE POWER TO CONDUCT BODY CAVITY SEARCHES IN RELATION TO DRUG OFFENCES

The most controversial and intrusive body search power is that contained in section 17 of the *Drugs Misuse Act*. This provides for a police officer of or above the rank of Inspector to require a person, whom the police officer reasonably suspects of having secreted within his or her body a dangerous drug, to submit to an examination of any internal part or cavity of the person's body by a medical practitioner. This is broader than the power in section 259(3) of the *Criminal Code* which only allows examination of body 'orifices', not 'cavities'. The *Drugs Misuse Act* provision does not require the consent of the suspect – if he or she refuses, the examination may be conducted using such force as is reasonably necessary. The power may be exercised either prior to or after arrest.

As discussed above, the Commission is of the view that:

- the threshold test for all legislative provisions conferring powers of arrest on police should be 'reasonable grounds to suspect' (1993b, p. 593) rather than 'belief on reasonable grounds'

- the conduct of examinations and the taking of body samples pursuant to section 259(3) should continue to be restricted to post-arrest situations.

In line with this approach the Commission considers that the power to conduct an internal body search for drugs should also only be exercisable after the suspect has been arrested.

In Volume II of this report the Commission noted the inadequate safeguards available to suspects under section 17 of the *Drugs Misuse Act*.[1] The Commission recommended in that volume that section 17 be amended by including requirements that:

- the approval of a magistrate be obtained where the suspect does not consent in writing
- the person be allowed to have present, where reasonable, two persons of his or her choice while the search is being conducted.

These recommended safeguards were based on those contained in section 259 of the *Criminal Code*.

The Commission is of the view that all of the safeguards in section 259, including the above proposals, should operate in respect of all body cavity searches and internal examinations carried out under section 17 of the *Drugs Misuse Act*. This will ensure that people suspected of drug offences are afforded the same rights and protection as those suspected of other offences under the *Criminal Code*.

26.7 Recommendation – Searches Under Section 17 of the *Drugs Misuse Act*

The Commission recommends that the safeguards applying to the conduct of intrusive procedures under section 259 of the *Criminal Code* also apply to intrusive procedures conducted under section 17 of the *Drugs Misuse Act*.

The Power to Search a Person in Custody

Both the common law and statute law empower police in certain circumstances to search a person who has been arrested.

Section 259(1) of the *Criminal Code* authorises a police officer of the same sex as the arrestee, or a medical practitioner acting at the direction of the police officer, to search a person who is in lawful custody upon a charge of committing an offence, and to take possession of anything that may afford evidence of the commission of the offence. This is separate from the examination and sample power pursuant to section 259(3).

Section 259(1) partly reflects the common law position with respect to the power to search a person who has been arrested. However, under the common law police are also empowered to seize items with which the person might seek to harm himself/herself or other persons (*Leigh v Cole* (1853) 6 Cox CC 329; *Lindley v Rutter* [1980] 3 WLR 660). The Commission considers that, in the interests of clarity, section 259(1) should be amended to reflect the common law position.

26.8 Recommendation – Power to Search a Person in Custody

The Commission recommends that section 259(1) of the *Criminal Code* be amended to authorise the police to search a person in custody upon a charge of committing an offence and seize items with which the person may seek to harm himself or herself or other persons.

CONCLUSION

This chapter has reviewed existing legislation governing body searches and examinations, particularly those provisions contained in section 259 of the *Criminal Code*. The main recommendations made in this chapter are that:

- The safeguards provided in section 259 should also apply to persons not under arrest who have consented to an examination.
- The power to take body samples and conduct examinations under section 259(3) only be available where the person has been arrested.
- The powers under section 259(3) only be available where the person has been charged with an indictable offence. A magistrate, in determining whether to authorise an examination or procedure under this section should also be required to consider factors such as the intrusiveness of the procedure and the seriousness of the offence.
- Police be explicitly authorised to transport a person in custody a reasonable distance, at the request of the medical practitioner or dentist, to have a procedure undertaken.

- The safeguards applying to intrusive procedures under section 259 also apply to section 17 of the *Drugs Misuse Act*.

- Section 259 be amended to make it clear that police have the power to search a person in custody.

CHAPTER TWENTY-SEVEN

FINGERPRINTS AND OTHER PARTICULARS

INTRODUCTION

Fingerprints have been used by the police for about a 100 years as a means of identifying individuals. Sir Samuel Griffith once described them as an "unforgeable signature" (*R v Parker* (1912) 14 CLR 861 at 683). Their use as a means of identification and investigation continues to be an integral part of policing in Queensland.

This chapter focuses primarily on the power of police to take fingerprints. It briefly considers police powers to take other particulars. Current law and practice in Queensland will be reviewed in order to address the following issues:

- under what circumstances should police be able to take fingerprints?
- what procedures should govern the destruction of fingerprints?
- how should the fingerprinting provisions apply to juveniles?
- what requirements should apply to other particulars, such as photographs and other types of prints taken by police as part of the investigative process?
- under what circumstances should police be able to use force to obtain a person's particulars?

CURRENT LAW AND PRACTICE IN QUEENSLAND

The Legal Framework

In Queensland, there is no power at common law to fingerprint a person or to take a record of other identifying particulars without that person's consent. There is also no general statutory power to fingerprint or take other particulars. Instead, fingerprinting is authorised under a variety of specific statutory provisions (see Appendix 15).

These various provisions differ in regard to such matters as:

- The point at which the taking of prints is authorised.

  For the most part, police power to take fingerprints and other particulars arises *after the arrest* of a person for an offence. However, some statutes also authorise the taking of prints after conviction where the court so orders [e.g. *Casino Control Act 1982, Gaming Machine Act 1991, Vagrants, Gaming and Other Offences Act 1931* (the *Vagrants Act*)].

- The rank of the police officer authorised to take the prints.

  The *Drugs Misuse Act 1986* provides that any police officer has the power to take prints. However, the *Police Service Administration Act 1990* limits authority to the officer in charge of the establishment.

- The nature of the particulars that may be taken.

  The *Gaming Machine Act* extends to voiceprints, photographs, fingerprints, palmprints, footprints, toeprints and handwriting, whereas the *Vagrants Act* only authorises the taking of photographs, fingerprints and palmprints.

- The purpose for which the prints may be taken.

  Some Acts (e.g. *Gaming Act 1850, Vagrants Act*) authorise the taking of prints only for the purpose of identifying the person. Others refer to the identification of the person *or* the investigation of an offence (e.g. *Drugs Misuse Act; Weapons Act 1990*).

- The requirements for the destruction of prints.

  Under some Acts, destruction may be required when a person is acquitted of an offence or a charge is not proceeded with. However, even this requirement varies within those Acts, with some requiring destruction automatically (e.g. *Invasion of Privacy Act 1971*); others requiring it in the person's presence (e.g. *Casino Control Act, Gaming Act, Vagrants Act*); and some requiring destruction only if the person requests it (e.g. *Gaming Machine Act, Police Service Administration Act*) or if the person requests it and the particulars are not otherwise required (e.g. *Drugs Misuse Act, Nature Conservation Act 1992*).

Of the various statutory provisions which authorise the taking of fingerprints and other particulars, section 43 of the *Vagrants Act* is the most widely used by police. It states:

> (1) Where a person has been arrested on any charge in respect of which a person may be arrested under this Act, or is in lawful custody for any offence punishable on indictment pursuant to the *Criminal Code*, or has been arrested for an offence against section 445, 446, 447, 448 or 448A of the *Criminal Code*, the officer in charge of police at the police station to which the person is taken after arrest or where the person is in custody, as the case may be, may take or cause to be taken all such particulars as may be deemed necessary for the identification of such person, including the person's photograph and fingerprints and palmprints.
>
> (1A) However if such person as aforesaid is found not guilty or is not proceeded against, any fingerprints or palmprints or photographs taken in pursuance of the provisions of this section shall be destroyed in the presence of the said persons so concerned.

This power is available in respect of people arrested for a wide range of offences – namely, offences under the *Vagrants Act* and the *Criminal Code*. The *Code* contains the bulk of indictable criminal offences under the law of Queensland.

When a person is arrested or in custody for an offence under another statute, police must look to that Act to see whether the taking of fingerprints or other particulars is authorised. For example, the *Drugs Misuse Act*, the *Weapons Act* and the *Casino Control Act* all authorise the taking of prints in certain circumstances. In contrast, the police have no authority to fingerprint a person who is arrested for an offence under the *Traffic Act 1949* because that Act has no fingerprinting provision. (See Appendix 15 for a more complete list of the statutory provisions authorising the taking of prints.)

Other Reviews in Queensland

In its final report (1992), the Criminal Code Review Committee recommended a general power to fingerprint and take other particulars of people arrested for any indictable offence. Section 267 of the draft Criminal Code prepared by the Committee states[22]:

> **Fingerprints, etc.**
>
> (1) Where a person has been arrested for any indictable offence, the officer in charge of police at the police station to which he or she is taken after arrest may take or cause to be taken all such particulars as may be deemed necessary for the identification of such person or the investigation of an offence, including prints of the person's hands, fingers, feet or toes, recordings of the person's voice, samples of the person's handwriting or photographs of the person and, except in the case of voice recordings and handwriting, he or she may use such force as is reasonably necessary to obtain such particulars.
>
> (2) If such person is later found not guilty or is not proceeded against or is discharged without a conviction being recorded, any such particulars taken for identification in pursuance of subsection (1) of this section shall be destroyed in the presence of the person from whom they were taken. (p. 126)

The Vagrants, Gaming and Other Offences Act Review Committee (1993, pp. 32–33) recommended that section 43 of the *Vagrants Act* be replaced with a new provision, based on section 267 of the draft Criminal Code. This provision would apply to any offence against the *Vagrants Act* or any other Act.

The Review Committee proposed that the power to take fingerprints or other particulars should also be available to police upon the Summons of a person for an offence, where ordered by a magistrate or upon the conviction of a person for any offence.

These proposals will be considered in more detail later in this chapter.

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22 The draft section is based on s. 23 of the *Drugs Misuse Act*.

Current Practice

In practice, fingerprints (including palmprints) are routinely taken upon arrest, except where the police have no power to take fingerprints – for example, in the case of *Traffic Act* offenders and those individuals arrested for a breach of bail or a breach of probation.[23] An arrestee who refuses to allow his or her prints to be taken is liable to be charged with hindering police.

The QPS has informed the Commission that it is current operational practice that three sets of fingerprint impressions are obtained from an arrested person. In some regions, a fourth set of fingerprints is taken and added to a limited collection held at the local level. The fingerprint documents are then forwarded to the QPS Fingerprint Section where a set of fingerprint impressions of sufficient quality is selected for coding by a fingerprint expert. Based on this examination, a master record is prepared and electronically entered into a national fingerprint database. The fingerprint file containing the master record, and all other fingerprint documents or parts of documents, are cross-referenced to the individual's criminal history and filed for future reference at the Fingerprint Section.

In the 1992/93 financial year, the QPS took 37,939 sets of fingerprints from persons who had been arrested. In March 1994 there were 465,734 sets of fingerprints held in the Fingerprint Section of the QPS, compared with 420,234 sets as at September 1991 (QPS 1991, and unpub. data). This means that in the space of 30 months 45,500 sets of prints were added to the databank – an average rate of almost 50 per day.

Other forms of identity (such as licences or identification cards) can be relatively easily manufactured. Moreover, some people arrested by the police do not carry any proof of identity.[24] By contrast, fingerprints provide a unique identifier with extraordinarily high reliability. This quality makes fingerprints a very important aid for investigating offences and maintaining accurate criminal records.

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23 Police also take fingerprints from people who apply for licenses, visas, etc. For instance, in 1992/93, prints were taken from 4,082 gaming machine licence applicants, 691 visa applicants and 520 Police Service applicants (unpub. data provided by the QPS). As the focus of this review is restricted to the exercise of police powers, the taking of prints for these other purposes will not be considered in this discussion.

24 According to the QPS submission (1991, p. 62) a 1988 study of the Victoria Police Fingerprint Bureau statistics revealed that, during the three month survey period, approximately nine per cent of offenders fingerprinted had given a name different to a previous record.

Fingerprints are used as part of the investigative process to:

- compare fingerprint impressions located at the scene of a crime with an existing collection of prints to enable police to identify a suspect

- compare prints found at a crime scene with prints belonging to a suspect in order to determine if there is a match and thereby inculpate or exculpate the suspect.

According to the QPS, in the 1990/91 financial year 11,220 sets of latent fingerprints were found at crime scenes visited by scenes of crime officers. In 2,805 cases, fingerprints were compared with fingerprints recorded in the databank, resulting in the identification and apprehension of 1,822 offenders (QPS 1991, p. 61).[25]

The police also use fingerprints extensively to manage criminal record data. Current practice in the QPS is for a person's criminal history to be indexed according to a unique identifying number. This number is generated from a fingerprint document and corresponds to a particular offence or series of offences. The number identifies a record which contains an individual's complete criminal history. To ensure integrity of criminal records, it is essential that each offence entered on a person's criminal history is supported by a set of fingerprints connecting the person with the offence.

Accurate criminal record data are very important for sentencing purposes. Some offences have a structured hierarchy of penalties which is related to the number of prior convictions which the offender has received for that or similar offences (e.g. *Traffic Act* (Qld) ss. 16(1A) – (1E) and 20). More generally, under the *Penalties and Sentences Act 1992* [s. 9(2)(f)] a court, when sentencing an offender, "must have regard to the offender's character". In determining the offender's character the court "may consider the number, seriousness, date, relevance and nature of any previous convictions" [s. 11(a)]. Where a person's criminal history is known to police the prosecution usually puts it before the sentencing court so that the court can take account of any relevant convictions. In cases where an accused disputes a conviction included in a criminal history, section 54 of the *Evidence Act 1977* provides that an affidavit of a fingerprint expert may be admitted as evidence of the convictions mentioned in the history. If there are no fingerprints on record connecting the person with the disputed offence and conviction such evidence cannot be given.

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25 The QPS did not provide any details on how these statistics were derived.

THE SCOPE OF THE FINGERPRINTING POWER

The Need for a Single Power

As outlined above, there are some significant differences between the various statutory provisions which deal with fingerprinting powers. The Commission considers that these diverse provisions should be replaced by a single statutory power. Similarly, the Vagrants, Gaming and Other Offences Act Review Committee recommended a fingerprinting power that would apply to all offences (1993, pp. 32–33). As previously argued by the Commission, a single power should help simplify the law, provide for greater consistency, and make the law more accessible to people.

In formulating a single power, the following issues need to be addressed:

- what standard of proof should be satisfied before a person can be fingerprinted?
- for what purposes should fingerprinting be allowed?
- for what offences should fingerprinting be allowed?
- at what points in the investigation and prosecution process should it be possible to take fingerprints?

Each of these issues will be considered in turn.

What Standard of Proof Should Apply?

In Queensland, police have the power to fingerprint people after arrest and (under some statutes) after they have been convicted of an offence. Police can only arrest someone where they have *reasonable grounds to suspect or believe that the person has committed a criminal offence* [emphasis added].[26] The police do not have a power

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26 Under the current law, many powers of arrest require a police officer to have reasonable grounds to believe that a person has committed the offence. In Volume III of this report, the Commission recommended a single legislative provision conferring a power of arrest. The threshold test for the exercise of that power included the requirement that a police officer has 'reasonable grounds to suspect' that a person has committed the offence. That test currently applies to some of the powers of arrest (CJC 1993b, p. 593).

to fingerprint a person where they only suspect that person of committing an offence, but do not have enough evidence to arrest him or her.

The QPS, in its submission, argued that the limitation of the fingerprint power to these circumstances could hamper the investigation of offences. The QPS sought a power to apply to a magistrate for an order to fingerprint suspects prior to arrest, using a lesser standard of proof than required for arrest. According to the QPS, such a power would assist the police, in appropriate cases, to obtain the evidence necessary to justify an arrest or to exclude a suspect at an earlier stage of the investigation.

The Commission acknowledges that a 'pre-arrest' fingerprinting power might be helpful in some investigations. However, the taking of fingerprints and other particulars from people and the recording and use of those particulars in criminal investigations may be seen as a substantial invasion of privacy. It has consistently been the Commission's view that powers of this kind should only be exercised by police where they have sufficient grounds to arrest a person for a criminal offence.[27]

For What Purposes Should Fingerprinting Be Allowed?

The two main purposes for which fingerprints may currently be taken in Queensland are identification (*Vagrants Act*) and investigation (*Drugs Misuse Act*, etc.). The term 'identification' is somewhat ambiguous, because it could mean identification:

- of the suspect as the perpetrator of the offence
- to confirm the name and other particulars given by the suspect
- of a person to determine whether he or she has a criminal history.

However, in practice the term 'identification' as defined in section 43 of the *Vagrants Act* has been interpreted as giving police the authority to routinely fingerprint almost everyone they arrest.

The Queensland Council for Civil Liberties and several other submissions argued that the fingerprinting provisions under the *Vagrants Act* are so broad that they allow for unjustified wholesale fingerprinting of people. One of the suggested ways of limiting the power of the police to take prints was to be more specific about the purpose for

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27 As discussed below, this is not to say that the Commission is of the view that the fingerprint power should only be exercisable at the point of arrest.

which prints could be taken. For example, some submissions argued that the police should only be able to fingerprint a suspect where fingerprints were found at the scene of the crime.

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

The Commission considers that the law should explicitly recognise that it is legitimate for police to take fingerprints to assist in maintaining accurate criminal records. A statutory provision to this effect would be preferable to using the ambiguous term 'identification'. The Commission agrees with the Criminal Code Review Committee and the Vagrants, Gaming and Other Offences Act Review Committee that police should also be explicitly authorised to take fingerprints for the purpose of investigating an offence.

The Commission recognises the legitimate privacy concerns that many people have about giving police a broad statutory power to fingerprint for record-keeping purposes. However, as discussed below, these concerns can be adequately addressed by implementing an effective regime for the destruction of the prints of people who are not found guilty of any offence.

For What Offences Should Fingerprinting Be Allowed?

A number of submissions received by the Commission argued that a power to take fingerprints cannot be justified in relation to all offences. In one submission it was claimed that fingerprinting powers are sometimes used in relation to minor offences as a means of degrading and humiliating people who have been arrested.

The Queensland Council for Civil Liberties argued that whilst there may be justification for fingerprinting persons arrested for serious offences under the *Criminal Code*, the widespread fingerprinting of persons arrested for a whole range of public order offences needed to be urgently reviewed. The Juvenile Advocacy Service also submitted that fingerprinting in such circumstances was unnecessary.

The Commission disagrees with these submissions. As emphasised, fingerprints play an important role in maintaining accurate criminal records. For the great bulk of offences, a person's prior convictions will be relevant to sentence. In some cases, prior convictions will also be relevant in determining the charge.[28] To restrict the taking of prints to a limited range of offences may mean that a person's identity and/or criminal history cannot be confirmed in cases where prior record may be relevant.

On the other hand, it needs to be acknowledged that the taking of fingerprints is an intrusive act which involves a person's attendance at a police station and some degree of coercion. Therefore some threshold should be defined, to avoid the possibility that people might otherwise be fingerprinted for very minor offences. Specifically, it is the Commission's view that the power to fingerprint should only be available in respect of:

- indictable offences contained in the *Criminal Code* or other statutes
- offences contained in the proposed Summary Offences Act which carry a prescribed penalty which includes imprisonment
- offences contained in the *Regulatory Offences Act 1985* which, if repeated, may result in the person being charged under the *Criminal Code*
- offences in other statutes which, upon repeat conviction, require the imposition of a mandatory term of imprisonment.

These criteria basically reflect the scope of the present powers, with the exception of the fourth category. This additional criterion has been included to accommodate simple offences which have a mandatory escalating penalty scheme for repeat offenders. For example, section 16 of the *Traffic Act* requires a term of imprisonment to be imposed upon an offender who is convicted three times within five years of a major drink–driving offence. In such cases, accurate criminal record data are vital to the determination of sentence.

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28 The Director of Prosecutions' *Guidelines Relating to the Prosecution of Offenders Under the Regulatory Offences Act 1985* recommend that a person be charged under the *Regulatory Offences Act* if he or she has not been convicted of a similar offence within the previous three years.

It is possible that there may be some offences in other Acts for which fingerprinting powers should also be available. However, no such offences were brought to the Commission's attention. If the power to fingerprint is to apply to any additional offences, it should be on a case by case basis, having regard to such factors as:

- whether a person's prior criminal record is likely to be a significant factor in the determination of penalty
- the severity of the penalty which is likely to be imposed on a person who has committed the offence
- the likelihood that difficulties will arise in establishing the identity of a person charged with the offence.

At What Point Should It Be Possible to Take Fingerprints?

Under current law, for most offences the police must arrest a person before they can fingerprint him or her. This requirement provides an inducement for police to arrest a person, rather than use an alternative procedure such as complaint and summons. The QPS itself acknowledged in its submission that, because there is no power to take fingerprints where a person is proceeded against by way of complaint and summons, in most instances police will choose to arrest the person.

As discussed in Volume III of this report (CJC 1993b), the Commission is strongly of the view that the use of the arrest powers should be kept to a minimum. To achieve this objective it is necessary, amongst other things, to make provision for police to take fingerprints for record–keeping purposes other than at the point of arrest. There are three possible ways of doing this:

- allow police to apply to have the defendant fingerprinted when he or she appears in court
- allow police to fingerprint a person following conviction
- allow police to issue a 'notice to attend for fingerprinting' when serving a summons or issuing a Field Court Attendance Notice (FCAN).

Each of these options will be briefly considered below.

Printing at the Time of a Court Appearance

In its submission, the QPS recommended that, at any court appearance by a person in answer to a notice to appear or summons, police should be able to take the fingerprints of that person "after an application to the court is made" (1991 p. 63).

Other submissions received by the Commission (e.g. the Queensland Law Society and the staff of the Legal Aid Office) opposed an automatic power to fingerprint a person who appears before a court in response to a summons or notice to appear. These submissions did agree, however, that fingerprints could be taken if, for example, the court before whom the person appears orders it, or if the person consents. In a separate submission, one member of the Queensland Law Society said that the court should only make the order for fingerprinting if there was some suggestion that the person might abscond or fail to appear.

The main benefit of giving police the power to apply at a court appearance for a defendant's prints to be taken is that police could then ensure that accurate record data were before the court for sentencing purposes. However, given that it may sometimes be necessary to obtain an adjournment for printing to take place, this may not be a very cost effective use of police or court resources. In addition, there will be occasions where the prosecution will need to have access to reliable criminal record data prior to charging, for example, in relation to offences for which a person could be prosecuted under the *Regulatory Offences Act*.[29]

Printing After Conviction

Another option is for police to print a person upon the order of a court after the person has been found guilty, as is currently allowed under some statutes, including the *Vagrants Act* [s. 43(2)]. This would help maintain the integrity of future criminal records, but would not assist in getting accurate criminal record data before the court – unless there was an adjournment between conviction and sentencing.

Notices to Attend for Fingerprinting

The Vagrants, Gaming and Other Offences Act Review Committee indicated that consideration should be given to the development of alternative procedures to arrest and summons (1993, pp. 32–33 and 27–30; compare CJC 1993b, pp. 605–610).

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29 See footnote 28.

The Commission has previously recommended the introduction of an FCAN scheme as an alternative to the complaint and summons process (CJC 1993b, p. 610). Under such a scheme, the police would be able to issue a person with an 'on-the-spot' notice requiring him or her to appear in court on a certain date. This procedure would be much quicker, and potentially much cheaper, than the traditional method of arresting a person, or issuing a complaint and summons.

In developing this recommendation, the Commission recognised that the absence of a complementary power to fingerprint would probably be an impediment to the use of FCANs. The Commission therefore suggested that any FCAN scheme should incorporate procedures to enable police, where appropriate, to obtain the fingerprints of the suspect. The Commission has been advised that in-the-field fingerprinting is a developing area and that the Australian Federal Police (AFP) has been using field fingerprinting for several years. The Commission considers that the use of such procedures should be carefully monitored with a view to determining whether they would be an effective method of obtaining the fingerprints of a person issued with an FCAN. If so, consideration should be given at some time in the future to introducing similar procedures in Queensland. In the meantime, the Commission believes that the most appropriate way to obtain the fingerprints of a person issued with an FCAN is to issue a notice requiring a person to attend at a police station to be fingerprinted. A similar procedure should apply where a complaint and summons is issued.

In the Commission's assessment, police reliance on arrest is most likely to be reduced if police in the field are empowered to issue notices to persons to attend at a police station for fingerprinting. For the reasons outlined above, there are practical problems with the other options of applying for an order at the time of a court appearance, or obtaining prints after a person has been convicted. The Commission has no objection to these options also being made available to police, but doubts whether they will be widely utilised and has concerns about their potential to cause delays in the system.

27.1 Recommendation – Power to Take Fingerprints

The Commission recommends that there be a single statutory power to fingerprint a person for the purposes of:

- **maintaining complete criminal records or**
- **the investigation of the offence for which the person was arrested, summonsed or issued with an FCAN.**

This power should be exercisable only:

- **following the arrest of the person or the issue of a summons or an FCAN to the person**
- **upon the order of a court at the time of the person's appearance before the court in answer to a charge, summons or FCAN, or**
- **upon the order of the court after the person has been found guilty of an offence by a court.**

The power should be available in respect of the following offences:

- **indictable offences (contained in the *Criminal Code* or other statutes)**
- **offences contained in the proposed Summary Offences Act which carry a prescribed penalty which includes imprisonment**
- **offences contained in the *Regulatory Offences Act* which, if repeated, may result in the person being charged under the *Criminal Code* and**
- **offences in other statutes which, upon repeat conviction, require the imposition of a mandatory term of imprisonment.**

WHO SHOULD HAVE THE POWER TO TAKE FINGERPRINTS?

As noted above, different provisions have different requirements regarding who can exercise a power to fingerprint.

The vast majority of fingerprints taken are authorised under the *Vagrants Act*. This provision limits authority to take fingerprints to "the Officer–in–Charge of police at the police station" to which the arrested person is taken. However, this power is routinely delegated to junior officers. In the circumstances, the Commission is of the view that it is appropriate that all police officers should have the power to fingerprint within the limits defined by the Commission's recommendations. The Commission's proposals acknowledge that the power will be exercised almost automatically on arrest. This is not an area where any significant exercise of discretion will be required (in contrast to the decision to take other particulars such as toeprints and voiceprints – see below).

27.2 Recommendation – Police Officers Authorised to Take Fingerprints

The Commission recommends that all police officers should have the power to take fingerprints within the limits defined by the Commission's recommendations.

DESTRUCTION OF FINGERPRINTS

Many of the public submissions expressed concern about the issue of the destruction of fingerprints and the circumstances in which that should take place. There seemed to be considerable agreement that police should not be required to destroy the prints of persons found guilty of an offence. On the other hand, the majority of submissions argued that police should be required – either on request or automatically – to destroy the prints of persons acquitted or not proceeded against. The QPS agreed that, subject to certain limitations, the prints of a person found not guilty, or not proceeded against, should be destroyed upon request. By contrast, the Director of Prosecutions argued that once a person has had an encounter with the criminal justice system the police should be able to keep that person's particulars, even if he or she was not found guilty of any offence. The Director submitted:

> Since [the prints] have been obtained under lawful authority, I can see no justification at all for a requirement that they be destroyed . . . A verdict of not guilty is not a proclamation of the person's innocence. It means no more than that the jury . . . has not been satisfied beyond a reasonable doubt that guilt has been established. (1992, p. 9)

The Criminal Code Review Committee and the Vagrants, Gaming and Other Offences Act Review Committee also recommended that provisions requiring the destruction of records should be included in the legislation.

As discussed above, there is little uniformity in existing legislative provisions concerning the destruction of fingerprints. The *Vagrants Act* currently requires that fingerprints be destroyed in the person's presence. This was also the proposal of the Criminal Code Review Committee. Some other legislation provides that where prints may be destroyed, destruction need only occur upon the request of the person whose prints were taken.

The QPS has informed the Commission that:

- fingerprints are destroyed only on receipt of a written request

- no arrangements exist for notifying persons of their right to request destruction

- in the 1992/93 financial year, only 96 requests for destruction of fingerprints were received (QPS unpub. data).

The Commission considers that provisions allowing for the destruction of fingerprints 'on request' are unsatisfactory. Only those persons with a sound knowledge of the relevant procedures or legislation are able to exercise the rights to destruction which are conferred under such provisions. In many cases, criminal defendants do not have the requisite knowledge to exercise such rights. A related difficulty with the requirement that prints be destroyed in a person's presence is that there is no obligation to destroy if the person is not present. Further, there is no power to procure the person's presence, nor any obligation to inform the person of this destruction requirement.

Given the relatively small percentage of persons charged who are not found guilty, the administrative cost of an automatic destruction mechanism is not likely to be appreciably greater than the existing 'request only' system of destruction. Such a destruction regime would satisfy a number of privacy issues and would act as a balance to the relatively broad powers to take prints which have been recommended in this report. The Commonwealth, Victoria, South Australia, Tasmania and the Northern Territory already make provision for automatic destruction of fingerprints.

Although destruction should be automatic, it is unrealistic to require that it be done immediately. At a minimum, there has to be provision for the QPS administrative processes to convey the result of the prosecution of the offence to the Fingerprint Bureau, and for destruction procedures to be activated. The Commission is not in a position to say precisely how long this should take, although on the basis of Victorian legislation it may be that about one month after a person has been acquitted or discharged will be sufficient.

Obviously, police should be able to retain prints for a longer period pending a decision whether or not to charge or to proceed with a charge. Victorian legislation provides for a six month time limit in such cases, after which destruction must occur. The Commonwealth and the Northern Territory specify a 12 month time limit for these situations.

The Commission is strongly of the view that the legislation should specify the timeframe in which automatic destruction should occur. The appropriate timeframe should be determined in conjunction with the QPS, but should be as soon as practicable.

27.3 Recommendation – Destruction of Fingerprints

The Commission recommends that the police be required to destroy the fingerprint records of a person automatically upon the expiration of a specified period after the person is not found guilty of the charge or if the person has not been charged or the charge is not proceeded with. Automatic destruction should apply to all hard copy records of fingerprints and entries on any electronic databases.

Ensuring Compliance with the Destruction Regime

Ensuring compliance with the requirement for automatic destruction of fingerprints is important. While the Commission does not doubt that the QPS would make every effort to comply with automatic destruction requirements, it is important, if public confidence in the process is to be preserved, that there be some independent oversight. One method would be to require the attendance of the person whose fingerprints are to be destroyed. However, as outlined above, this is a cumbersome and ineffective method of overseeing the destruction process. In the Commission's view an independent body, such as the Ombudsman or other independent agency, should be given legislative responsibility for overseeing the QPS's compliance with the destruction scheme The role of this person or body would involve ensuring that records are destroyed or removed from electronic databases where required within the proposed time frame. The details of a scheme to monitor compliance are beyond the scope of this report, but presumably the function could best be discharged by undertaking periodic 'audits'. Clearly, the monitoring body would need to have the statutory powers and resources necessary to perform its role effectively.

27.4 Recommendation – Independent Oversight of Destruction

The Commission recommends that an independent monitoring body be responsible for ensuring compliance with the destruction regime.

FINGERPRINTING OF JUVENILES

In theory, police can take fingerprints from juveniles pursuant to section 43 of the *Vagrants Act*, which authorises the taking of fingerprints from persons who have been arrested. However, the *Juvenile Justice Act 1992* provides that (except in the case of

a life offence) a proceeding against a child for an offence must be started either by complaint and summons or attendance notice and that *arrest should be used as a last resort* (ss. 4 and 21).

Currently, a police officer may arrest a child where the police officer believes on reasonable grounds that arrest is necessary to:

- prevent a continuation or repetition of the offence or the commission of another offence
- prevent concealment, loss or destruction of evidence relating to the offence.

A police officer may also arrest a child if the police officer believes on reasonable grounds that the child is unlikely to appear before the Children's Court in response to a complaint and summons or an attendance notice [s. 20(3)]. In a situation where a police officer does not know the identity of a juvenile, it may be that the officer can justify arrest pursuant to section 20(3) and then take fingerprints for the purpose of identification under the power conferred by section 43 of the *Vagrants Act*.

The Youth Affairs Network of Queensland and the Juvenile Advocacy Service submitted that persons under the age of 15 years should not be subjected to the criminalising processes of fingerprinting and photographing. The Juvenile Advocacy Service argued that if there are circumstances where fingerprinting is necessary, an application for a court order should be made. Both groups agreed that, for young people over the age of 15 years, fingerprinting should only be allowed in respect of certain offences where the fingerprints are relevant in establishing the commission of the offence. They also proposed that, in the circumstances where fingerprints are to be obtained, an independent person should be present with the young person.

The Youth Affairs Network of Queensland proposed that fingerprinting and photographing of juveniles 15 years and over should only take place after arrest or summons and in the presence of an independent person of the young person's choice. Further, such fingerprinting should be:

- restricted to specific offences referred to in consolidated legislation
- undertaken only where it is necessary to further the investigation of the offence with which the young person is currently charged
- undertaken only where the officer is not aware of any current records of this type already held by the QPS.

The Victorian *Crimes Act 1958* prohibits the fingerprinting of a child under 10 years of age [section 464L(1)]. Police can take fingerprints from juveniles under 15 years only on the order of a court. A child between the age of 10 and 15 years may be fingerprinted where the child:

- is believed on reasonable grounds to have committed; or
- has been charged with; or
- has been summonsed to answer to a charge for –

an indictable offence or certain scheduled summary offences if both the child and the parent or guardian consent [section 464L(2)]. Where consent is refused, the Children's Court may order fingerprinting after taking account of:

- the seriousness of the circumstances surrounding the commission of the offence
- the alleged degree of participation by the child in the commission of the offence
- the age of the child.

Section 464K authorises the taking of fingerprints of a juvenile over the age of 15 years in respect of indictable offences and other specified offences.

The Commission agrees that there should be no power to fingerprint a juvenile under the age of 10 years. Section 29 of the *Criminal Code* provides that such a juvenile is not criminally responsible; therefore, there can be no justification for taking prints in such cases.

The *Criminal Code* provides that there is a rebuttable presumption of criminal responsibility for juveniles from 10 to 15 years of age. The Commission considers that in these cases an order from the Children's Court should be required to fingerprint the juvenile unless the consent of the juvenile and the parent or guardian has been obtained. Further, an independent person should be present when the juvenile is fingerprinted. The court, in deciding whether to order prints, should have regard to factors such as those in the Victorian provision outlined above.

In the case of a juvenile aged 15 years and over, the adult provisions should apply, but there should be an independent person present, as required by the rules relating to juveniles in custody (CJC 1994b).

27.5 Recommendation – Fingerprinting of Juveniles

The Commission recommends that:

- **There be no power to fingerprint juveniles below the age of 10 years.**
- **In the case of juveniles aged 10 to 15 years, the consent of the juvenile and the parent or guardian be required before fingerprinting can take place. Where consent is refused, a Children's Court order must be obtained. Further, an independent person should be present when the juvenile is printed.**
- **Where a court order is required, the court should take account of the following factors in deciding whether to order fingerprinting:**
  - **the seriousness of the circumstances surrounding the commission of the offence**
  - **the alleged degree of participation by the child in the commission of the offence**
  - **the age of the child.**
- **In the case of juveniles aged 15 years and over, the adult provisions should apply, but an independent person should be required to be present when the prints are taken.**

When Should the Fingerprints of Juveniles Be Destroyed?

The Youth Affairs Network submitted that copies of a juvenile's fingerprints should be automatically destroyed if:

- the young person is found not guilty or the charge is not proceeded with; or
- two years pass from the time of the offence and the young person has not re-offended; or
- the young person reaches the age of 17.

The Network noted that the United Nations Minimum Standard Guidelines for the Administration of Juvenile Justice state that "records of juvenile offenders shall not be used in adult proceedings".

As indicated above, the Commission agrees that fingerprints should not be retained where the young person has not been found guilty, or the charge is not proceeded with. This is consistent with the Commission's recommendations for adult offenders. However, the Network's recommendation that all fingerprints of children be destroyed upon reaching the age of 17 years requires more consideration. Where a juvenile's previous convictions are relevant to sentence, which will be in virtually all cases in the Children's Court, record-keeping requirements necessitate that prints be retained. The Commission recognises that, once a person attains the age of 17 years and is within the jurisdiction of the adult courts, many convictions imposed on the person while he or she was a child will not be relevant. The adult courts are barred from considering childhood convictions by section 114(1) of the *Juvenile Justice Act*, except where a court ordered that a conviction be recorded or the Act deemed a conviction to have been recorded [s. 124(4)].

However, the Commission is of the view that it is appropriate to distinguish between the use against a person in adult proceedings of his or her juvenile criminal history and the use or retention for investigative purposes of records of fingerprints of people found guilty of offences as children, after they attain the age of 17 years.

It is a fact that some people who committed offences as children also commit offences as adults. For instance, it is possible that a juvenile offender may be found guilty of a number of offences (for example, break and enters) which, although they do not fall into the definition of 'serious offence' under the *Juvenile Justice Act* (as a result of which a conviction may be recorded), are nonetheless reasonably serious offences in terms of their impact on the wider community. To destroy all records of that person's fingerprints when he or she attains the age of 17 years would limit police access to information about known offenders for the purposes of investigation of offences.

The Commission is therefore satisfied that fingerprints of persons found guilty of offences as children should be retained after they attain the age of 17 years. However, it also recognises that for the vast majority of people who commit offences, their offending behaviour peaks in the late teens and early twenties, after which the probability of offending drops significantly. It therefore, seems appropriate to allow a period of time at the expiration of which, if the person has not been found guilty of further offences, his or her fingerprints should be destroyed. This approach is broadly consistent with the scheme of the *Criminal Law (Rehabilitation of Offenders) Act 1986* and the Victorian legislative provisions for the destruction of fingerprint records of people found guilty of offences as juveniles (s. 464K *Crimes Act*).

The Commission's view is that, if a person is not found guilty of any other offence during a period of 5 years from the date of being found guilty of an offence as a juvenile, or the expiration of a sentence imposed while a juvenile, the person's fingerprints should be destroyed. The exception to this recommendation is where a person is found guilty of an offence as a juvenile, and has a conviction recorded against him or her under the provisions of the *Juvenile Justice Act*. In those cases, the Commission is satisfied that the offences for which the conviction was recorded must have been sufficiently serious to justify the recording of a conviction. In such circumstances the destruction of the person's fingerprints would not be appropriate.

27.6 Recommendation – Destruction of Juvenile's Fingerprint Records

The Commission recommends that the fingerprint records of a juvenile be destroyed automatically if the juvenile is not found guilty or the police do not proceed with the charge.

The Commission further recommends that:

- **where a juvenile has been found guilty of one or more offences but does not have a conviction recorded against him or her, and**

- **the juvenile has not been found guilty of an offence as an adult**

the fingerprint records of the juvenile be destroyed upon the expiration of five years from the date of sentence or from the expiration of the sentence for the last offence of which the juvenile was found guilty.

Other Particulars

A number of other particulars are sometimes taken by police for identification or for investigative purposes. The following brief discussion is concerned with photographs, footprints and toeprints, voiceprints, and samples of handwriting.

Next to fingerprints, photographs are the methods most frequently used to identify an offender. The major advantages of photographs are that the technology is widely available, inexpensive and does not depend on expert interpretation. The major disadvantage, of course, is that an individual's appearance can change, even over a

short period of time. This factor limits the reliability of a photograph for identification purposes, especially in the longer term.

The QPS has informed the Commission that all persons who are fingerprinted are photographed at the same time, as part of an integrated process. In most cases, two photographs of the subject are taken and the film forwarded to the QPS Photographic Section for processing. All of the negatives are developed and a single photograph produced for permanent retention at the Photographic Section. Reprints from the original negative are returned to the originating station. Reprints are available for investigative purposes upon request by members of the QPS or other law enforcement agencies.

The existing statutory provisions allowing for fingerprinting also allow police to photograph a suspect for the purpose of identification. The Commission accepts that this is a legitimate purpose for taking photographs. As with fingerprints, if a person is not found guilty, or the charge is withdrawn, the photograph should be automatically destroyed.

Other types of prints, such as footprints and toeprints or voice and handwriting samples, are only useful if there is evidence against which they can be matched. Accordingly, there is no need for a broad power to obtain such particulars. Rather, police should be authorised to obtain such prints or samples only where this may assist in the investigation of the offence for which the person has been arrested or summonsed, or for which an FCAN has been issued.

The decision as to whether such prints or samples are necessary should be made by the Custody Officer[30] or, if the Commission's recommendations in this respect are not accepted, by the Officer-in-Charge of the station. This officer may order the taking of the prints after being informed of the evidence in the possession of the police and determining that the prints or samples are likely to be of evidentiary value.

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30 See Chapter 22 of Volume IV (CJC 1994b).

27.7 Recommendation – The Power to Take Other Particulars

The Commission recommends that the single statutory power to take fingerprints and the associated destruction requirements also apply to the taking of photographs. The Commission further recommends that the proposed Custody Officer, or Officer-in-Charge of the station, be authorised to order the taking of footprints or toeprints, voiceprints or handwriting samples, where:

- **a person has been arrested or issued with an FCAN or summons for an offence**
- **a print or sample is necessary to assist in the investigation of the offence.**

USE OF REASONABLE FORCE

In most cases, suspects can be expected to co-operate with a police request to provide particulars. However, resistance may be encountered from time to time. The Commission agrees with the Criminal Code Review Committee and the Vagrants, Gaming and Other Offences Act Review Committee that, except in the case of voice recordings and handwriting samples, police should be explicitly authorised to exercise such force as is reasonably necessary to obtain the particulars. This authorisation should not extend to voice and handwriting samples because of the practical difficulty, if not impossibility, of obtaining a reliable sample of a person's voice or handwriting by the use of force.

27.8 Recommendation – Use of Reasonable Force

The Commission recommends that, except in the case of voiceprints and handwriting samples, police be able to exercise such force as is reasonably necessary to obtain the particulars required.

CONCLUSION

This chapter has reviewed police powers to take fingerprints and other particulars. The main recommendations are that:

- there be a single statutory power authorising all police officers to take the fingerprints of a person for the purposes of:
  - maintaining complete criminal records or
  - investigating the offence for which the person was arrested, summonsed or issued with an FCAN.
- this power be exercisable:
  - following the arrest of the person or the issue of a summons or an FCAN to the person
  - upon the order of a court at the time of the person's appearance before the court in answer to a charge, summons or FCAN, or after the person has been found guilty of an offence.
- the power be available in respect of:
  - indictable offences contained in the *Criminal Code* and other statutes
  - offences contained in the proposed Summary Offences Act which carry a prescribed penalty which includes imprisonment
  - offences contained in the *Regulatory Offences Act* which, if repeated, may result in the person being charged under the Criminal Code
  - offences which upon repeat conviction require the imposition of a mandatory term of imprisonment.
- the police be required to destroy the fingerprint records of a person automatically upon the expiration of a specified period after the person is not found guilty of the charge, or if the person has not been charged or the charge is not proceeded with

- an independent monitoring body be responsible for ensuring compliance with the destruction regime.

With respect to juveniles, the Commission has recommended that:

- There be no power to fingerprint juveniles below the age of 10 years.

- In the case of juveniles aged 10 to 15 years, the consent of the juvenile and the parent or guardian be required before fingerprinting can take place. Where consent is refused, a Children's Court order must be obtained. Further, an independent person should be present when the juvenile is printed.

- In the case of juveniles aged 15 years and over, the adult provisions apply, but an independent person should be required to be present when the prints are taken.

- Where a juvenile has been found guilty of one or more offences but does not have a conviction recorded against him or her, and the juvenile has not been found guilty of an offence as an adult, the fingerprints of the juvenile be destroyed upon the expiration of five years from the date of sentence or from the expiration of the sentence for the last offence of which the juvenile was found guilty.

Finally the Commission has recommended that:

- the single statutory power to take fingerprints and the associated destruction requirements also apply to the taking of photographs

- the proposed Custody Officer, or Officer-in-Charge of the station, be authorised to order the taking of footprints or toeprints, voiceprints or handwriting samples, where:

  - a person has been arrested or issued with an FCAN or summons for an offence

  - a print or sample is necessary to assist in the investigation of the offence

- except in the case of voiceprints and handwriting samples, police be authorised to exercise such force as is reasonably necessary to obtain the particulars required.

CHAPTER TWENTY-EIGHT

IDENTIFICATION BY EYEWITNESSES

INTRODUCTION

A variety of investigative techniques may be used to help determine whether a suspect is the perpetrator of an alleged crime. Chapters Twenty-six and Twenty-seven have examined the taking of body samples for forensic analysis and fingerprints. This chapter focuses on eyewitness identification.

The main methods available to police to establish if a witness to a crime can identify the person who committed the offence are:

- an identification parade (or 'line-up'), where the suspect is being paraded in a line with 11 other persons of the same sex and approximately the same age and appearance and the witness is asked if he or she can see the offender
- a group identification, where a witness is taken to a place where the suspect is present with many other people and the witness is asked if he or she can see the offender[31]
- a photographic identification, where the witness is shown photographs of the suspect and 11 other persons of similar appearance and asked if he or she can identify the offender's photograph
- a confrontation arranged between a suspect and a witness to determine whether the witness can identify the suspect as the perpetrator of the alleged offence
- a 'dock' identification, where a witness, on entering a court to give evidence against an accused, is asked if the offender is present in the court.

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31 Sometimes a group identification uses a video of a suspect among numerous other persons at a particular place e.g. a busy train station.

The failure to use identification procedures prior to trial, in cases where eyewitnesses are available, may greatly reduce the cogency of identification evidence. Further, if there is a mistake in identification the consequences may be serious. Hence, it is essential that when identification procedures are employed they are conducted properly and fairly.

This chapter examines:

- current law and practice in Queensland concerning identification parades
- issues relating to identification parades
- alternative methods of eyewitness identification
- statutory regulation of eyewitness identification procedures.

IDENTIFICATION PARADES: CURRENT LAW AND PRACTICE

The courts consider that a correctly conducted identification parade is the preferred method of eyewitness identification of suspects. In *Alexander v The Queen* (1980–1981) 145 CLR 395, a leading High Court authority, Gibbs CJ (pp. 400–401, with whom Mason and Aicken JJ agreed) said:

> The value of holding an identification parade is not only that, if properly carried out, it provides the most reliable method of identification, but also that it is necessary to hold it in the presence of the accused, who is . . . able to observe . . . any unfairness in the way in which the parade was conducted, or any weakness in the way in which the witness made the identification. However, . . . it seems to me impossible to say that the admissibility of evidence of a prior . . . identification depends on the fact that an identification parade was held. [A photo-identification] would be equally admissible . . . There are, however, two grounds of objection to the proof of identification by means of police photographs. In the first place, the accused . . . has no means of knowing whether there was any unfairness in the process or whether the witness was convincing in . . . [making] the identification. Secondly, the production in evidence at the trial of photographs coming from the possession of police is very likely to suggest to the jury that the person photographed had a police record . . .
>
> For these reasons, it is most undesirable that police officers who have arrested a person . . . should arrange for potential witnesses to identify that person except at a properly conducted identification parade. Similarly, speaking generally, an identification parade should be held when it is desired that a witness should identify a person who is firmly suspected to be the offender.

The Queensland Court of Criminal Appeal considered these matters in *R v Beble* [1979] Qd R 278 where Hoare J (p. 283, with whom W B Campbell and Andrews JJ agreed) said:

> It is undoubtedly true that when identification is likely to be in issue there should be a line-up or some such procedure to avoid the obvious dangers of a person too readily identifying a suspect as the actual perpetrator of an offence. In some circumstances the absence of a line-up and incorrect use of photographs may destroy the effectiveness of identification evidence. However, the identification by each individual witness, while important in itself, should not be regarded in isolation from other evidence adduced at the trial.

Current QPS internal policy reflects the common law position that identification parades are the preferred method of identification of suspects. Commissioner's Circular 64/92 provides:

> Where there are witnesses to offences, identification parades will be the preferred method of identifying offenders.

The annexure to the Commissioner's Circular sets down guidelines for the conduct of identification parades. These guidelines need only be followed where it is practical to do so. The main guidelines are:

- At the earliest possible time, the witness's description of the offender shall be recorded in full and signed by the witness.
- A suspect should be warned that he or she is not obliged to take part in an identification parade.
- A suspect should be informed prior to the identification parade that he or she may have a legal representative, relative or other suitable person present at the identification proceedings, provided this person can attend within a reasonable time and does not interfere with proceedings.
- Where it is not practicable to use an identification parade, officers are to document difficulties to enable reasons to be tendered in court. In addition, documentation is to be forwarded to the Policy Branch[32] of the QPS to allow comprehensive assessment of any difficulties to assist with future legislative development.

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32 This Branch now forms part of the Service Operational Policy/Procedures area of the Policing, Policy and Strategy Branch of the QPS.

In practice, identification parades are rarely conducted by QPS members. Police officers have informed the Commission of the following practical difficulties associated with parades:

- a suspect cannot be compelled to take part in an identification parade
- it is often difficult to obtain the assistance of 11 other persons of the same sex, and of similar age and appearance to participate in a parade.

In Queensland, the courts have often expressed "astonishment", "disquiet" and other disapproval at the infrequency with which identification parades are used (*R v Beble* [1979] Qd R 278 (Hoare J at 238); *R v Kern* [1986] 2 Qd R 209 (Derrington J at 210); *R v Corke* (1989) 41 A Crim R 292 (Derrington J at 293–295); *R v Currie* (unreported, CA 83/93, 8 March 1994: Macrossan CJ and Davies JA at 4).

IDENTIFICATION PARADES: ISSUES

The following discussion considers three issues concerning identification parades:

- should police be able to compel a suspect to participate in an identification parade?
- should police have the power to compel non–suspects to participate in an identification parade?
- should police be required to conduct an identification parade at the suspect's request?

Should Police Be Able to Compel a Suspect to Participate in an Identification Parade?

As stated, the Commissioner's Circular 64/92 provides that a suspect should be warned that he or she is not obliged to take part in an identification parade.

Some police officers, in individual submissions, called for police to be given a power to compel a suspect to participate in an identification parade. Other submissions, including the QPS submission, argued that compulsory identification parades would be impractical. The Bar Association of Queensland submitted that a power to compel a suspect to participate in an identification parade would be inconsistent with the

presumption of innocence and the right to refuse to answer questions or co–operate with police. Some submissions noted that it is in an innocent suspect's interests to participate in a parade, but that it should be the suspect's decision to take part.

The major difficulty with compelling suspects to participate in identification parades is that the suspect who does not wish to co–operate can undermine the whole procedure by drawing attention to himself or herself. An unwilling line–up participant could deliberately attract the notice of the viewer. This would undermine the evidentiary value of any identification obtained, as the defence could argue that the witness only identified the suspect because of the suspect's behaviour.

It could be argued that only the guilty suspect would attempt to interfere with the conduct of an identification parade in this way. However, some innocent suspects may also doubt the fairness of an identification parade and seek to interfere with its conduct.

28.1 Recommendation – Suspect's Participation in an Identification Parade

The Commission recommends that a suspect not be compelled to participate in an identification parade.

Should Police Have the Power to Compel Non–Suspects to Participate in an Identification Parade?

The Commissioner's Circular, which is based on case law, requires that the suspect be placed with 11 other persons, of the same sex and of similar age, height, build, general appearance and (where possible) attire to the suspect. Many submissions from individual police officers pointed out that it can be difficult to assemble 12 persons of similar appearance, particularly outside of the larger population centres. Also, a common complaint was that individuals who were invited to participate in identification parades could – and often did – refuse to take part.

Some submissions argued that these problems could be overcome if police had the power to compel members of the public to participate in an identification parade. However, the Commission does not agree with this approach. Compelling persons to participate in an identification parade would give rise to several difficulties. What sanction would apply if the person refused? Would the requirement mean the detention of innocent persons who might be put in a position where they themselves

may become suspects? Requiring innocent members of the community who have been randomly selected by the police to participate in an identification parade would be unjustified and unfair.

The preferred option is to encourage persons to participate. For example, in the United Kingdom parade requirements are advertised through the Department of Social Security. Persons meeting the required description are paid a modest hourly remuneration for their assistance. The LRCC has also suggested that line-up participants be paid a nominal fee, just as witnesses and jurors are provided with an honorarium as partial compensation for the inconvenience caused to them (LRCC 1983, pp. 148–149). The Commission considers that a similar approach should be adopted in Queensland. The details of such a scheme are beyond the scope of this report.

28.2 Recommendation – Participation of Members of the Public in an Identification Parade

The Commission recommends that:

- **participation in an identification parade continue to be on a voluntary basis only**

- **to encourage participation, a scheme be developed whereby participants in an identification parade are paid a suitable fee for their assistance.**

Should Police Be Required to Conduct an Identification Parade at the Suspect's Request?

The Commissioner's Circular requires that identification parades be used where possible. However, there is no duty on a police officer to conduct an identification parade, not even at the request of the suspect.

The Lucas Inquiry considered the question of identification parades in 1977 and stated that:

> . . . in many cases, identification parades are held only when the police think it will benefit their case. When they think it will not benefit their case, it is not attempted, or the cruder form of direct confrontation may be used. In court, the failure to hold an identification parade may be blamed on the accused. (pp. 127–131)

Recent amendments to the *Commonwealth Crimes Act*[33] provide that an identification parade may be held if the suspect agrees, and must be held if the suspect requests it and it is reasonable in the circumstances. The United Kingdom *Police and Criminal Evidence Act 1984* (*PACE Act*) (Code of Practice D) also provides that a parade must be held if the suspect requests it and it is practicable.

An independent, properly conducted line-up procedure may benefit the innocent suspect and exculpate him or her in cases where identification is an issue. Police should therefore be obliged to hold a parade, provided that it is practicable to do so, where identification is in issue and the suspect is prepared to co-operate. Where a parade is not practicable, a written record should be made of attempts made to arrange a parade and the reasons why one was not conducted. This information should be recorded in the Custody Index (see CJC 1994b, pp. 727–8).

28.3 Recommendation – Requirement to Conduct an Identification Parade

The Commission recommends that:

- **the police be required to conduct an identification parade provided that it is practicable to do so, where identification is in issue and the suspect is prepared to co-operate**

- **where it is not practicable to hold an identification parade, the attempts made and the reasons why it was not practical be recorded in the Custody Index.**

33 The *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cwlth) s. 3ZM.

ALTERNATIVE METHODS OF IDENTIFICATION

As discussed above, the courts consider identification parades to be the preferred method of identification. However, where a suspect refuses to participate in a parade, or it is not practicable to conduct a parade, there are alternative means of identification. These include:

- confrontations
- dock identification
- group identification
- photographic identification.

Confrontations and dock identifications have been heavily criticised by the courts (*Alexander v The Queen* (1980–1981) CLR 395 at 399 per Gibbs CJ). The QPS has issued instructions to police officers forbidding the use of confrontation as a method of establishing identification, except in exceptional circumstances. There is also little or no evidentiary value in having a person identified by a witness when the suspect is in the dock of the court. At that stage the witness is certainly aware that the person is under suspicion. Although in-court identification must occur as part of the trial, it is greatly strengthened if the witness can testify to having identified the accused at some stage beforehand.

According to the Commissioner's Circular, group identification is the preferred alternative to an identification parade. The Circular provides:

> Where a suspect refuses to take part in a parade, investigating officers are to attempt to have the witness identify the suspect among a large group of other members of the public. Court buildings are to be avoided if at all possible.

However, there are often practical difficulties associated with group identification. For the identification to be reliable, the witness must be able to view the suspect as part of a large group of people, and in circumstances which ensure that the suspect is not the subject of unnecessary attention. One police officer reported taking a video of a large number of people arriving for work at a factory. The witness then identified the suspect from the video. This was a very sound strategy, but it is often not possible for police to obtain this type of material, especially at relatively short notice.

Another alternative to an identification parade is photographic identification. This method of identification requires the witness to be shown a collection of photographs[34] and asked whether he or she recognises the suspect's picture. This method of identification can be used for two main purposes:

- To assist the police in the detection of an offender, where that person is still at large and unknown to the police (e.g. by asking the witness if he or she recognises anyone from amongst a collection of 'mug shots').

- To obtain eyewitness identification evidence after the alleged offender has been taken into custody, or otherwise has become a definite suspect in the eyes of the police. In this case, the witness would be provided with a collection of photographs which included a picture of the suspect, with a view to seeing whether the witness can 'pick out' the suspect.

The use of photographic identification for the latter purpose was considered at some length by the High Court in *Alexander v The Queen* (1980–1981) 145 CLR 395. In this case, the majority of the court agreed that an identification based on photographic identification could be admitted as evidence, subject to the trial judge's discretion "to exclude any evidence if the strict rules of admissibility operate unfairly against the accused" (p. 402, per Gibbs CJ). However, the members of the court raised several objections to the use of photographic identification, and made it clear that this procedure should only be employed where it was impractical to conduct an identification parade. The three main concerns expressed by the court were that:

- When a photographic identification is made, the suspect will of necessity be absent, and so will have "no means of knowing whether there was any unfairness in the process or whether the witness was convincing in the way in which he made the identification" (p. 400, per Gibbs CJ).

- If a police photograph of the accused is shown to the jury in the course of the trial (as evidence that the witness made the identification) there is a risk that the jury will conclude that the person has a police record, probably for the kind of offences in question.

- There is also a risk that, "once a witness has seen a photograph which he links with the person seen he . . . [may] substitute the photographic image for his recollection" (p. 426, per Mason J). This is sometimes referred to as a 'displacement effect'.

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34 An alternative is to use "still" video shots instead of photos.

As indicated, the Commission accepts that identification parades should continue to be the preferred form of identification. However, provided the appropriate procedures are followed, it should be possible to overcome most of the concerns which the High Court expressed in relation to the use of photographs. For instance, the problem presented by the accused being absent from the photographic identification can be dealt with by requiring the police to video-tape the procedures. This should enable a court to evaluate the fairness of the process and the degree of confidence with which the witness made the identification. Such evidence could also be of assistance in assessing the likelihood of there having been a 'displacement effect'. (Arguably, where the witness is hesitant in his or her initial identification, the risk of displacement occurring will be greater.) The problem of the police photograph being prejudicial when put before the jury can be addressed by discouraging police from relying on police files as a source of photographs. Thus, if the accused's photo was simply one of a range of photos taken of people in the street, or in some other public place, the jury would be less likely to infer that the accused must have a criminal record.

It appears that some Queensland police officers have already implemented these practices in relation to photographic identifications. For instance, a solicitor has brought to the Commission's attention the identification procedure adopted by police in a recent murder case. The police obtained some 50 photographs taken at random in the community by a surveillance police officer. Those photographs were then laid out on a table for the witnesses to view and each witness's examination of those photographs was video-taped. In the Commission's view, provided that such procedures are followed, there should be no objection to the use of photographic identifications in appropriate circumstances.

In summary, the Commission considers that the legislation should specify that, where it is impractical to conduct an identification parade, the police should be able to use a group identification or photographic identification – provided that the procedure was properly conducted. To ensure that the process was conducted fairly, the police should be required to video-tape the conduct of those procedures. Consistent with current QPS policy, this requirement should also apply to identification parades.[35]

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35 The Annexure to the Commissioner's Circular provides that, where resources are available, the conduct of identification parades should be electronically recorded and, if possible, video-taped. This is in addition to the requirement that the police officer conducting the identification parade be responsible for keeping a comprehensive record of the proceedings.

28.4 Recommendation – Use of Methods Other Than Identification Parades

The Commission recommends that where it is impractical to conduct an identification parade, the police conduct a group identification or photographic identification.

28.5 Recommendation – Video-taping of Identification Procedures

The Commission recommends that police be required to video-tape any identification procedure involving an eyewitness.

STATUTORY REGULATION OF IDENTIFICATION PROCEDURES

As outlined above, the conduct of eyewitness identification procedures is currently regulated by the common law and by internal QPS policy rather than by legislative provisions. For instance, the Commissioner's Circular sets out guidelines for the conduct of identification parades but these guidelines need only be used where it is practical to do so.

In its submission, the QPS recommended the development of procedural guidelines for the conduct of identification parades. However, the QPS argued that this should be done by administrative regulation rather than by statute.

The Lucas Inquiry (1977, pp. 128, 130) recommended that some aspects of identification parades should be the subject of internal policy instructions and others the subject of legislative provisions.

The Gibbs Committee (1991, p. 122) recommended that identification parades should be regulated by statute rather than being set out in police standing orders or general instructions. The Commonwealth Government has acted on the Committee's recommendation in introducing the *Crimes (Search Warrants and Powers of Arrest) Amendment Act*, which regulates identification procedures. Further, in the United Kingdom, provisions for the identification of persons have been shifted from Home Office Circulars to Code of Practice D, which forms part of the *PACE Act*.

The Commission agrees with the Gibbs Committee's view that:

> If the procedures are approved by Parliament they become open to debate and so are likely to achieve a greater measure of fairness and, if the statutory procedure has been followed, arguments regarding admissibility are likely to be avoided. (1991, p. 122)

28.6 Recommendation – Legislation Governing Identification Procedures

The Commission recommends that the regulation of identification procedures be the subject of legislation.

CONCLUSION

This chapter has reviewed the law and practice concerning procedures for identification by eyewitnesses and has recommended that:

- identification parades remain the preferred form of identification by eyewitnesses
- police not be given power to compel suspects or others to participate in parades
- a scheme be developed whereby participants (other than the suspect) be paid a nominal fee
- where a suspect requests a parade, police be required to conduct one, where practicable
- where it is not practicable to conduct a parade, the attempts made to conduct the parade, and the reasons why one could not be arranged, be recorded in the Custody Index
- group identification or photographic identification be used where a parade cannot be conducted

- police be required to video–tape any identification procedure involving an eyewitness
- procedures for identification by eyewitnesses be the subject of legislation.

CHAPTER TWENTY-NINE

CRIME SCENE PRESERVATION

INTRODUCTION

When an offence is reported, police typically respond by proceeding to the location of the offence. Where necessary, they will endeavour to seal off the area so that all available evidence which might assist in the investigation of the offence is preserved.

The QPS, in its submission to the Commission, stated that it is often the case that valuable scientific evidence is lost to investigators due to the actions of persons accessing the crime scene. For example, a person might unintentionally destroy fingerprints by touching items at a crime scene, or damage foot impressions or minute forms of evidence, such as hair, semen, or blood spots, simply by walking over them. The QPS proposed that, in order to deal with such problems, police should be given a power to preserve the scene of a crime to protect evidence from intentional or unintentional damage or destruction.

In the majority of cases, the exercise of a power to preserve a crime scene involves no more than protecting the scene from interference or damage caused by onlookers and media representatives. However, it is important that the role and duties of police in these cases should be made clear.

This chapter addresses four issues:

- are existing powers adequate?
- should the police be given explicit legislative authority to take action necessary to preserve a crime scene in a public place?
- should the police have the power to enter private property to preserve a crime scene?
- under what circumstances should police have the power to exclude occupiers/invitees from the crime scene?

ARE EXISTING POWERS ADEQUATE?

Under the common law and existing statutory provisions, the police do not have clear authority to prevent damage or disturbance to a crime scene, or to exclude persons from the crime scene. Police, like everyone else, are entitled to enter and remain on public property. However, there is no specific statutory authority which allows police to take action to protect a crime scene on public property by sealing off the area and giving directions to persons to leave, or not enter, the area. At present, the only options available to police are to:

- charge a person with obstructing a police officer in the performance of the officer's duties pursuant to section 10.20A(2) of the *Police Service Administration Act 1990*[36]

- charge a person with destroying evidence, pursuant to section 129 of the *Criminal Code*.

The QPS submission argued that such measures do not assist in the preservation of evidence and merely punish a person after the event for disturbing or destroying evidence.

The QPS submitted that, as a matter of practice, police generally rely on a liberal reading of the functions of a constable at common law for authority to preserve a crime scene. Those common law functions have been incorporated into the *Police Service Administration Act* and include the "detection of offenders and bringing of offenders to justice" [s. 23(d)].

According to the QPS submission, senior officers of the scientific and technical sections of QPS, and regional 'scenes of crime' officers, had identified a number of problems including:

- The complete or partial destruction of evidence by inadvertent actions of persons at crime scenes.

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36 'Obstruct' means hinder, resist or attempt to obstruct [s. 10.20A(1) of the *Police Service Administration Act*].

- The wasting of crime scene officers' time due to the need to identify and eliminate material introduced to a crime scene subsequent to the commission of an offence, especially fingerprints and footprints. Concern was also expressed about the distraction caused by the presence of non–essential persons, possibly resulting in less efficient examinations.

- The possibility that crime scene officers may be exposed to civil litigation if the officers are not clearly authorised to take steps to preserve the scene.

The QPS submission estimated that difficulties in preserving the scene of a crime arose in three out of five major crime scenes and one out of five minor crime scenes, although the submission did not indicate how these estimates were obtained.

The QPS called for police to be given clear statutory authority to be able to remove or exclude persons from a crime scene for the time required to preserve and take possession of evidence which may assist in the investigation of an offence. The QPS also proposed that the police be given a power of arrest where a person refused to leave a crime scene after being warned not to enter. The QPS recommended that police should only close off a crime scene for such time as is reasonably necessary to complete an investigation, examination, test or evidence gathering procedure, and that any evidence seized be dealt with in a similar manner to property seized under a warrant.

On the other hand, the Queensland Law Society maintained that the existing law regarding crime scene preservation seemed adequate. The Society submitted that if a person is to be removed or excluded it should only be by order of a court and on proper grounds. The Legal Aid Office supported this submission and argued that if such a power were to be given to the police, it should only be available where an offence carrying a maximum penalty of life imprisonment had been committed. Furthermore, the exercise of this power should be subject to review by the courts in the same manner as search warrants.

The Commission accepts that the powers currently used by police to preserve crime scenes are not adequate in all circumstances. However, care must be taken in giving police powers which may infringe on the rights of individuals. The extent to which an individual's rights are affected will, in turn, depend upon such matters as whether the proposed entry by police is onto public property or private property and whether the person sought to be excluded from the property has an interest in the property. These and related issues will be addressed in the following discussion.

SHOULD THE POLICE BE GIVEN EXPLICIT LEGISLATIVE AUTHORITY TO TAKE ACTION NECESSARY TO PRESERVE A CRIME SCENE IN A PUBLIC PLACE?

In the case of a crime scene located on public property, the right of the community to use, and move freely in, a public place must be balanced against the community interest in police having powers to facilitate the investigation of crime. In the majority of cases the exercise of a crime scene preservation power would simply entail protecting the scene from damage caused by onlookers and media representatives. The Queensland Law Society suggested that the present law "provided adequate protection" for the preservation of evidence and exhibits. However, the Commission is of the view that police should have clear legislative authority to define and mark out a crime scene area in a public place and to give reasonable directions to protect a crime scene. This authority should include the power to remove and/or exclude persons from that area for a period necessary to enable police to examine the scene. Where a person does not comply with a reasonable direction and has been warned of the consequences of non–compliance, he or she should be liable to be arrested and charged with obstructing a police officer in the performance of the officer's duties. In the Commission's view:

- the proposed power would involve a minimal and temporary restriction on the rights of members of the community

- the encroachment on public rights to use public space is negligible compared with the potential benefits of the proposed power, particularly in view of the fact that a power to remove and exclude people from a crime scene would be exercised for only a limited time and over a limited area.

29.1 Recommendation – Preserving a Crime Scene in a Public Place

The Commission recommends that:

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

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

SHOULD POLICE HAVE A POWER TO ENTER PRIVATE PROPERTY TO PRESERVE A CRIME SCENE?

A crime scene located on private property, as opposed to a public place, presents a more complex set of problems and raises different competing rights and interests. The privacy of an individual in a dwelling house has generally been protected by requiring that entry and search of a dwelling house without the consent of the occupier can take place only with a warrant. The execution of a search warrant upon a person's private property, especially a dwelling house, is a significant intrusion and must be carefully circumscribed.

In Queensland, there is no specific statutory authority which allows police to enter private property to preserve the scene of a crime. In the normal course of events, the occupier will co-operate with police and permit entry to the property – as the QPS submission pointed out, it is usually the occupier who reports the offence to police. However, in certain circumstances the occupier may be unco-operative and refuse police entry; for example, where he or she is the alleged offender.

At present, where police do not have the consent of the occupier to enter private property they have three options:

- They can obtain a search warrant pursuant to section 679 of the *Criminal Code* which authorises police to enter private property and search for evidence.

- In some specific cases, police may have a power to enter and search premises without a warrant.[37] An example is the power given to police under the *Drugs Misuse Act 1986* to enter and search premises without a warrant. This power is available if the police officer has reasonable grounds to believe that evidence of an offence against Part II of the Act is on the premises and is likely to be concealed or destroyed unless the place is entered and searched immediately.

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37 See Volume II of this report.

- In the rare case where the alleged offence may constitute an 'emergency situation' under the *Public Safety Preservation Act 1986*, a police officer may enter and direct the evacuation and exclusion of persons from that area (s. 8).

Police powers to enter and search premises with or without a warrant were addressed in Volume II of this report (CJC 1993a). The Commission recommended a general power to enter and search premises without a warrant where a police officer has reasonable grounds to suspect that material evidence of an offence carrying a maximum penalty of seven years imprisonment or more is on the premises and will be concealed or destroyed unless the place is entered and searched immediately. The Commission further recommended that, in applying for a warrant, the police officer should be required to particularise the objects which he or she suspected to be on the premises and suspected to be evidence of the offence. For an entry and search without a warrant, it was recommended that the police officer be required to notify the occupier and record the details of the search.

The search provisions recommended in Volume II require specification of the objects of search, and therefore are limited in terms of their application to crime scenes. The police may have reasonable grounds to suspect that a serious offence has been committed at particular premises. However, they will not usually be able to specify the particular evidence which may be located at the scene.

In order to overcome these potential difficulties, the police should be given a power to enter private premises to preserve evidence of an offence. This power should be available where there are reasonable grounds to suspect that the evidence may be concealed, damaged or destroyed or new material introduced if the premises are not immediately entered. Consistent with the recommendation in Volume II (p. 456), this power should be restricted to circumstances in which it is reasonably suspected that any offence carrying a maximum penalty of at least seven years imprisonment has been committed.

29.2 Recommendation – Entry to Private Property to Preserve a Crime Scene

The Commission recommends that police be empowered to enter private property without a warrant to preserve the scene of a crime where they have reasonable grounds to suspect that:

- **an offence carrying a maximum of seven years imprisonment or more has been committed on the property, and**
- **if they do not enter immediately, material evidence of the offence may be lost, concealed, damaged or destroyed, or new material introduced to the crime scene.**

Under What Circumstances Should Police Have Power to Exclude Occupiers/Invitees from the Crime Scene?

There is no specific statutory provision in Queensland which authorises police to give directions to protect a crime scene located on private property. Currently, as in the case of a crime scene located on public property, police are restricted to charging a person either with an offence of obstructing police in the performance of their duty (s. 10.20A(2) of the *Police Service Administration Act*) or destroying evidence (s. 129 of the *Criminal Code*). The QPS has criticised these provisions as merely reactive.

The QPS submitted that police should have a clear statutory authority to remove or exclude from a crime scene any person, including the owner of the premises on which the scene is located. In particular, the QPS pointed to the possibility that the 'owner' of property, who may be a suspect in the case, could otherwise observe the work of crime scene officers and might destroy, modify or remove available evidence then under examination, or before the crime scene officer has had a chance to examine it.

Where police reasonably suspect the occupier of private property of having committed an offence on that property they may arrest the person, subject to the restrictions upon arrest recommended in Volume III (CJC 1993b, Ch. 13) of this report. However, where the occupier is not a suspect, or the police do not have sufficient grounds to arrest the person, it is not clear what action the police may currently take.

If the police are given authority to enter private property to prevent the destruction of evidence, they should also be empowered to give directions to achieve that objective. However, the exclusion of persons from a suspected crime scene on private property

should be used as a last resort, especially where the person sought to be excluded is the lawful occupier or his or her invitee. One submission suggested that allowing police exclusive access to a crime scene would allow their activities to be totally unsupervised, and to invite abuse of power. Volume II of this report made it clear that a person who is the subject of a search warrant is entitled to be informed of what is going on. Implicitly, this recognises that the person should be present during the search, both as a matter of right and as a safeguard on how the search is conducted.

The Commission proposes that the police be given authority to give such directions to persons as are reasonably necessary in order to preserve the scene of a crime. There would be very few cases where it would be reasonable, for instance, to exclude an occupier or his or her invitees from the crime scene. Only where the occupier or his or her invitees refuse to comply with other directions should the police be able to exclude them. As in the case of crime scenes on public property, the police should be empowered to arrest a person who fails to comply with a direction not to enter, or to leave, a crime scene, after the person has been warned that non–compliance may result in arrest.

29.3 Recommendation – Preserving a Crime Scene on Private Property

The Commission recommends that:

- **police be empowered to give reasonable directions as are necessary to preserve the scene of a crime on private property**
- **the lawful occupier or his or her invitees not be excluded unless they refuse to comply with those directions**
- **where a person refuses to comply with a reasonable direction after having been warned by police that such action could result in arrest, the police be empowered to arrest and charge that person with obstructing a police officer in the performance of the officer's duty.**

CONCLUSION

In this chapter the Commission has found the current powers available to police to preserve a crime scene inadequate. The Commission has recommended that:

- Police be given the power to define and mark out a crime scene and give such reasonable directions as are necessary to preserve the crime scene.

- Where the crime scene is on private property, police also be given a power to enter to preserve the scene where:

  - they have reasonable grounds to suspect that an offence carrying a maximum of seven years imprisonment or more was committed on the property, and

  - if they did not enter immediately material evidence of the offence might be lost, damaged, concealed or destroyed, or new material introduced to the crime scene.

- The lawful occupier or his or her invitees not be excluded from a crime scene unless they refuse to comply with other reasonable directions.

- Where a person has refused to comply with a reasonable direction, after having been warned that such action could result in arrest, the police be empowered to arrest and charge the person with obstructing a police officer in the performance of the officer's duty.

PART III

CHAPTER THIRTY

ENSURING COMPLIANCE WITH THE COMMISSION'S PROPOSED SCHEME

INTRODUCTION

In this report the Commission has proposed a comprehensive legislative scheme to govern police investigative procedures and practices. In developing this scheme, the Commission has been conscious of the need to have rules that are capable of being enforced. Many of the submissions received by the Commission were also very concerned that police practice 'on the ground' should conform with the stated law.

Volume IV of this report addressed the issue of ensuring compliance with the rules proposed to govern the questioning of suspects. As part of this discussion, the difficulties inherent in some of the existing sanctions were described (CJC 1994b, p. 730). The issue of exclusion of improperly obtained evidence was also addressed and the Commission made recommendations concerning the exclusion of evidence of confessions that were not tape-recorded. The report foreshadowed a more comprehensive treatment of sanctions and controls in this volume, as they relate to the overall scheme of police powers recommended by the Commission. To this end, this chapter:

- describes how the existing sanctions for non-compliance will operate under the Commission's proposed scheme
- proposes changes to the rules governing the exclusion of evidence unlawfully or improperly obtained.

OVERVIEW OF CURRENT SANCTIONS AND CONTROLS

Like other citizens, police are able to do anything that the law does not forbid. Police powers are simply exemptions from criminal or civil liability for what otherwise

would be an unlawful act.[38] Police powers in Queensland are derived from common law and statute (CJC 1993c, pp. 27–30).

Police conduct, practices, procedures and behaviour are regulated by the following statutes:

- *Police Service Administration Act 1990*
- *Police Service (Discipline) Regulations 1990.*

Complementary forms of regulation include:

- the QPS Code of Conduct
- the Commissioner's directions.[39]

If police act outside the authority of their common law or statutory powers, or in breach of the procedural requirements, they may be liable to some form of sanction – civil, criminal or disciplinary – and may run the risk that any evidence which was unlawfully or improperly obtained may be excluded from court proceedings These remedies are not mutually exclusive. For example, an individual may, through a civil action, claim damages against a police officer for injuries received during an unlawful assault; the Director of Prosecutions may charge the officer with assault arising out of the same circumstances; and the Commissioner of Police may take disciplinary action against the officer for misconduct, official misconduct or a breach of discipline. Subsequently, evidence may be excluded at the trial of the individual because it was obtained unlawfully or improperly.

Each of these sanctions and controls will be discussed in more detail below.

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38 Examples of such powers include the power to enter premises, to search premises and seize property and to arrest.

39 See s. 4.9 of the *Police Service Administration Act*. These directions are included in the Policeman's Manual as General Instructions and the Commissioner's Circulars. They are in the process of being replaced by the QPS Operational Procedures Manual, which is expected to take effect from 1 January 1995.

Civil Action

Civil action involves legal proceedings between two private individuals. For example, where an officer enters premises unlawfully he or she may commit the tort of trespass to property and be liable for civil damages. If an officer arrests a person unlawfully he or she may be held personally liable for such causes of action as unlawful arrest, assault and malicious prosecution. Where a police officer has committed a civil wrong the action is between the aggrieved person and the police officer and/or the Crown. Such remedies are seldom sought by members of the public for the following reasons:

- The costs of civil proceedings are prohibitively expensive even for the more affluent members of the community (see Trade Practice Commission 1994; Access to Justice Advisory Committee 1994).

- For those on low incomes, it is increasingly difficult to obtain legal aid to fund civil actions.

- Civil actions take a long time to be determined by the courts. Even if a successful outcome is realised, it may be of little consolation to the person if criminal proceedings arising out of the investigation have already been taken against him or her.

While recognising the limitations of civil action as a remedy for police misconduct, the Commission is of the view that the existing rights to institute such proceedings should be preserved.

Criminal Action

Criminal action may be taken if action by the police constitutes a criminal offence. For example, an officer who arrests a person unlawfully may commit the criminal offence of assault or deprivation of liberty. In more general terms, legislation such as the *Criminal Code* also imposes certain specific statutory duties on police. Some provisions specifically state that a failure to comply with such a duty renders the officer liable to a penalty.[40] A duty may also be imposed by statute without reference

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40 For example, s. 137 of the *Criminal Code* creates a specific offence of failure to comply with the obligation under s. 552 of the *Criminal Code*, namely, the duty to take a person arrested forthwith before a magistrate.

to a penalty for a breach. Section 204 of the *Criminal Code,* which creates a general offence of disobedience to statute law, applies to these cases.[41]

In order for a police officer to be charged with a criminal offence, the complaint must come to the notice of an investigating authority. The individual must be aware that the conduct was unlawful or improper and be aware of the avenues of complaint. An aggrieved person may complain to the Commission or the QPS. If upon investigation it is considered there is prima facie evidence to charge a police officer, the matter is referred to the Office of the Director of Prosecutions for action. If the officer's conduct is raised in the course of a criminal trial, the judge may refer the matter directly to the Director of Prosecutions.[42]

Criminal prosecutions of police officers who breach the rules seem to be rare in Queensland. There are two main reasons for this:

- Proving a charge beyond reasonable doubt can be difficult when rule breaches take place within an organisation whose members have traditionally had a strong sense of solidarity and a professional awareness of their rights.

- It is often difficult to establish conclusively that the officer exceeded his or her powers deliberately, rather than acting innocently in ignorance of the true extent of his or her powers.[43]

A further limitation of criminal sanctions is that they can only be invoked in respect of relatively serious breaches of the rules. As a consequence, this form of sanction is of limited use as a means of promoting routine compliance.

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41 The Criminal Code Review Committee recommended that this provision be incorporated into the proposed Simple Offences Act and that it be used as a sanction against police officers who fail to inform suspects of their rights (1992, p. 263).

42 If the complainant is convicted at the trial often he or she has little interest in pursuing the matter further.

43 In the latter case disciplinary action against the officer would be more appropriate.

Disciplinary Action

Disciplinary action is a relatively widely used sanction for dealing with breaches of the QPS Code of Conduct and other rules and guidelines. Disciplinary action picks up a wider range of improper behaviour than does civil or criminal action and requires a lower standard of proof than criminal action. If a breach of discipline, misconduct or official misconduct is substantiated, disciplinary sanctions may be imposed. These disciplinary sanctions include dismissal, reduction in rank, reduction in salary, a deduction of a sum from salary equivalent to a fine and/or a reprimand. Because the imposition of disciplinary penalties affects the officer personally, they may have a greater educative or deterrent effect than, say, the exclusion by a court of improperly obtained evidence.

Since the Fitzgerald Inquiry there have been significant changes to the complaints and discipline process in Queensland. There are clearer disciplinary rules and procedures and an enhanced process for investigating and penalising unlawful or improper conduct by police.[44] However, the disciplinary process is only activated if someone makes a complaint. In many cases, suspects and others will be unaware of the law relating to police powers, particularly if the legal position is unclear. Hence, unless there is clear misconduct by the police (such as an assault or an abduction), suspects and others may be unaware that there has been any infringement of the laws governing police powers and responsibilities. Moreover, even if a person believes that a police officer has breached a rule, he or she may not always be willing to make a formal complaint.

There are various ways of enhancing the effectiveness of disciplinary processes to facilitate greater compliance. A key principle of the scheme outlined in this report is that, by providing a clear, concise and workable set of rules for police, there is likely to be less cause for complaint and, where there is cause, action is more likely to be taken. The Commission has recommended that, where possible, the rules relating to police responsibilities and powers be set down in legislation. This will mean that the rules will be clear and publicly accessible, and there can be no dispute about their status. Other aspects of the Commission's recommendations, if adopted, should be

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44 See *Criminal Justice Act 1989*, *Police Service Administration Act* and *Police Service (Discipline) Regulations* and the QPS Code of Conduct.

incorporated into police guidelines which regulate police conduct, such as Commissioner's Instructions and the Operational Procedures Manual.[45]

Effective disciplinary systems also require proper supervisory procedures. Throughout its report the Commission has stressed the need to enhance these procedures. Effective supervision in turn depends upon supervisors being given adequate feedback about breaches of the rules. To this end, the Commission has recommended in relation to the rules governing questioning, that any breach of the rules revealed in a criminal proceeding be reported to the Commissioner of Police (CJC 1994b, p. 733). Such a requirement is essential if there is to be effective supervision of the exercise of police powers.[46]

Exclusion of Unlawfully or Improperly Obtained Evidence[47]

The judicial discretion to exclude evidence which has been unlawfully or improperly obtained is one of the means whereby the courts exercise some control over police impropriety. As a general rule, evidence which is obtained unlawfully or improperly is admissible at trial, provided it is reliable. However, the court has a discretion to exclude such evidence if its admission would operate unfairly against the accused (ALRC 1975, p. 136) or if, on balance, its admission would not be in the public interest because of its potential to undermine the administration of criminal justice.[48]

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45 This manual should be readily available to the public. The Commission has recommended that the proposed changes to police operational procedures and policies with respect to information-giving and record-keeping be integrated with the Commissions recommendations. See Recommendation 11.1, Volume II (CJC 1993a).

46 The Commission plans in the near future to conduct a general review of the complaints and discipline process in the QPS in the post-Fitzgerald Report period. It is possible that this review will identify additional ways in which the process can be improved.

47 Nothing in this chapter is intended to affect the other common law discretions to exclude evidence e.g. on the grounds of unfairness or prejudice.

48 See *Bunning v Cross* (1978) 141 CLR 54 and *R v Cleland* (1982) 151 CLR 1.

In its 1975 report on criminal investigation, the ALRC concluded that the discretion to exclude unlawfully and improperly obtained evidence was narrow, limited to conduct that in some way was oppressive, and was rarely exercised (1975, p. 137). Since that time the common law has developed a broader discretion, as stated in *Bunning v Cross* (1978) 141 CLR 54 (per Stephen and Aicken JJ at 74):

> [What the exercise of this discretion] involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.

The discretion as described in *Bunning v Cross* is often referred to as the discretion to exclude improperly or unlawfully obtained evidence on the grounds of 'public policy'. This discretion is applied to counteract the ". . . threat which cynical disregard of the law by those empowered to enforce it represents to the legal structure of our society and to the integrity of the administration of justice".[49] The "real evil" at which the 'public policy' discretion is aimed is the "deliberate or reckless disregard of the law" by criminal investigators.[50] However, a significant, even if unintended, breach of a statutory duty may in some cases also justify discretionary exclusion.[51] The discretion operates principally in relation to what might loosely be called 'real evidence',[52] but it also applies in cases of entrapment,[53] tricks, improper detention and interrogation.[54]

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49 *Pollard v The Queen* (1992) 176 CLR 177 per Deane J at p. 207.

50 *Foster v The Queen* (1993) 67 ALJR 550 per Brennan J at 557.

51 *Pollard v The Queen* (1992) 176 LCR 177 per Mason CJ at 196.

52 For example, articles found by search, recordings of conversations, the result of breathalyser tests, fingerprint evidence implements of crime and so on; *Bunning v Cross* (1978) 141 CLR 54 Stephen and Aicken JJ at p. 75

53 *R v Venn–Brown* (1991) 1 Qd. R. 458.

54 *Pollard v The Queen* (1992) 176 CLR 177.

The effect of the existing common law exclusionary 'public policy' discretion may be summarised as follows:

- Good faith or honest mistake on the part of the investigator will favour admission of the evidence whereas deliberate or reckless disregard of the law will favour exclusion.

- Highly probative evidence will generally be admitted where the evidence was improperly obtained as the result of a genuine error. However, the strength of the evidence will not excuse a deliberate or reckless impropriety – except, perhaps, when the evidence is vital and perishable in nature and the illegality was committed in urgent circumstances.

- The improperly obtained evidence is less likely to be admitted where compliance with the proper procedures was not difficult.

- The gravity of the offence is a material consideration. Generally speaking, the likelihood of reception increases according to the seriousness of the alleged crime relative to the extent of the investigative impropriety.

- Where the impropriety involves a breach of a statutory duty of fairness it is more likely that the evidence will be excluded.[55]

- A confession procured from an unlawfully detained suspect will be excluded unless there are 'special circumstances', such as the triviality of the breach.[56]

- Reception of tainted evidence is more likely in cases where other non-evidentiary means of redress are available.[57]

- A more lenient approach will be taken where it would have been difficult to detect the offence by conventional means.[58]

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55 *Bunning v Cross* (1978) 141 CLR 54.

56 *Cleland v The Queen* (1982) 151 CLR 1.

57 *R v Byzcks* (1982) 7 A Crim. R. 263.

58 *R v Warneminde* (1978) Qd. R. 371. Cf *R v Venn Brawn* (1991) Qd. R. 458.

- The probative value of derivative evidence[59] is theoretically independent of the truth or falsity of its source. In relation to such evidence, the public interest in convicting the guilty may override the countervailing interest in protecting individual suspects against official oppression.[60]

- Evidence of a confessional statement which might fairly be admitted against an accused should be excluded in cases of a deliberate or reckless breach of statutory duties.[61]

Proposals for Statutory Reform of the Discretion

The two key issues in relation to the discretion to exclude unlawfully or improperly obtained evidence are:

- should the onus be on the defence to establish that the evidence should not be admitted, or on the prosecution to establish that it should be admitted?

- what factors should the court consider in determining whether to exercise its discretion to exclude evidence?

These two issues will be discussed below.

The Onus

As noted earlier, the ALRC (1975) concluded that the discretion to exclude improperly obtained evidence was rarely exercised, with the courts being content merely to criticise the police for any misconduct. Despite the development of the exclusionary

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59 Evidence discovered as a consequence of the unlawfully or improperly obtained evidence.

60 *R v Warickshall*; (1783) 1 Leach CC 263; *R v Scott*, Ex parte Attorney-General (1993) 1 Qd R. 537.

61 *Pollard v The Queen* (1992) 176 CLR 117 per Deane J at p. 204.

rule in the years following the ALRC report, the courts still appear reluctant to exclude evidence. For instance, in 1990 the New South Wales Law Reform Commission (NSWLRC) reported having 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. (p. 17)

In response to this apparent judicial reluctance, several law reform bodies have proposed that evidence obtained illegally or improperly should be prima facie inadmissible, unless the prosecution demonstrates grounds for admitting it.[62] This proposal has recently been incorporated into the draft Commonwealth Uniform Evidence Bill 1994 and the draft New South Wales Evidence Bill 1993. The recommended approach is a reversal of the current situation where the onus of satisfying the court that the evidence should not be admitted lies on the accused.

In its 1987 report on evidence the ALRC, in affirming the approach taken in its 1975 report, argued that:

- Where evidence has been obtained in breach of the law or an established standard of conduct, those who infringed the law should bear the onus of persuading the judge not to exclude it.

- Factors relevant to the exercise of the discretion include the mental state of the law enforcement officers involved and the urgency under which they acted. It would therefore seem more appropriate that the prosecution has the primary responsibility of showing that the officers acted in good faith, rather than the accused having to show the reverse. The prosecution, unlike the defence, will have access to the relevant information and witnesses.

The New Zealand Law Commission (NZLC) (1992, p. 186) said that a rule of prima facie inadmissibility of improperly obtained evidence was necessary to discourage unlawful conduct and to indicate the significance of the values protected by the rule. The NZLC emphasised that the proposed improperly obtained evidence rule was important in ensuring compliance with the NZLC's proposed questioning regime.

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62 ALRC 1975; ALRC 1985; ALRC 1987; NSWLRC 1990; NZLC 1992.

The rule proposed by the ALRC (1987) is reflected in the provisions of the Commonwealth Government's recently produced Evidence Bill 1994. This Bill has been designed as the basis of a scheme to establish uniform evidence laws in all Australian jurisdictions. Clause 138(1) of the Evidence Bill and clause 137(1) of its New South Wales counterpart[63] provide:

> Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian Law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law,
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

In the Commission's assessment, adoption of such a provision, in conjunction with the other sanctions outlined earlier in this chapter, would be a valuable strategy for ensuring compliance with procedural requirements.

What Factors Should be Considered?

In its interim report on evidence (1985) the ALRC found that the application of the common law discretion to exclude evidence relied heavily on vague and subjective considerations. According to the ALRC, this had led to inconsistency and uncertainty in the exercise of the discretion. The ALRC therefore recommended that the proposed statutory exclusionary rule should state the factors to be considered by the court in deciding whether to admit the improperly obtained evidence. A similar rule was recommended by the NSWLRC.[64]

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63 Evidence Bill 1993 (NSW).

64 NSWLRC 1990, *Police Powers of Detention and Investigation After Arrest.*

Clause 138 of the Evidence Bill (Cwlth) and Clause 137(3) Evidence Bill (NSW), both of which broadly reflect the ALRC Draft Evidence Bill, identify the following mandatory but non-exclusive factors to be taken into account when exercising the discretion:

- the probative value of the evidence
- the importance of the evidence in the proceeding
- the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding
- the gravity of the impropriety or contravention
- whether the impropriety or contravention was deliberate or reckless
- whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights
- whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention
- the difficulty (if any) of obtaining evidence without impropriety or contravention of an Australian law.

In essence these factors have all been recognised by the common law, as it has developed (see p. 892). However, a statutory provision would provide for greater consistency in the exercise of the discretion.

30.1 Recommendation - Exclusion of Unlawfully or Improperly Obtained Evidence

The Commission recommends that a legislative provision be introduced in Queensland which provides:

Evidence that was obtained:

(a) improperly or in contravention of the law; or

(b) in consequence of an impropriety or of a contravention of the law

is not to be admitted in a criminal proceeding unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Without limiting the matters that the court may consider, in determining whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in this way, the following matters are to be taken into account:

- **the probative value of the evidence**
- **the importance of the evidence in the proceeding**
- **the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding**
- **the gravity of the impropriety or contravention**
- **whether the impropriety or contravention was deliberate or reckless**
- **whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights[65]**
- **whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention**
- **the difficulty (if any) of obtaining evidence without impropriety or contravention of an Australian law.**

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65 Opinions may differ as to whether these international treaty obligations need to be recognised explicitly in Australian law, especially as the International Covenants are couched in fairly broad terms. However, the Commission considers that to ensure consistency with the Commonwealth and New South Wales Evidence Bills, a similar provision should be incorporated into Queensland legislation.

CONCLUSION

This chapter has addressed issues relating to the enforcement of the Commission's proposed scheme of police powers. The key conclusions are that:

- Civil action is of limited value as a remedy for police misconduct, although existing rights to institute such proceedings should be preserved.

- Criminal sanctions although necessary for dealing with serious breaches of rules, are of limited use as a means of promoting routine compliance.

- Disciplinary action is an important sanction. Since the Fitzgerald Inquiry there have been significant improvements to the complaints and discipline process in the QPS. Further improvements to this system can be achieved by providing for:

  - clear, concise and workable rules and guidelines

  - improved supervisory and management procedures

  - improved feedback to supervisors and managers about breaches of the rules.

- The rule relating to the exclusion of unlawfully or improperly obtained evidence should be strengthened.

In relation to this last issue, the Commission has recommended that:

- unlawfully or improperly obtained evidence should be prima facie inadmissible and the prosecution be required to demonstrate grounds for admitting it

- the legislation provide a non-exclusive list of factors to be considered by the court in determining whether to admit such evidence.

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APPENDICES

APPENDIX 14

TABLES OF ELECTRONIC SURVEILLANCE DEVICE LEGISLATION IN QUEENSLAND, THE COMMONWEALTH AND OTHER STATES AND TERRITORIES

This appendix consists of tables summarising relevant aspects of listening device legislation in Queensland and the following jurisdictions:

- New South Wales
- Tasmania
- Northern Territory
- Victoria
- South Australia
- Western Australia

The table also includes the Commonwealth *Telecommunications (Interception) Act 1979*.

To enable information about the various Acts to be presented in tabular form, it has been necessary to limit the amount of detail provided. For a more complete statement of the law, the reader should consult the relevant Act or Acts.

QUEENSLAND: *Invasion of Privacy Act 1971*

QUEENSLAND: *Invasion of Privacy Act 1971*	
Who can obtain a warrant? s. 43(2)(c)	Commissioner of Police, Assistant Commissioner, or officer above the rank of Inspector authorised in writing by the Commissioner.
From whom? s. 43(3)	Judge of the Supreme Court.
On what grounds?	Not specified.
Is "offence" specified?	No.
Form of application? s. 43(4)	As per the rules of the Court or if no procedure is prescribed, as the judge directs; ex parte and in camera; no notice or report to be available except by direction of judge.
What matters to be considered by a judge before a warrant is issued? s. 43(3)	Gravity of matters being investigated; extent to which privacy of person likely to be interfered with; extent to which prevention of detection of offence likely to be assisted.
Power of entry and ancillary powers?	No.
What matters to be specified in a warrant? s. 43(3)	Any conditions, limitations and restrictions that in judge's opinion are necessary in the public interest.
What is the maximum specified period for a warrant?	Not specified.
Can a warrant be extended?	Not specified.
Can a warrant be revoked?	Not specified.
Telephone etc. warrants available?	No.

QUEENSLAND: *Invasion of Privacy Act 1971*	
Use of a listening device in urgent circumstances without a warrant permitted?	No.
Use of a listening device by a party to a private conversation? s. 43(2)(a)	Permitted.
Records of application available for search? s. 43(4)	No, except by direction of a judge of the Supreme Court.
Destruction of irrelevant records? s. 47	The Commissioner of Police shall cause any record in writing or otherwise of information obtained through an authorised listening device to be destroyed as soon as practicable after it has been made, if it does not relate directly or indirectly to the commission of an offence.
Report required upon expiration of a warrant? s. 43(5)	Not later than seven days after obtaining warrant, Commissioner of Police to notify Registrar and ensure Registrar receives monthly reports in respect of any information he requires concerning the ongoing use of the device authorised.
Annual report required?	No.
Publication and communication of information obtained by illegal use of a listening device? s. 44	Permissible only if: communication was to a party to the conversation or with consent of such a party; or in the course of proceedings for an offence against the Act; or the knowledge has also come to a person in a lawful manner.
Publication and communication of information obtained pursuant to a warrant? s. 43(6)	Permissible only in the performance of duty, if communication not by a party to the conversation.

QUEENSLAND: *Invasion of Privacy Act 1971*	
Publication and communication of information obtained by a party to the conversation? s. 45	Prohibited unless: made to another party to the conversation; or all other parties have consented; or made in the course of legal proceedings; or not more than reasonably necessary in the public interest, or in the performance of a duty, or for the protection of the lawful interests of the person making the communication; or the person to whom it is communicated is believed to have such an interest as to make the communication reasonable under the circumstances; or made by a person who used device pursuant to a warrant under this Act; or person employed in connection with the security of the Commonwealth.
Requirement to inform subject of surveillance?	No.

QUEENSLAND: *Drugs Misuse Act 1986*

Note: These provisions apply equally to listening devices as to video surveillance devices.

QUEENSLAND: *Drugs Misuse Act 1986*	
Who can obtain a warrant? s. 25	Police officer, ranked Inspector or above.
From whom? s. 25	Judge of the Supreme Court.
On what grounds? s. 25	Reasonable grounds for suspecting a person has committed, is committing, or is about to commit an offence defined in Part II carrying a penalty of imprisonment for 20 years.
Is "offence" specified? s. 25	Yes, crimes defined in Part II carrying a penalty of imprisonment for 20 years.
Form of application? s. 28(1)	As per the rules of the court or, if no procedure is prescribed, as the judge directs; ex parte in the judge's chambers in the presence of only such persons as the judge permits; no transcript shall be made; no notice or report of application shall be published or available except by direction of the judge.
What matters to be considered by a judge before a warrant is issued? s. 28(2)	Gravity of matter being investigated; extent to which privacy of a person likely to be interfered with; extent to which prevention or detection of offence likely to be assisted by warrant.
Power of entry and ancillary powers? ss. 27, 18, 53	Yes. Power to enter or re-enter to install, service and retrieve a listening device and power to pass through, from, over and along any other place for the purpose of making an entry or re-entry (ss. 27, 18). Section 53 provides that police may use such assistants as are necessary, and such force as is reasonably necessary to effect the warrant.
What matters to be specified in the warrant? s. 28(2)	Any restrictions, limitations and conditions the judge thinks necessary in the public interest.

QUEENSLAND: *Drugs Misuse Act 1986*	
What is the maximum specified period for a warrant?	Not specified.
Can a warrant be extended?	Not specified.
Can a warrant be revoked?	Not specified.
Telephone etc. warrants available?	No.
Use of a listening device in urgent circumstances without a warrant permitted? s. 26	No. Act provides for the issue of emergency permits upon personal application to the court in circumstances that render the making of an application in the usual way impracticable. Permits are enforceable for a maximum of 48 hours. Judge can order a shorter time.
Use of a listening device by a party to a private conversation?	Permitted. See Invasion of Privacy Act s. 43.
Records of application available for search? s. 28(1)	No, except by direction of a judge of the Supreme Court.
Destruction of irrelevant records? s. 29(1)(a)	Section 47 of the *Invasion of Privacy Act* applies.
Report required upon expiration of a warrant or emergency permit? s. 29A	The applicant shall, at the first reasonable opportunity, provide a written report to the Commissioner of Police detailing the exercise of the power and the circumstances in which exercised. The Commissioner shall bring it to the notice of the Minister at the first reasonable opportunity.
Annual report required?	No.

QUEENSLAND: *Drugs Misuse Act 1986*	
Publication and communication of information obtained by illegal use of a listening device?	Not specified. Section 44 of the *Invasion of Privacy Act* applies. Under s. 29(1)(b) of the *Drugs Misuse Act*, a listening device used for interception of a private conversation under the authorisation of s. 25 shall be taken not to be in contravention of s. 43 of the *Invasion of Privacy Act*.
Publication and communication of information obtained pursuant to a warrant?	Not specified. Section 45(2) of the *Invasion of Privacy Act* applies.
Publication and communication of information obtained by a party to the conversation?	Section 45(2) of the *Invasion of Privacy Act* applies.
Requirement to inform subject of surveillance?	No.
Tracking Devices s. 24	Can be placed on or in any moveable thing or vehicle (except aeroplane) if a police officer reasonably suspects a crime as defined by Part II has been, is being or about to be committed and that a dangerous drug or the suspect is in or on that vehicle. At first reasonable opportunity, officer shall furnish written report to Commissioner of Police upon the exercise of the power and the circumstances in which it was exercised and the Commissioner shall, at the first reasonable opportunity, bring it to the notice of the Minister.

QUEENSLAND: *Criminal Justice Act 1989*

QUEENSLAND: *Criminal Justice Act 1989*	
Who can obtain a warrant? ss. 82(2), 140(1)	The Chairperson or a director of the Commission who is the delegate of the Chairperson.
From whom? s. 82(1)	Supreme Court Judge.
On what grounds? s. 82(2)	Reasonable grounds for suspecting that a use of a listening device may disclose information relevant to the subject matter of an investigation by the Commission.
Is "offence" specified?	No, but investigation must be within the Commission's jurisdiction.
Form of application? ss. 119, 123	In accordance with the rules of court or in so far as those rules do not provide, as directed by the judge and supported by evidence on oath or affirmation; ex parte in chambers; no notice or report to be published or available except by direction of judge; applicant to disclose all factors favourable and adverse to application, within applicant's knowledge.
What matters to be considered by a judge before a warrant is issued? s. 123(3)	Gravity of the subject matter of the investigation; extent to which privacy of any person likely to be affected; extent to which Commission's investigation likely to be assisted by information sought.
Power of entry and ancillary powers? s. 123(5)	Judge may confer on officers of the Commission such powers and authority considered appropriate in the public interest including authority to enter by such means and using such reasonable force as is necessary.
What matters to be specified in a warrant? ss. 119(3), 123(5), 82(1)	Approval to use device may be subject to conditions, limitations and restrictions as the judge thinks fit to impose and specify in the order. May include any powers and authority judge considers appropriate in the public interest, including authority to enter upon any premises by such means and using such reasonable force as is necessary.

QUEENSLAND: *Criminal Justice Act 1989*	
What is the maximum specified period for a warrant?	Not specified.
Can a warrant be extended?	Not specified.
Can a warrant be revoked?	No.
Telephone etc. warrants available?	No.
Use of a listening device in urgent circumstances without a warrant permitted?	No.
Use of a listening device by a party to a private conversation?	Yes. A listening device approved under s. 82(1) may be used by a party to a private conversation.
Records of application available for search? s. 123(2)	Only if at the direction of a Supreme Court Judge
Destruction of irrelevant records? ss. 83(3), 140(1)	Records to be preserved until Chairperson or his delegate determines they are no longer required for the purpose of the Commission's investigation or any other proceedings to which any part of the information is relevant.
Report required upon expiration of a warrant?	No.
Annual report required?	No.
Publication and communication of information obtained by illegal use of a listening device?	Not specified. Section 44 of the *Invasion of Privacy Act* applies.

QUEENSLAND: *Criminal Justice Act 1989*	
Publication and communication of information obtained pursuant to a warrant? s. 83(1)	A person shall not communicate or publish the text, substance or meaning of a private conversation to which the person is not a party, and was obtained by virtue of a listening device used for the purposes of the Commission, except to the Chairperson or a person nominated by the Chairperson for that purpose.
Publication and communication of information obtained by a party to the conversation? s. 83(2)	Not specified. However s. 83(2) provides that material shall not be used for the purposes of the Commission without the Chairman's approval or further approval of the Judge who granted the warrant.
Requirement to inform subject of surveillance?	No.

NEW SOUTH WALES: *Listening Devices Act 1984 No. 69*

NEW SOUTH WALES	
Who can obtain a warrant? s. 16(1)	A "person".
From whom? s. 15	Supreme Court Judge. Regulations may permit a warrant to be issued by a District or Local Court [s. 16(7)].
On what grounds? s. 16(1)	Reasonable grounds for a suspicion or belief that: a prescribed offence has been, is about to be or is likely to be committed; and that to investigate the offence or to enable evidence to be obtained of the commission of the offence or the identity of the offender, a listening device is necessary.
Is "offence" specified? s. 15	An offence punishable upon indictment or an offence of a class or description prescribed for the purpose of this part of the Act.
Form of application? s. 21	The proceedings including the manner of making complaints to the Court shall, subject to this Part and the regulations, be regulated by the rules of the Court; proceedings shall be conducted in the absence of the public. Judge may exclude persons from the Court and prohibit publication or disclosure of any matter connected with the proceedings.
What matters to be considered by a judge before a warrant is issued? s. 16(2)	The nature of the prescribed offence; the extent to which the privacy of any person is likely to be affected; alternative means of obtaining the evidence or information sought to be obtained; the evidentiary value of the evidence sought; any previous warrant sought or granted in connection with the same prescribed offence.
Power of entry and ancillary powers? s. 16(3)	Power to enter to install and retrieve.

NEW SOUTH WALES	
What matters to be specified in a warrant? s. 16(4)	The prescribed offence in respect of which the warrant is granted; where practicable the name of any person whose private conversation might be recorded or listened to; the period during which the warrant is in force; the name of the person who may use the listening device and the persons who may use the device on behalf of that person; where practicable, the premises or place where the device is to be installed or used; any conditions subject to which the premises may be entered or a listening device may be used; the time within which a report on the use of the device is required to be furnished to the Court and the Attorney-General.
s. 16(3)	Further, if installation of a listening device is authorised on any premises the Court shall by the warrant authorise and require retrieval of the device, and authorise entry onto those premises for the purpose of that installation and retrieval.
What is the maximum specified period for a warrant? s. 16(4)(c)	A period not exceeding 21 days.
Can a warrant be extended? s. 16(6)	No. However, further warrants may be issued in respect of an offence the subject of a previous warrant.
Can a warrant be revoked? s. 16(5)	Yes, by the Supreme Court, at any time before its expiration.

NEW SOUTH WALES	
Telephone etc. warrants available? s. 18	Yes. Available to members of the police force only. Section 18(4) allows also for another member of the police force to transmit the complaint to the Court on behalf of a complainant if impracticable for complainant to communicate directly. Court must be satisfied there are reasonable grounds for the officer to suspect or believe that a prescribed offence has been, is about to be or is likely to be committed; and the *immediate* use of the device is necessary for the purpose of investigating that offence or identifying the offender. Shall not grant if the Court satisfied it would be practicable to grant a s. 16 warrant. The provisions of s. 16(2)–(6) apply except that the warrant is valid for a period not exceeding 21 days.
Use of listening device in urgent circumstances without a warrant permitted? s. 5(2)(c)	Yes, if necessary to use the device immediately to obtain evidence or information of: an imminent threat of serious violence to persons; substantial damage to property; or a serious narcotics offence.
Use of a listening device by a party to a private conversation? s. 5(3)	Permitted, provided person has consent expressly or impliedly of all principal parties to the device being used; or has consent of principal party and recording of the conversation is reasonably necessary for the protection of the lawful interests of the principal party; or recording not made for the purpose of communicating or publishing the conversation, or a report thereof, to persons who were not parties to it.
Records of application available for search?	Not specified. However, pursuant to s. 21(c) the Court may prohibit publication or disclosure.
Destruction of irrelevant records? s. 22	Yes. As soon as practicable after it has been made "a person" shall destroy so much of any record, whether in writing or otherwise, of any evidence or information obtained by use of a listening device used pursuant to a warrant or urgent circumstances, as does not relate directly or indirectly to the commission of a prescribed offence.

NEW SOUTH WALES	
Report required upon expiration of a warrant? s. 19	Yes. A written report to be furnished to the Court and Attorney–General stating: whether or not the device was used and names, if known, of persons whose private conversations were listened to or recorded; the period the listening device was used; particulars of any premises or place where the device was installed or used; particulars of the general use made or to be made of any evidence or information obtained; particulars of any previous listening device used in connection with the prescribed offence. Court may direct any record of evidence or information obtained to be brought in to the Court. The record shall be kept in the custody of the Court. It may be made available to any person by order of the Court.
Annual report required? s. 23	Yes. The Attorney–General, as soon as practicable after 31 December each year, shall cause to be prepared a report to be laid before both Houses of Parliament. The report must contain the number of warrants sought and the number granted each year, and other matters concerning listening devices and the administration of the Act which the Attorney–General considers appropriate.
Publication and communication of information obtained by illegal use of a listening device? s. 6	Prohibited unless: express or implied consent given by all principal parties; made to a party to the private conversation; made in the course of proceedings for an offence against the Act; is not more than is reasonably necessary in connection with an imminent threat of serious violence to persons, or of substantial damage to property, or a serious narcotics offence; or to prevent a person who knows the information from communicating it to another.

NEW SOUTH WALES	
Publication and communication of information obtained pursuant to a warrant?	Not specified, however see s. 7.
Publication and communication of information obtained by a party to the conversation? s. 7	Prohibited unless: made to another party to the conversation; all principal parties have given express or implied consent; is made in the course of legal proceedings; is not more than reasonably necessary to protect the lawful interests of the person making the communication or publication; the person to whom it is communicated is believed to have such an interest in the private conversation as to make the communication or publication reasonable in the circumstances; the communication is made pursuant to a warrant under this Act, the *Telecommunications (Interception) Act* or any other law of the Commonwealth.
Requirement to inform subject of surveillance? s. 20	Court may direct a person who was authorised to use the device to supply to the subject of surveillance within a specified period, such information regarding the warrant and the use of the device as the Court may specify. The Court shall not give such a direction unless satisfied the use of the device was not justified and was an unnecessary interference with the privacy of the person concerned. Before giving such a direction, the Court shall give the person to whom the warrant was granted an opportunity to be heard in relation to the matter.

TASMANIA: *Listening Devices Act 1991*

TASMANIA	
Who can obtain a warrant? s. 17(1)	Member of the Police Force above the rank of Sergeant.
From whom? s. 17(1)	A magistrate.
On what grounds? s. 17(1)	Reasonable suspicion or belief that a prescribed offence has been, is about to be or is likely to be committed; the use of the listening device is necessary for the purpose of investigation into that offence or obtaining evidence of the commission of the offence or the identity of the offender.
Is "offence" specified? s. 16	Yes. Indictable offence or an offence of a class or description prescribed for the purpose of this part of the Act (Part 4).
Form of application?	Not specified. (Upon complaint).
What matters to be considered by a magistrate before a warrant is issued? s. 17(2)	Nature of the prescribed offence; extent to which privacy of any person is likely to be affected; alternative means of obtaining the evidence or information sought; evidentiary value of any evidence sought to be obtained; any previous warrant sought or granted in connection with the same prescribed offence.
Power of entry and ancillary powers? s. 17(3)	Yes. Where a warrant authorises installation on any premises, the magistrate shall authorise and require the retrieval of the listening device; and authorise entry onto those premises for the purpose of that installation and retrieval.

TASMANIA	
What matters to be specified in a warrant? s. 17(3) & (4)	Where installation authorised, authority to install the device and requirement to retrieve it; authority to enter premises for the purpose of installation and retrieval. Warrant shall specify: the prescribed offence in respect of which the warrant is granted; where practicable the name of any person whose private conversation may be recorded or listened to; the period during which the warrant is in force; where practicable, the premises or place the device is to be installed or used; any other conditions subject to which the premises may be entered or a listening device may be used.
What is the maximum specified period for a warrant? s. 17(4)(c)	Not exceeding 60 days.
Can a warrant be extended? s. 17(6)	A warrant shall not exceed 60 days (s. 17(4)(c)), but this shall not be construed as preventing the grant of a further warrant in respect of a prescribed offence for which one or more warrants has previously been granted.
Can a warrant be revoked? s. 17(5)	Yes, by a magistrate, at any time before the expiration of the period of the warrant.

TASMANIA	
Telephone etc. warrants available? s. 18	Yes. Upon complaint by member of the Police Force above the rank of Sergeant on same grounds as warrant under section 17, provided the applicant suspects or believes the **immediate use** of a listening device is necessary. Magistrate shall not grant a warrant if satisfied it would be practicable for the normal course to be employed (ie warrant under s. 17). The complaint may be made by a member of the Police Force on behalf of another member, if magistrate considers in the circumstances that it is impracticable to communicate directly with the member of the Police Force making the complaint. The magistrate shall consider same matters as with normal warrants and include same matters in warrant. Warrant not to be valid for more than 24 hours. Magistrate to keep written record of name of complainant, member of police force who transmitted complaint if relevant, details of complaint, terms of warrant, date and time warrant granted.
Use of a listening device in urgent circumstances without a warrant permitted? s. 5(2)(c)	Yes, if an imminent threat of serious violence to persons or of substantial damage to property, or in connection with a serious narcotics offence (defined s. 3), and reasonable grounds to believe necessary to use the device immediately to obtain that evidence or information.
s. 5(4)	Within three days after first using the device the person who used the device must furnish a report to the **Chief Magistrate** containing particulars of the circumstances in which the device is being or was used.
s. 5(5)	If on receipt of report the Chief Magistrate is not satisfied that the use of the listening device was justified, the Chief Magistrate shall order that the use of the device immediately cease.
s. 5(6)	If such an order made [s. 5(5)] the person shall not use the listening device after the order, unless it is used pursuant to a warrant under Part 4.

TASMANIA	
s. 5(7)	If Chief Magistrate satisfied the use was justified, he or she shall so notify the person using the device. Within one month after the device ceases to be used, that person shall furnish a written report to the Chief Magistrate specifying: • the name, if known, of any person whose private conversation was recorded or listened to; • the period it was used; • particulars of any premises on which device was installed or any place at which it was used; • particulars of the general use made or to be made of any evidence or information obtained by the use of the device.
s. 8	Where a listening device is used in circumstances referred to in section 5(2)(c), the person using the device shall, within one month after the device ceases to be used, furnish a report to the **Attorney-General** containing particulars of the circumstances in which the device was used, and containing the same particulars and specifying the same matters as required by section 5(7).
Use of a listening device by a party to a private conversation? ss. 5(1)(b), 5(3)	Not permitted unless: all the principal parties consent expressly or impliedly; a principal party consents and the recording is reasonably necessary for the protection of that person's lawful interests; or the recording is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation.
Records of application available for search? Part 4, s. 5(2)(c)	Not specified.

TASMANIA	
Destruction of irrelevant records? ss. 21, 5(2)(c)	Yes. As soon as practicable after it has been made, "a person" shall cause to be destroyed so much of any record, whether in writing or otherwise, of any evidence or information obtained as does not relate directly or indirectly to the commission of a prescribed offence.
Report required upon expiration of a warrant? s. 19 See reporting requirements re urgent warrants s. 5(4) & (7) and s. 8 discussed above.	Yes. Within three months after the warrant has ceased to be in force, a report in writing must be furnished to the Chief Magistrate and the Attorney-General. The report must state whether or not a device was used pursuant to the warrant and, if so, must specify: the names of persons if known whose private conversations were recorded or listened to; the period during which the device was used; particulars of any premises or any place the device was installed or used; and particulars of the general use made or to be made of any information or evidence obtained by use of the device; and particulars of any previous use of a device in connection with the prescribed offence in respect of which the warrant was granted.
Annual report required? (s. 22)	Yes. The Attorney-General shall as soon as practicable after 30 June each year cause to be prepared a report on the number of warrants sought under Part 4 and the number granted in that year and on such matters relating to the use of listening devices and to the administration of the Act as the Attorney-General considers appropriate. Such report to be laid before both Houses of Parliament.

TASMANIA	
Publication and communication of information obtained by illegal use of a listening device? s. 9	Prohibited unless communication or publication is made to: a party to the private conversation; or with the consent express or implied of all principal parties; or in the course of proceedings against the Act; or where the person making the communication or publication believes on reasonable grounds that it was necessary in connection with an imminent threat of serious violence to persons or of substantial damage to property; or a serious narcotics offence; or to prevent a person who has obtained knowledge of the private conversation, otherwise than in the manner referred to, from communicating it to another.
Publication and communication of information obtained pursuant to a warrant?	Not specified.
Publication and communication of records of a private conversation by a party to the conversation? s. 10	Prohibited unless: made to another party to the conversation or with the consent, express or implied, of all principal parties to the conversation; or is made in the course of legal proceedings; or is not more than reasonably necessary for the protection of the lawful interests of the person making the communication or publication; or is made to a person who is believed on reasonable grounds (by the person making the communication or publication) to have such an interest in the private conversation as to make it reasonable under the circumstances; or made pursuant to a warrant under this Act, or under the *Telecommunications (Interception) Act* or any other law of the Commonwealth.

TASMANIA	
Requirement to inform subject of surveillance ss. 5, 6, 20	The Chief Magistrate may direct the person who was authorised to use, or who used the listening device to supply to a person whose private conversation has been recorded or listened to, within a period specified by the Chief Magistrate, such information regarding the use of the device as the Chief Magistrate may order. The Chief Magistrate shall not give such a direction unless satisfied that having regard to the evidence or information obtained by use of the listening device and to any other relevant matter, the use of the listening device was not justified and was an unnecessary interference with the privacy of the person concerned. Before giving such a direction the Chief Magistrate shall give the person to whom the warrant was granted an opportunity to be heard.

NORTHERN TERRITORY: *Listening Device Act 1990*

NORTHERN TERRITORY	
Who can obtain a warrant? s. 4(1)	A member of the Police Force
From whom? s. 4(1)	A Judge of the Supreme Court
On what grounds? s. 4(1)	Reasonable belief that an offence has been, is being or is about to be or likely to be committed; and that a listening device is necessary to investigate the offence or obtain evidence of its commission, or the identity or location of the offender.
Is "offence" specified? s. 3(1)	Yes. Offence means: a crime; an indictable offence against the Cwlth or State or Territory; or any prescribed offence.
Form of application? ss. 4(2), 7	Application must set out or have attached to it a written statement setting out the grounds; further information required by the court given orally or by sworn affidavit. Application heard in closed court and no notice or report or record of application or order to be made available except by direction of Chief Justice.
What matters to be considered by a judge before a warrant is issued? s. 4(3)	The gravity of the offence; the extent to which a person's privacy is likely to be interfered with; extent to which information likely to be obtained is likely to assist the investigation of the offence; extent to which this information is likely to be obtained by other methods; evidentiary value of information sought to be obtained; any other warrants applied for or issued in respect to the same offence.
Power of entry and ancillary powers? s. 4(6)	May authorise installation, relocation, repair and retrieval of the listening device; entry into or onto specified premises or place or another premises adjoining or providing access to the specified premises, using such force and assistance as necessary.

NORTHERN TERRITORY	
What matters to be specified in a warrant? s. 4(5) s. 4(7)	Any conditions the Supreme Court considers necessary in the public interest and specifies in the warrant. Shall specify the offence; where practicable, names of any persons whose private conversations might be recorded and listened to; the period the warrant will remain in force; the name of the police officer to whom the warrant is issued; where practicable, the place the listening device is to be installed or used; the conditions and restrictions under which a place may be entered, or a listening device used.
What is the maximum specified period for a warrant? s. 4(7)(c)	Period not longer than 21 days.
Can a warrant be extended? s. 5	Yes, for no longer than 21 days. A further application for extension may be sought.
Can a warrant be revoked? s. 4(10)	Yes. Supreme Court may withdraw the warrant before it is executed upon application by a member of the Police Force.
Telephone etc. warrants available? s. 6	Yes, where impracticable to appear in person the member of the Police Force may apply to a Supreme Court Judge over telephone. The application to be prepared as per s. 4, on oath; if required by the Judge the applicant must prepare an affidavit setting out the grounds. If necessary may make the application before either document sworn. If Judge is satisfied there are reasonable grounds, may issue warrant as per s. 4 and inform applicant of terms and reasons for issuing. Not later than the day following the expiry of the warrant, the applicant must forward to the issuing Judge the information and affidavit and warrant. The Judge will then compare the warrants and if satisfied they are identical, sign the original warrant and forward all the material to the Commissioner of Police.

NORTHERN TERRITORY	
Use of listening device in urgent circumstances without a warrant permitted? s. 11	Yes, where it is necessary to use the device immediately to obtain evidence or information in connection with: any threat of violence which may or is likely to cause the death of, or grievous harm to, a person; any serious drug offence [see s. 11(1)]. The Commissioner of Police shall make or cause to be made an application for a warrant, not later than 24 hours after initial use. If warrant refused, use of the device must cease not later than 24 hours after initial installation. Any information obtained must be destroyed within seven days of recording and any evidence obtained thereby is inadmissible in any legal proceedings.
Use of a listening device by a party to a private conversation? s. 8	Permitted.
Records of application available for search? s. 7(2)	No, except by direction of the Chief Justice of the Supreme Court.
Destruction of irrelevant records? s. 12	Section refers to 'recordings'. Commissioner of Police shall report to the minister if satisfied that the information is not likely to be required in connection with: the investigation of an offence in respect of which a warrant was issued; the making of a decision whether to prosecute for an offence; or the prosecution of an offence. The Minister may then direct the Commissioner of Police to destroy the recording.
Report required upon expiration of a warrant? s. 13	Yes. The Commissioner of Police shall furnish a report to the relevant Minister not more than 28 days after the expiration of the warrant, detailing the use made of information obtained by use of the listening device.

NORTHERN TERRITORY	
Annual reports required? s. 14	Yes. The Commissioner of Police must furnish a report to the Minister by August 31 containing information re: the number of applications for warrants, telephone warrants and extension to warrants and the orders made; the periods the warrants and extensions thereto remained in force; the number of arrests made on the basis, or partly on the basis of information obtained by use of a listening device; how many prosecutions were instituted in which such information was given in evidence; how many persons were found guilty as a consequence of those prosecutions. The Minister must table this report in Parliament.
Publication and communication of information obtained by illegal use of a listening device? s. 9(2)	Not permitted.
Publication and communication of information obtained pursuant to a warrant? s. 9(3)	Not permitted unless for: the investigation or prosecution of an offence; a proceeding for forfeiture or confiscation of property or for imposition of pecuniary penalty; a proceeding for the taking of evidence on commission for use in Australia or New Zealand; extradition proceedings; police disciplinary proceedings; any other investigation or proceeding relating to alleged misbehaviour or misconduct of a police officer or an officer of the Territory, State, Commonwealth or another Territory of the Commonwealth; and as below s. 9(4).
Publication and communication of information obtained by a party to the conversation? s. 9(4)	Permissible if has express, implied consent of the parties; for a purpose specified above; no more than reasonably necessary in the public interest; in the course of that person's duty; for the protection of that person's lawful interests.
Requirement to inform subject of surveillance?	No.

VICTORIA: *Listening Devices Act 1969*

VICTORIA	
Who can obtain a warrant? s. 4A(1)	A member of the Police Force.
From whom? s. 4A(1)	Supreme Court Judge.
On what grounds? s. 4A(1)	Reasonable grounds for a suspicion or belief that an offence has been, is about to be, or is likely to be committed; and device is necessary to investigate offence or obtain evidence of the commission of the offence or identity of the offender.
Is "offence" specified?	No.
Form of application? s. 4A(7)	Not specified. (4A(1) 'on complaint') To be heard in a closed court.
What matters to be considered by a judge before a warrant is issued? s. 4A(2)	Nature and gravity of offence; extent to which privacy of any person is likely to be affected; alternative means of obtaining evidence or information sought; the evidentiary value of the evidence sought; any previous warrant sought or granted in connection with the same offence.
Power of entry and ancillary powers? s. 4A(3) s. 4A(4)(f)	Yes. May authorise and require the retrieval of the listening device and authorise entry onto premises for the purpose of installation and retrieval. May specify any conditions subject to which premises may be entered or a listening device may be used.

VICTORIA	
What matters to be specified in a warrant? s. 4A(3) & (4)	See 4A(3) above together with the following matters: the offence in respect of which warrant granted; if practicable the names of persons whose private conversations might be recorded if listened to; the period the warrant is in force; the name of any person who may use the device and the persons who may use the device on behalf of that person; the premises or place the device is to be installed or used; any further conditions of entry to premises or use of the device; the time within which a report is to be furnished to the relevant Minister concerning use of the device.
What is the maximum specified period for a warrant? s. 4A(4)(c)	Period not exceeding 21 days.
Can a warrant be extended? s. 4A(6)	Further warrants may be granted with respect to the offence.
Can a warrant be revoked? s. 4A(5)	Yes, by Supreme Court, at any time before expiration of the period specified in the warrant.
Telephone etc. warrants available?	No.
Use of a listening device in urgent circumstances without a warrant permitted?	No.
Use of a listening device by a party to a private conversation? s. 4(1)(a)	Permitted.
Records of application available for search?	No.
Destruction of irrelevant records? s. 7	Yes. Where the record is made by a person who is not a party to the private conversation, and the information is not or is not likely to be of assistance in the performance of his duty, the person shall forthwith destroy such record.

VICTORIA	
Report required upon expiration of a warrant? s. 5	Yes. Within the time specified in the warrant, a report must be furnished in writing to the Minister administering the *Police Regulation Act 1958*. The report must state whether or not the listening device was used pursuant to the warrant; names of persons whose conversations were listened to or recorded; the period over which device used; the premises or place where the device was used; the use made or to be made of evidence or information gathered by the device; particulars of any other warrants granted re same offence.
Annual report required?	No.
Publication and communication of information obtained by illegal use of a listening device?	Not specified.
Publication and communication of information obtained pursuant to a warrant? s. 4(3)	Permitted in the performance of duty.
Publication and communication of information obtained by a party to the conversation? s. 4(1) & (2)	Prohibited except in the course of any legal proceedings; or if no more than reasonably necessary in the public interest; or if communicated by a person in the course of duty or for the protection of his lawful interests.
Requirement to inform subject of surveillance?	No.

SOUTH AUSTRALIA: *Listening Devices Act 1972*

SOUTH AUSTRALIA	
Who can obtain a warrant? s. 6(2)	A member of the South Australian police force; member of NCA or AFP and other police who are attached to NCA for the purposes of an investigation of a matter by the Authority.
From whom? s. 6(1)	Supreme Court Judge.
On what grounds? s. 6(2)	For the purposes of investigation of a matter by the police/by the Authority.
Is "offence" defined?	No.
Form of application? s. 6(3) s. 6(5)	Must be in writing; set out grounds on which application based; specify period warrant requested to be in force for and reasons for the same; may request authority to enter onto specific premises. Judge may require further information be given.
What matters to be considered by a judge before a warrant is issued? s. 6(6)(b)	Extent to which privacy of a person would be likely to be interfered with; gravity of criminal conduct being investigated; extent to which information which would be likely to be obtained would be likely to assist the investigation; extent to which information would likely be obtained by other methods of investigation; and extent to which use of those other methods would be likely to assist the investigation or prejudice through delay or any other reason; and if warrant authorises entry onto premises, that it would be impractical or inappropriate to use a listening device pursuant to the warrant without entry onto premises.
Power of entry and ancillary powers? s. 6(7)(b)	May restrict entry to within specified hours; may allow entry without permission or demand being made – if so, may specify in warrant measures by which entry may be gained.

SOUTH AUSTRALIA	
What matters to be specified in a warrant? s. 6(7)(a) & (b)	May specify conditions relating to use; if warrant authorises entry, may restrict entry to premises to within specified hours during the day; provide entry be made without permission and the measures by which entry may be made; must specify the period warrant to be in force.
What is the maximum specified period for a warrant? s. 6(7)(c)	Period not greater than 90 days
Can a warrant be extended? s. 6(7)(d)	Yes. May be renewed.
Can a warrant be revoked? s. 6(8) & (9)	Yes. It must be cancelled if Commissioner of Police or member of NCA is satisfied grounds for issuing warrant have ceased to exist. Must be cancelled in writing. May be cancelled at any time.
Telephone etc. warrants available? s. 6(4)	Yes. Applications may be made by telephone in circumstances of urgency. Must state grounds for warrant, specify period it is requested to be in force and reasons therefore, and include particulars of the urgent circumstances.
Use of a listening device in urgent circumstances without a warrant permitted?	No.
Use of a listening device by a party to a private conversation? s. 7(1)	Permitted in limited circumstances. Must be in the course of that person's duty, in the public interest, or for the protection of the lawful interests of that person.
Records of application available for search?	No.

SOUTH AUSTRALIA	
Destruction of irrelevant records? s. 6c	Commissioner of Police and NCA must: keep all records of information obtained in a secure place that is not accessible to those not entitled to deal with it; Commissioner and NCA must destroy information if satisfied the information is not likely to be required in connection with: the investigation of the offence in respect of which the warrant was issued; the making of a decision whether to prosecute or not; the prosecution of an offence.
Report required upon expiration of a warrant? s. 6b	Yes. As soon as practicable after issue or cancellation of warrant, Commissioner of Police must forward copies of warrant or instrument of cancellation to Minister. Within three months of a warrant expiring, Commissioner of Police must provide Minister with a written report detailing use made of information obtained and any communication of that information to persons other than police members.
Annual report required? s. 6b(1)(c)	Yes. The Commissioner of Police must provide the Minister with a report by August 31 containing information in relation to; applications for warrants; telephone applications; renewal applications; applications that included request to enter premises; how many applications made; how many withdrawn or refused; how many successful average time warrants in force; average periods warrants were to be in force and were actually in force; average length of time of renewal warrants; how many arrests made during the year; how many arrests on the basis – fully or partly – of information obtained by use of listening device; how many prosecutions instituted in which information obtained by use of listening device; how many found guilty as a consequence of those prosecutions; any other matter the Minister may specify.
s. 6b(3) & (4)	The Minister upon receiving this report must table before both Houses of Parliament a report containing the information provided by the Commissioner of Police.

SOUTH AUSTRALIA	
Publication and communication of information obtained by illegal use of a listening device? s. 5	Prohibited.
Publication and communication of information obtained pursuant to a warrant? s. 6a(1) s. 6a(2)	Permissible only in course of duty or as required by law. To the extent necessary to give full effect to the purposes for which the warrant was issued, and for the purposes of giving evidence.
Publication and communication of information obtained by a party to the conversation? s. 7(2)	Permissible if communicated or published information: in the course of duty; in the public interest; or for the protection of the lawful interests of the person.
Requirement to inform subject of surveillance?	No.

WESTERN AUSTRALIA: *Listening Devices Act 1978*

WESTERN AUSTRALIA	
Who can obtain an authority? s. 4(3)(a)	A member of police force may in the course of duty request authorisation to use a device.
From whom? s. 4(3)(a)	Commissioner, Senior Assistant Commissioner of Police or officer of Inspector rank or above appointed by Commissioner of Police to authorise use of listening devices.
On what grounds?	Not specified.
Is "offence" specified?	No.
Form of application? s. 4(3)(a)	Not specified. Authority must be in writing.
What matters to be considered by an authorising officer before an authority is issued?	Not specified.
Power of entry and ancillary powers available?	No.
What matters to be specified in the authority? s. 4(3)(a)	No requirement except that authorisation to use device must be in writing.
What is the maximum specified period for an authority?	Not specified.
Can an authority be extended?	Not specified.
Can an authority be revoked?	Not specified.

WESTERN AUSTRALIA	
Telephone etc. authorities available?	No.
Use of listening device in urgent circumstances without an authority permitted?	No.
Use of a listening device by a party to a private conversation? s. 4(1)(a)	Permitted.
Records of application available for search?	No.
Destruction of irrelevant records? s. 7	Yes. Where the information recorded is not or not likely to be of assistance in the performance of a person's duty (and that person was not a party to the conversation), shall forthwith destroy such record of information.
Report required upon expiration of an authority? s. 5	If Minister so requests, Commissioner of Police shall furnish a report containing such particulars as required by the Minister as to the use of any listening device by any member of the police force.
Annual report required?	No.
Publication and communication of information obtained by illegal use of a listening device? s. 4(1)	Must have express or implied consent of parties to the conversation or be in the course of legal proceedings.
Publication and communication of information obtained pursuant to an authority? s. 6	Permissible only in the performance of duty.

WESTERN AUSTRALIA	
Publication and communication of information obtained by a party to the conversation? ss. 4(1) & (2)	Permissible only if; have consent of the parties or in the course of legal proceedings; if no more than reasonably necessary in the public interest; if communicated by a person in the course of duty, or for the protection of his lawful interests.
Requirement to inform subject of surveillance?	No.

COMMONWEALTH: *Telecommunications (Interception) Act 1979*

*Part VI – Warrants authorising AFP to intercept telecommunications

Telecommunications (Interception) Act 1979	
Who can obtain a warrant? ss. 34, 39, 40, (s. 5)	A person authorised in writing by the chief officer of a declared agency. At present these agencies include AFP, NSWPOL, VICPOL, SAPOL, NCA, NSWCC, ICAC.
Who may execute a warrant? ss. 32, 33	The Telecommunications Interception Division of the AFP is to take action to enable warrants issued to other agencies to be executed.
From whom? ss. 6D, 39	Eligible judge being a judge of a court created by Federal Parliament, who has consented in writing to be nominated by the Minister.
On what grounds?	Not specified. However, see ss. 45, 46 which specify the grounds on which the judge may exercise his/her discretion and issue a warrant authorising interception.
Is "offence" specified? s. 5	Yes. Class 1 and Class 2 offences. Class 1 offences include murder, kidnapping, narcotics, s. 235 of the *Customs Act 1901*. Class 2 offences include offences punishable by imprisonment for life or at least seven years involving: loss of life; serious personal injury; serious damage to property in circumstances endangering the safety of a person; trafficking in a prescribed substance; serious fraud; serious loss of revenue of the Commonwealth or a State; and offences against a provision of Part VI A of the *Crimes Act*.

* There is a different statutory scheme authorising telecommunications interception by ASIO, see Part III of the Act.

Telecommunications (Interception) Act 1979	
Form of application ss. 40, 41, 42	Application to be in writing stating name of agency and person making the application together with an affidavit setting out facts and other grounds on which application based; specifying period requested for warrant to be in force and why; setting out number of previous applications for that service, number of warrants previously granted, use of information obtained as a result of those applications.
s. 44	Judge can request further information, to be provided on oath if the application was in writing and orally.
s. 48	May include a request that the warrant authorise entry on premises. It must specify the premises; state why believed necessary to enter premises; previous applications for warrants issued to enter those premises; and the number issued. Reasons why impractical or inappropriate to intercept otherwise than by use of equipment or a line installed on those premises. Special provisions for telephone applications in urgent circumctances (ss. 50, 51).
What matters to be considered by a judge before a warrant is issued? s. 45	In the case of a Class 1 offence, judge to be satisfied that: there are reasonable grounds to suspect a person is using or likely to use the service; the information likely to be obtained would be likely to assist the investigation of the offence/s in which the person is involved; that some or all of the information cannot be appropriately obtained by other methods – having regard to extent to which other methods have been used or are available, how much information could be obtained by such methods and how much investigation would be prejudiced by use of those methods.

Telecommunications (Interception) Act 1979	
s. 46	In the case of Class 2 offences, judge to be satisfied of all matters listed above and have regard to: the extent to which privacy of person/s will be interfered with; and the gravity of conduct constituting offence.
Powers of entry and ancillary powers s. 48	A judge may, in specified circumstances, authorise: • entry onto premises to install, maintain and use or recover equipment or a line, and • the interception of communications using that equipment. The warrant must state whether entry is authorised at any time of day or night or only during specified hours, and may provide for entry without prior permission or demand and authorise measures that the judge is satisfied are necessary and reasonable for that purpose.
What matters to be specified in the warrant? s. 49	Shall be in accordance with the prescribed form and signed by the judge; may specify conditions and restrictions; shall specify the period for which it is in force; shall set out short particulars of each serious offence in relation to which the judge issuing warrant was satisfied as mentioned in section s. 45 or s. 46.
What is the maximum specified period for a warrant? s. 49(3)	Period specified in the warrant, up to 90 days.
Can a warrant be extended? s. 49(4) & (5)	No. However, can re-apply for a new warrant.
Can a warrant be revoked? ss. 56, 57	Yes. Commissioner or Deputy Commission of AFP – or Chief Officer of the Agency – may by writing revoke the warrant where the grounds on which the warrant was issued have ceased to exist.

Telecommunications (Interception) Act 1979	
Telephone etc. warrants available ss. 40(2) & (3), s. 43, s. 50	Available for warrants to intercept communications in urgent circumstances. May be made by Chief Officer of Agency or a person authorised in writing by the Chief Officer to make such application. Judge must be informed of particulars of urgent circumstances and all matters required to be dealt with in a normal application. This information shall be given orally or in writing as judge directs. As soon as practicable after completing and signing warrant, judge shall inform the applicant of its terms; of the day and time warrant signed; and give it to the person. Judge to keep copy of warrant.
s. 51	Within within one day after the warrant is issued, the applicant is to ensure that each person who gave information to the judge swears an affidavit containing the information so given. Unless Chief Officer applied, a copy of the affidavits and applications authorisation are to be given to the judge.
s. 54	A telephone warrant issued other than to AFP does not come into force until Commissioner of Police of the AFP receives notification.
Revocation of telephone warrants s. 52	Judge can revoke warrant if satisfied s. 51 not complied with. May do so in writing (signed) and inform, and provide instrument of revocation, to applicant or Chief Officer of agency. Chief officer of agency (except AFP) must inform, and give copy of instrument of revocation to Commissioner of AFP.
Records of application available for search	Not specified.
Destruction of irrelevant records	Records of interception are to be destroyed if they not likely to be required for a permitted purpose (s. 79).

Telecommunications (Interception) Act 1979	
Report required upon expiration of warrant ss. 94, 96, 97	Chief Officer of Commonwealth agency must provide the Commonwealth Attorney–General with copies of all warrants and revocations, reports on the use made by the agency of intercepted information and comprehensive reports in order to enable the Attorney–General to prepare the *Telecommunications (Interception) Act* annual report (ss. 94, 96). The reports are to contain information relating to how many arrests, prosecutions and convictions were made during that year on the basis of information that was lawfully obtained by the use of interception devices. The following information must also be provided: • the average periods specified in warrants that were issued • average period of time for which warrants were sought • average period of time within which warrants were actually in force • the number of renewals of warrants that were sought and granted • the average length of time of such renewals and • other details in relation to the class and nature of offences for which warrants were sought. The Managing Directors of carriers must provide reports to the Minister on acts or things done in relation to warrants (s. 97).
Annual report required Part IX	The Commonwealth Attorney–General (being the Minister charged with administering the Act) is required to table a comprehensive annual report in Parliament in relation to the use of interception devices by both Commonwealth and State agencies.

Telecommunications (Interception) Act 1979	
Publication and communication of information obtained by illegal use of telecommunications interception ss. 63, 63A, 71, 76, 88–89	Unlawfully obtained information cannot be communicated or used in evidence in proceedings unless: • it is for the purpose of a proceeding begun prior to the commencement of Part VII of the Act and was obtained prior to that date (ss. 63, 63A, 77(1)(a)) • it is communicated to the Federal Attorney–General, the Federal DPP, the AFP Commissioners, or the NCA Chairperson by a person who suspects on reasonable grounds that the interception may tend to establish that a (prescribed) 'suspected offence' has been committed, for the purpose of investigating, making a decision whether to prosecute or prosecuting the suspected offence (s. 71) • it is given in evidence in a proceeding for a prosecution for a breach of the Act constituted by the interception or communication of the information, or an ancillary offence (s. 76) • is for the purpose of giving information and access to the Ombudsman (ss. 88–89).
Publication and communication of information obtained pursuant to a warrant to intercept ss. 63, 63B, 64, 65, 65A, 66, 67, 68, 70, 74, 75, 77, 83, 86–89	A person is not permitted to communicate intercepted communications except in circumstances prescribed in Part VII of the Act: • Officers of agencies may communicate information to another person for 'permitted purposes' defined in s. 5 to include the investigation of a serious offence; certain offences under the Act; an offence against a provision of the Part VIIB of the *Crimes Act 1914*; any other offence punishable by imprisonment for life or for a period, or maximum period, of at least three years; or an offence ancillary to the above offences (s. 67).

Telecommunications (Interception) Act 1979	
	• Agencies may communicate to other agencies information relating to the commission of any 'relevant offence' defined in s. 5 to include a 'prescribed offence' that is an offence against the Commonwealth an offence against a law of the State or an offence over which the agencies have jurisdiction (s. 68). • A member of the police force may communicate information received as a result of an emergency trace under section 30 to any person whose assistance may be required in dealing with that emergency (s. 70). • Information can be used as evidence: – in certain exempt proceedings defined in section 5B to include a proceeding by way of a prosecution for a prescribed offence; for the confiscation or forfeiture of property in connection with the commission of the prescribed offence; for extradition relating to a prescribed offence; a police disciplinary proceeding; a proceeding relating to alleged misbehaviour or improper conduct of an officer of the Commonwealth or the State; a proceeding for recovery of a debt due in relation to supply of a telecommunications service; or a proceeding that concerns an offence against the laws of a foreign country punishable by imprisonment for life or for a period, or maximum period, of at least three years (ss. 74, 77). – in hearings to determine whether there is defect in the warrant (s. 75) or – in certain proceedings to determine the extent (if any) to which information may be given in evidence (s. 77(1)(b)).

Telecommunications (Interception) Act 1979	
	• Employees of the carrier in performance of their duties may communicate information relating to: – the operation or maintenance of the network operated by the carrier or supply of the services by the carrier or another carrier by means of the network (s. 63B) – the investigation by an agency of a serious offence (s. 65A) and • A person who has intercepted a communication pursuant to a warrant may communicate that information to an officer who applied for the warrant or who is authorised to receive such information (s. 66) • The Commonwealth and State Ombudsman have the power to communicate information relating to the performance of their inspection and oversight functions (s. 92A).
Requirement to inform subject of surveillance	No.

APPENDIX 15

POWERS TO TAKE HUMAN PRINTS AND PHOTOGRAPHS: QUEENSLAND

This appendix provides a table of Queensland legislation which allows for the taking of human prints and photographs. These Acts are as follows:

- *Casino Control Act 1982*
- *Drugs Misuse Act 1986*
- *Gaming Act 1850*
- *Gaming Machine Act 1991*
- *Hawkers Act 1984*
- *Invasion of Privacy Act 1971*
- *Law Courts and State Buildings Protective Security Act 1983*
- *Nature Conservation Act 1992*
- *Pawnbrokers Act 1984*
- *Police Service Administration Act 1990*
- *Public Safety Preservation Act 1986*
- *Racing and Betting Act 1980*
- *Regulatory Offences Act 1985*
- *Second-hand Dealers and Collectors Act 1984*
- *Vagrants, Gaming and Other Offences Act 1931*
- *Weapons Act 1990.*

This table lists the relevant provisions in each act and compares the powers granted under the following headings:

- circumstances of exercise of power
- person authorised
- nature of particulars
- associated powers
- circumstances of destruction.

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Casino Control Act 1982 s. 115(1)	Where a person has been arrested for an offence or an attempt to commit an offence against s. 103 (cheating)* or s. 104 (unlawful use of equipment).*	A member of the police force at the establishment where the person is taken or is in custody.	All particulars the officer considers necessary for identification including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is reasonably necessary for taking the particulars.	Where a person is found not guilty of such an offence, any particulars taken under the section in relation to that offence shall be destroyed in their or their nominee's presence.
Casino Control Act 1982 s. 115(2)	Where a court which convicts a person who appears before it of an offence against s. 103 (cheating)* or s. 104 (unlawful use of equipment)* orders the person into custody for the purpose of obtaining particulars.	A member of the police force.	As above.	As above. Take the person to a place where the particulars can be taken. Be aided by other officers. Use such force as is reasonable in the circumstances in taking the person to the place.	As above.

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Drugs Misuse Act 1986 s. 23(1)	Where a person is arrested on a charge of having committed an offence under the Act.*	A police officer.	All particulars the officer considers necessary for identification of the person or investigation of an offence, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is reasonably necessary to obtain particulars, except voiceprints or handwriting.	Where a person is acquitted of an offence under the Act or the charge is withdrawn or dismissed, the particulars shall, at the request of the person and in the person's presence, be destroyed except where in the opinion of the Director of Prosecutions they are required as evidence in respect of another offence or proceedings for any other offence have been commenced (s. 23(2)(a)&(b)).
Gaming Act 1850 s. 1	Where person has been arrested on a charge of an offence under s. 1.*	The member of the police force in charge of the police station, watchhouse or lock up where person is taken after arrest.	All particulars the officer thinks necessary for identification of the person, including photograph, fingerprints and palmprints.	Nil.	If proceedings are not taken against the person or the person is found not guilty on the charge, particulars shall be destroyed, in the person's presence.

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Gaming Machine Act 1991 s. 202(1)	Where a person has been arrested for an offence or attempt to commit an offence against s. 135(1) (manufacture, etc. of gaming machines)* or (2) (manufacture, etc. of restricted components),* s. 152(1) (unlawful interference with gaming equipment),* s. 196 (cheating)* or s. 197 (forgery and like offences).*	A police officer at the police establishment or station where a person is taken after arrest or is in custody.	All particulars the officer considers necessary for identification, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is reasonable in the circumstances in taking particulars, other than voiceprint or handwriting (s. 202(2)).	Where a person is found not guilty of such an offence, any particulars taken under the section in relation to that offence must, on written request from the person, be destroyed in their or their nominee's presence (s. 202(6)).

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Gaming Machine Act 1991 s. 202(3)	Where a court which convicts a person who appears before it of an offence against s. 135(1) or (2), s. 152(1), s. 196 or s. 197 orders the person into custody for the purpose of obtaining particulars.	The police officer into whose custody the court orders the person.	As above.	As above. Take the person to a place where the particulars can be taken (s. 202(4)). Be aided by other officers (s. 202(4)). Use such force as is reasonable in the circumstances in taking the person to the place (s. 202 (5)).	As above.
Hawkers Act 1984 s. 40(1)	Where a person is arrested for an offence against the Act.*	Officer in charge of police at the police establishment to which the person is taken or is in custody.	All particulars as officer considers necessary for identification, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is necessary to obtain particulars, except voiceprints and handwriting (s. 40(1A)).	Where the person is not proceeded against or is found not guilty of the offence, particulars taken shall, at the person's request, be destroyed in their presence (s. 40(3)).

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Hawkers Act 1984 s. 40(2)	Where a court which convicts a person who appears before it of an offence against the Act* orders the person into custody for the purpose of obtaining particulars (custody to cease at expiration of one hour from making of order).	The police officer into whose custody the court orders the person.	As above.	As above. Be aided by any police officer. Take the person to a place where particulars can be taken. Use such force as is necessary to take person to place and take particulars.	As above.
Invasion of Privacy Act 1971[2] s. 48A(7)	Where a person is arrested for an offence against s. 48A.* (The provisions of s. 43 of the Vagrants, Gaming and Other Offences Act 1931 apply).	Officer in charge of police at station where person is taken or is in custody.	All particulars as may be deemed necessary for identification, including photograph, fingerprints and palmprints.	Nil.	If person is found not guilty or is not proceeded against, any particulars shall be destroyed in persons's presence (s. 43(1A)) of Vagrants, Gaming and Other Offences Act 1931).

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*†	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Law Courts and State Buildings Protective Security Act 1983 s. 27(1)	Where a person is arrested on a charge of an offence against the Act.*	Officer in charge of police at establishment where person is taken or is in custody.	All particulars as the officer considers necessary for identification, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as necessary in taking particulars (s. 27(1A)).	Where person is not proceeded against or is found not guilty of the offence, particulars shall be destroyed automatically unless another charge is pending, or person convicted of another offence, or particulars are required in respect of another offence alleged to have been committed by the person (s. 27(2)).

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Nature Conservation Act 1992 s. 152(1)	If a person is arrested on a charge of an offence against the Act* and it is reasonably necessary for the future identification of the person.	A police officer.	Photographs or fingerprints.	Such force as is necessary and reasonable to take the photographs or fingerprints (s. 152(2)).	If the person is found not guilty or the charge is withdrawn or dismissed, any photographs, fingerprints and copies must, if the person requests, be destroyed in their presence unless required in connection with another offence against the Act alleged to have been committed by the person (s. 152(3)).
Pawnbrokers Act 1984 s. 53(1)	Where a person is arrested for an offence against the Act.*	Officer in charge of police at establishment where person is taken or is in custody or taken.	All particulars as officer considers necessary for identification, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is necessary to obtain particulars, except voiceprints and handwriting (s. 53(1A)).	Where person is not proceeded against or is found not guilty of the offence, particulars shall, at person's request, be destroyed in their presence (s. 53(3)).

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Pawnbrokers Act 1984 s. 53(2)	Where a court which convicts a person who appears before it of an offence against the Act* orders the person into custody for the purpose of obtaining particulars (custody to cease at expiration of one hour from making of order).	A police officer.	As above.	As above. Be aided by any police officer. Take person to place for particulars to be taken. Use such force as is necessary to take person to place and take particulars.	As above.
Police Service Administration Act 1990 s. 10.22(2)	Where a person is arrested having been found committing an offence against s. 10.19 (offences), s. 10.20 (bribery or corruption of officers or staff members) or s. 10.20A (Assault of police officer) of the Act.	Officer in charge of police establishment or station where person is taken or is in custody.	Fingerprints, palmprints and photograph for identification of the person.	Use such reasonable force as is necessary for the purpose of taking particulars for identification (s. 10.22(2A)).	If person is not proceeded against or is found not guilty particulars must, if the person requests, be destroyed in their presence (s. 10.22(3)).

Provision	Circumstances of Exercise of Power*[1]	Person Authorised	Nature of Particulars	Associated Powers	Circumstances of Destruction
Public Safety Preservation Act 1986 s. 15(1)	Where a person is charged with an offence against the Act.*	A member of the police force.	All particulars as may be considered necessary for identification, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is necessary in taking particulars, except voiceprints and handwriting. Offence to refuse or fail to provide or resist the taking of any particular (s. 15(4)).	Where person is found not guilty or is not proceeded against, any particulars shall, at the person's request, be destroyed in the person's presence unless another charge is pending, or the person is convicted of another offence, or particulars are required in respect of another offence allegedly committed by the person (s. 15(3)).

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Public Safety Preservation Act 1986 s. 15(2)	Where a court which convicts a person who appears before it of an offence against the Act* orders the person into custody for the purpose of obtaining particulars (custody to cease at expiration of one hour from making of order).	The police officer into whose custody the court orders the person.	As above.	Be aided by any police officer. Take person to place for particulars to be taken. Use such force as is necessary to take person to place and take particulars. Offence to refuse or fail to provide or resist the taking of any particular (s. 15(4)).	As above.

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER[*1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Racing and Betting Act 1980 s. 246(1)	Where a person has been arrested for an offence against the Act.*	Officer in charge of police at the establishment where the person is taken or is in custody.	All such particulars as the person [sic] considers necessary for the identification of that person including voiceprints, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is reasonably necessary for the purpose.	If the person is found not guilty of an offence against the Act or the complaint of an offence against the Act is dismissed, any particular previously taken under the Act in relation to the offence shall, at the person's request and in their presence, be destroyed unless required as evidence against the person in respect to any other alleged offence against the Act (s. 246(3)).

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Racing and Betting Act 1980 s. 246(2)	Where a court which convicts a person who appears before it of an offence against the Act* orders the person into custody for the purpose of obtaining particulars.	The police officer into whose custody the court orders the person.	As above.	Be aided by any police officer. Take person to place where particulars can be taken. Use such force as is necessary to take person to place and take particulars.	As above.
Regulatory Offences Act 1985 s. 8(3)	Where a person has been arrested in respect of any offence against the Act.*[3]	A member of the police force at police establishment where a person is taken or is in custody.	All such particulars as the officer considers necessary for identification, including photograph, fingerprints and palmprints.	Nil.	If the person is found not guilty of the offence or is not proceeded against, any particulars shall be destroyed in the person's presence or the presence of the person's nominee.

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Second-hand Dealers and Collectors Act 1984 s. 60(1)	Where a person is arrested for an offence against the Act.*	Officer in charge of police at establishment where person is taken or is in custody.	All particulars as officer considers necessary for identification, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is necessary in taking particulars, except voiceprints and handwriting (s. 60(1A)).	If the person is found not guilty of the offence or is not proceeded against, any particulars shall be destroyed in the person's presence or in the presence of the person's nominee (s. 60(3)).
Second-hand Dealers and Collectors Act 1984 s. 60(2)	Where a court which convicts a person who appears before it of an offence against the Act* orders the person into custody for the purpose of obtaining particulars (custody to cease at expiration of one hour from making of order).	The police officer into whose custody the court orders the person.	As above.	Be aided by any police officer. Take person to place for particulars to be taken. Use such force as is necessary to take person to place and take particulars.	As above.

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Vagrants, Gaming and Other Offences Act 1931 s. 43(1)	Where a person is arrested under the Act on a charge,* or is in custody for any indictable offence under the Criminal Code,* or is arrested for an offence against the Code ss. 445,* 446,* 447,* 448* or 448A.*	Officer in charge of police at station where person is taken or is in custody.	All particulars as may be deemed necessary for identification, including photograph, fingerprints and palmprints.	Nil.	If person is found not guilty or is not proceeded against, any particulars shall be destroyed in persons's presence (s. 43(1A)).
Vagrants, Gaming and Other Offences Act 1931 s. 43(2)	Where a court which convicts a person who appears before it of an offence against the Code ss. 445,* 446,* 447,* 448* or 448A* orders the person into custody for the purpose of obtaining particulars.	The police officer into whose custody the court orders the person.	As above.	Be aided by any police officer. Take person to place for particulars to be taken. Use such force as is necessary to take person to place and take particulars.	Not applicable.

PROVISION	CIRCUMSTANCES OF EXERCISE OF POWER*[1]	PERSON AUTHORISED	NATURE OF PARTICULARS	ASSOCIATED POWERS	CIRCUMSTANCES OF DESTRUCTION
Weapons Act 1990 s. 4.11(1)	Where a person is arrested on a charge of an offence against the Act.*	A police officer.	All particulars as officer considers on reasonable grounds necessary for identification of the person or the investigation of an offence, including voiceprint, photograph, fingerprints, palmprints, footprints, toeprints and handwriting.	Use such force as is necessary to obtain particulars, except voiceprints and handwriting.	If person is acquitted of an offence in the Act, the charge being withdrawn or dismissed or the person being absolutely discharged, particulars are to be destroyed within 28 days (s. 4.11(2)).

1 **Offences or classes of offences marked with an asterisk are punishable by imprisonment.**

2 **The *Invasion of Privacy Act 1971* s. 48A(7) simply adopts provisions of the *Vagrants Gaming and Other Offences Act* s. 43.**

3 **Although no regulatory offences are punishable by imprisonment, they can be prosecuted as indictable offences which are punishable by imprisonment.**

APPENDIX 16

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.

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Date of Issue	Title	Availability	Price
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