Queensland Law Society

LAPCSESC
Police Powers
Submission 023

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Office of the Chief Executive

Your Ref: 11.14.C: Ms Amanda Powell

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26 September 2011

Ms Amanda Powell
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Legal Affairs Police, Corrective Services and Emergency Services Committee
Parliament House
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Dear Research Director

POLICE POWERS AND RESPONSIBILITIES AND OTHER LEGISLATION AMENDMENT BILL 2011 - CALL FOR SUBMISSIONS

We refer to the letter by the Hon Dean Wells MP, the Acting Chair of the Legal Affairs Police, Corrective Services and Emergency Services Committee, dated 2 September 2011. Thank you for the opportunity to make submissions to the Committee on the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2011* (the Bill).

We advise that the Society was a key stakeholder in the PPRA Review Committee. We also note that we responded to a public call for submissions from the Minister for Police, Corrective Services and Emergency Services and we **enclose** a copy of that correspondence for your information.

1. Referral of Suspects and Defendants to Police Preferred Solicitors

The Society has been concerned for some time that there has developed within part of the Queensland Police Service a practice of referring suspects to particular solicitors. The solicitors are themselves often former police officers and work colleagues of the officers making the referrals. The Society believes that the referral relationships have had a detrimental effect on the quality and independence of the advice given to the referred clients. Some police officers are encouraged to engage in sharp practice or misconduct, relatively secure in their belief that their actions will not be challenged by friendly defence lawyers. The issue of inappropriate police referrals has been a persistent problem and in some cases may constitute official corruption.

The present legislation is neither clear, nor effective. It could be made so very simply. The Society was disappointed to observe that Clause 39 of the Bill would simply move the existing, flawed provision from the Regulations to the Act.

For readers unfamiliar with the workings of the Act the problem is not immediately apparent. A superficial reading of the provision would suggest that police officers may not refer matters to solicitors. The provision proposed in clause 39 reads as follows:

> *(5) A police officer must not do or say anything with the intention of –*
> *(a) dissuading the relevant person from obtaining legal advice; or*
> *(b) persuading a relevant person to arrange for a particular lawyer to be present.*

However, the loose drafting of the provision allows police officers to refer very many cases without any fear of contravening the provision. The provision will not apply when, for example:

i. the person has already been charged;[1]
ii. the person is not being questioned by that particular police officer;[2]
iii. the offence is a simple (summary or regulatory) offence;[3] or
iv. the person is detained for a search;[4]

The words "to arrange for a particular lawyer to be present", create a loophole allowing referrals to solicitors who are expected to provide advice by telephone and/or agree to represent defendants in court, but who are not contacted with the "intention" that the lawyer will attend the police station.

The use of the words "intention of... persuading" creates a barrier to any complaint against a police officer being upheld. Any disciplinary tribunal would have to be satisfied not only that the officer made the referral, but also that they did so with a particular intention.

The use of the words "particular lawyer" means that referrals can be made, in any and every case, to a particular firm, provided an individual solicitor is not named.

For these reasons, the provision is entirely ineffective.

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[1] Section 415(1) of the Act provides that a person is only a "relevant person" if "in the company of a police officer for the purpose of being questioned as a suspect..."

[2] See Note 1. In addition the proposed s.418A might only apply to a police officer to whom s.418(1) applies, although the drafting does not make this clear. The proposed section 418A(1) refers to "a police officer to whom s.418(1) applies". Subsections (2), (3) and (4) refer to "**the** police officer", but subsection (5) reverts to "**a** police officer". Section 418(1) applies to a police officer "before a police officer starts to question a relevant person". Arguably, it might no longer apply once questioning had begun.

[3] The provision would be inserted in Part 3 of Chapter 15 of the Act. Section 414 provides that Part 3 only applies to indictable offences.

[4] Section 415(2)(a) provides that Part 3 does not apply to a person detained for a search.

There is no reason why it should be so. The Minister and the Queensland Police Service say that they support the principle and the policy behind the provision. The Society cannot understand the apparent reluctance to enact an effective provision.

A simple example can be found in the equivalent legislation in England and Wales which provides:

> *"...an officer must not advise the suspect about any particular firm of solicitors" (PACE Code C nfg 6B).*

The provision from England and Wales could be improved by including reference to "any particular lawyer, or firm of lawyers" so that it prevented referrals to both individuals and firms, and also to both solicitors and barristers.

In addition to these submissions, we note that we are liaising with the Queensland Police Service to develop a regional lawyer list. The Society resolved to work with the Queensland Police Service to compile a regional lawyer list. It is envisaged that this list could be used by Queensland Police Service officers who are requested (by people in their custody) to provide referrals to solicitors.

While we believe that this initiative has significant benefits for both the Queensland Police Service and legal practitioners throughout Queensland, the use of the regional lawyers lists have not been mandated by the Queensland Police Service. We continue to lobby the Honourable Neil Roberts, Minister for Police, Corrective Services and Emergency Services for the use of these lists to be mandated by the Queensland Police Service Operational Procedures Manual.

In order to fully address the problem and to target improper police referrals made at the arrest stage, we consider that it is imperative that use of the regional lawyer list be mandated in the *Police Powers of Responsibilities Act* 2000. In conclusion, the *Police Powers of Responsibilities Act* 2000 must be amended to mandate the provision of the regional lawyer list to every suspect, prior to questioning.

While the maintenance and supply of Regional Lawyer Lists will provide a significant safeguard, it will be worthless without an effective prohibition against referrals.

2. Clause 6 – Insertion of new s.52A – Power to conduct a pat-down search for ss.50-52

The Society is concerned that the search power to be created by this clause represents a new intrusion into the civil liberties of law abiding citizens. This power would allow a search of all passengers and luggage in a bus, train or aeroplane if the police detained and searched the vehicle because of the actions of one suspicious passenger. Similarly, it would allow police officers to search every person in a crowd of demonstrators if they were temporarily detained to prevent a breach of the peace.

While the safety of police officers is an important consideration, it should not be overlooked that in most circumstances the proposed provision would permit people who have not committed, or are not suspected of committing, an offence to be detained and searched. It is to be noted that police officers have possessed the related detention power for centuries, and it has not previously been thought necessary to impose a related power to search.

The safeguards referred to in the note to sub-section (2) are the standard safeguards that apply to all searches. They do nothing to allay the Society's concerns about the un-necessarily wide extent of this power.

3. Clause 12 – Amendment of s.188 (Sale of motor vehicle if not recovered after impounding ends)

The Society has some concerns about the effect of the proposal to extinguish a secured creditor's right to possession of the vehicle. That is so despite the limited protection given to the security interest in s.121(2)(c).

4. Clause 13 – Amendment of s.121 (Application of proceeds of sale)

This proposal is to permit the proceeds of sale to be paid towards an enforcement order made by the State Penalties Enforcement Register (SPER) against the "owner" of the vehicle. "Owner" is defined to include the registered keeper. There is scope for injustice to be caused by this provision when the legal owner and the registered keeper are not the same person.

5. Clauses 20 to 26 – Use of Civilian Participants in Controlled Activities

The Society strongly opposes the proposal to permit civilians to participate in a controlled activity and be authorised to perform acts that would otherwise aiding and abetting criminal offences. At present civilians can only be so authorised as part of a controlled operation. Greater safeguards are in place in a controlled operation. In our view, this proposal has the potential to have a serious impact on public safety, the safety of the civilian participants and the integrity of police investigations.

Great care needs to be taken in the use of civilians in covert activities. It is usual to conduct psychological evaluations on any civilians involved prior to their participation and such operations should only be run by people with the requisite experience and training in controlled operations.

Uncertainty is created by the distinction attempted in Clause 20 between, on one hand, aiding, abetting and conspiring, and on the other hand, the act or omission that constitutes a controlled activity offence. The distinction is not easily drawn, particularly for drug related offences. For example, the definition of "supply" includes offering to supply or transport, and offering to do any act in furtherance of a supply. Similarly, the definition of "produce" includes offering to do anything in furtherance of, or in preparation for, preparing, manufacturing, cultivating, or packaging.[5] So a person offering to assist a police officer in a drug transaction will often not be simply aiding in the offence committed by the police officer. They will be a principal offender. Such a person would not be protected against prosecution by the proposed amendments. Without independent legal advice, they are likely to be misled by the encouragement of the authorisation, the effect of which is likely to be misunderstood by the operational police. The illegality of the civilian's actions could lead to the exclusion of evidence obtained in the course of the operation.

6. Clause 32 – Amendment of s.332 (What a surveillance device warrant authorises)

This proposed clause would permit the removal of a vehicle to install a surveillance device. The Society is not persuaded that such a power is necessary to effect the installation of modern surveillance devices.

[5] Section 4 *Drugs Misuse Act* 1986

The proposal goes significantly beyond equating vehicles with other objects on particular premises, as the proposed clause would create a power of entry to any premises in which the vehicle happens to be parked. This expansion of police powers would permit police intrusion into premises which could not otherwise be justified, simply because a vehicle of interest is parked on the premises.

7. Clause 32 – Insertion of new s.388A (Extension of Notice to Appear)

The Society welcomes and supports this proposal.

8. Clauses 38 & 39 – Amendment of s.418 - Insertion of new s.418A and 418B

The Society welcomes the amendment to the headings to section 418 and 418A to clarify that the Act provides two separate rights; effectively the right to two telephone calls, one to a friend or relative and also one to a lawyer. The distinction is not always understood by detained suspects nor made clear by police officers. To make the point quite clear to investigating officers, s.418 could be further improved so that it provided:

> (2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1)(a).
>
> (2A) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1)(b).

9. Clause 45– Amendment of s435 (Right to be electronically recorded)

The Society notes that clause 42 inserts a power to ask questions to establish the need for an interpreter, and that clause 44 inserts a similar power to ask questions in relation to the right of a foreign citizen to communicate with an embassy. Clause 45 will require a police officer giving information about rights to electronically record the conversation, where practicable. However, there is no requirement that the police officer record the questioning. The Society considers that the requirement for electronic recording should extend also to questions asked and answers given with a view to establishing such things as the need for an interpreter and the right to contact a foreign embassy. An accurate recording of such conversations would be of assistance to any court that later had to rule on whether the relevant person had been treated fairly and lawfully.

It would be a simple matter to include an additional paragraph to 435 as follows:

> (2) A police officer who is authorised under s.432A(2) or s.433A(2) to question a relevant person must, if reasonably practicable, electronically record the questioning of the person and the person's response.

10. Clause 47 – Identification Procedures

The Society is disappointed that the Queensland Police Service continues to conduct almost every identification procedure by photoboard. This antiquated and unreliable method has attracted judicial criticism for thirty years.

At present, photo-boards are prepared by officers involved in the investigation, who often have an emotional investment in a "positive" identification. The suspect and their lawyer have no say in the compilation of the photo-board and are not present when the witness views the board. The identification procedure is usually recorded by the investigating officer on an audio device, which fails to remove suspicion that the witness may have been prepared before the recording began, or prompted by some gesture or other visual signal. Further, the photo-board procedure is often conducted as the final stage of taking a statement from the witness, leading to uncertainty as to whether the witness was reminded of earlier descriptions, asked leading questions about identifying features, or that the description in the statement was influenced by viewing the photo-board.

The dangers of mistaken identification by photo-board were illustrated starkly in the recent case of *R v Carkeet* [2008] QCA 143. Mr Carkeet was identified from a photo-board by two witnesses and convicted of armed robbery. Sadly, after Mr Carkeet had served his sentence, fingerprint evidence established his innocence beyond reasonable doubt. The Society's concerns about photoboard identification do not arise from the case of *Carkeet*. It is simply a recent example of how this method of identification can lead to the arrest, charge, conviction (even by inducing a plea of guilty) and imprisonment of an entirely innocent person.

Australian courts have been critical of the photo-board procedure for many years. Justice Mason, as he then was, in the High Court said in *Alexander v R* (1981) 145 CLR 395 that one of the problems that afflicts identification evidence is:

> *"the use by police of methods of identification which, though well suited to the investigation and detection of crime, are not calculated to yield evidence of high probative value in a criminal trial (at 426-427)."*

In *Pitkin v R* [1995] HCA 30 at 38 the High Court said:

> *"The use of photographs of suspects by law enforcement agencies for the purpose of identifying an offender is a necessary and justifiable step in the course of efficient criminal investigation. Nonetheless, it is attended by some danger of consequential and unfair prejudice to the accused."*

The superiority of a video identification procedure was recognised 15 years ago in the Queensland Court of Appeal in the case of *R v Murphy* [1995] QCA 568 where Pincus JA observed:

> *"Identification by comparing video images appears to be a promising technique; it can enable the witness conveniently to observe and compare the appearance of quite a number of rather similar people, depicted in the course of movement. I should add that the practice, adopted in the present case, of taking a video record of the witness' responses during the process of identification seems a very useful one."*

In the same case Thomas J outlined the factors in favour of identification by parades and noted the rarity of the procedure in Queensland, in part due to lack of training and facilities:

> *"A warning should therefore be sounded that continuation of the position as it has been described in this case will inevitably lead to rejection by the Courts of evidence so obtained, with*

undesirable consequences. Unless and until police stations in populated areas have a two-room facility with a double-sided mirror the Commissioner's direction [to hold parades] will be an empty exhortation."

Once again, an idea of best practice can be gleaned from England & Wales, where identification procedures are conducted at dedicated "identification suites" by police officers independent of the investigation, under the supervision of an Inspector. The procedures are contained in a comprehensive Code, PACE Code D, which provides a useful model for reform in Queensland.

Reform in this area may be beyond the scope of the Committee's consideration of the present Bill. However, the Society takes this opportunity to commend the use of modern technology to the Committee, which may like to take up with the Minister the reasons for Queensland lagging behind in this field.

11. Clause 62 – Child DNA Sample Order

These provision permit the forcible taking of a DNA sample from a child who is not a suspect, but more likely to be a victim of an offence.

The Society is aware of widely held concerns that DNA Sample Orders would cause further distress and trauma to young children who may already be victims of serious sexual and violent offences. The Society submits that the safeguards provided for in the proposed regime are vague and ineffective in that regard. For example, the proposed s.488I suggests in the note to paragraph (a) that entry to premises could be forced, even causing damage, in order to find the child. Yet paragraph (d) would limit the police officer to the use of minimal force in taking the child. The exception clause in s.488J(3) is likely to render of little practical value the safeguards elsewhere in that section.

Of most concern is section 488L which deems any person who impedes a police officer attempting to enforce a DNA Sample Order to be obstructing the officer. The provision is itself un-necessary, as such conduct would be obstruction in any case for the purposes of the offence in s.790. The Bill attempts to create an exception for obstruction by the child. The exception is probably intended to make an obstructive child immune from prosecution under s.790, however the drafting does not achieve that, because s.488L(1) is not necessary to the offence. So, an obstructive child would still commit an offence under s.790. The child could still be arrested for obstructing the police officer. The police officer could use all reasonably necessary force to effect the arrest. The grim prospect of innocent, perhaps already violated and traumatised, children being dragged from their homes kicking and screaming to have their DNA forcibly taken at the police station is still raised by this proposal as presently drafted.

Even if an effective amendment were drafted, so that the child would not commit an offence against s.790, the Society would have concerns about how the power would be used in practice. Police officers are naturally reluctant to allow their powers to be flouted. The position of a police officer faced with an obstructive child would be difficult, forced to choose between using force (unlawfully) and giving in to the child's refusal. The Society doubts that many police officers in that situation would back down. It is a recipe for conflict.

A further practical difficulty arises if the child or their parent seeks legal advice about enforcement of the Order. A solicitor would be bound to advise that the police may only use minimal force, and that a child

who violently resisted could not be compelled to provide a sample. The Society's members would be uncomfortable with coming so close to counselling a child (even indirectly, through a parent) to violently resist a police officer.

12. Clause 63 – Amendment of s.489 (Power to analyse etc. DNA samples)

This proposal would allow the testing of forensic evidence by laboratories other than those operated by Queensland Health, at the discretion of the Police Commissioner. It is designed to allow the "outsourcing" of forensic testing.

The Society is strongly opposed to this proposal, in the absence of any statutory safeguards to be enacted surrounding it.

While the principle in itself is attractive, there are a number of unidentified risk factors in the proposal. For example, the use of new and controversial technologies and the increased litigation this would cause in the courts, the lesser ability to scrutinise and challenge the work of inter-state and international laboratories, the danger of expert shopping, the loss of local expertise, and the danger of commercial incentives affecting integrity. Accreditation by NATA is not a panacea for all those ills.

The Society urges the Committee, and Members of Parliament generally, to scrutinise this proposal with particular care.

13. Clause 64 – Insertion of new 490A (When DNA sample taken from child in particular circumstances must be destroyed)

The Society considers that the provisions of this proposed section would become unworkable where more than one person was arrested or charged for the offence. If proceedings against one defendant were withdrawn, the DNA sample would have to be destroyed, even if it incriminated the other defendant. The evidence would not be available to assist a later defendant, even if it might have exonerated them. The proposal has the potential to work injustice to both victims and defendants.

14. Clause 78 – Amendment of s.538 – Disease Test Orders

The Society is troubled by the proposal in (1A) according to police officers and public officials a right to an Order whilst denying it to other similarly injured citizens.

15. Clause 79 – Amendment of s.540 (Application for order for blood and urine testing of person)

The Society opposes the proposal to remove the Magistrate's discretion to require an application to be supported by evidence on oath, affirmation or statutory declaration.

16. Clauses 81 and 82 – Anonymous complaints about noise

The words "clearly audible at or near the complainant's residential or commercial premises" in s.578(1)(c) represent an important safeguard, and would be retained under the proposed Bill. The clear intention of the present scheme is that there must be a person actually annoyed by the noise, and that person's annoyance must be reasonably justified before an abatement notice will issue. However, it will be

impossible for a police officer to make the determination required in s.578(1)(c) if they do not know where the complainant resides because the complaint was made anonymously. It would also be difficult in such a case for a tribunal of fact to find that any abatement notice was given lawfully.

The requirement for an identifiable, locatable complainant assists with the proportionate enforcement of the abatement powers, and also protects police officers against allegations that they have acted arbitrarily of their own volition.

The proposal in clause 84 to relieve the police officer even from proving that a complaint was made has the tendency to undermine the intention and scheme of the Act and would in practice permit police officers, without fear of scrutiny, to issue abatement notices in situations where no complaint had been made.

17. Clause 86– Amendment of s.609 (Entry of place to prevent offence, injury or domestic violence)

The intention of this proposal is to remove the right of a detained person to accompany police officers on a search of their premises, but only if the detained person is violent or dangerous. The practical difficulty, identified by the Society is that the circumstances where this power is exercised will almost always permit the police officer to form the reasonable suspicion (not belief) required to deny the detained person their right. That suspicion might be based on behaviour that the officers suspect occurred before they arrived, regardless of the person's behaviour towards the police at the time of the proposed search. The warning proposed in a new s.609(6)(b) is of no value or purpose. The Society suggests a warning that allows the detained person an opportunity to moderate their language and behaviour before the police officer decides to deny them their right to accompany the officer.

18. Clause 101– Amendment of s.790 (Offence to assault or obstruct police officer)

The Society strongly supports the aim of separating the offences of assault and obstruction. The clause as drafted does not do so clearly enough, merely dividing the conduct into subsections of the same offence. This fails to correct the main problem of the present situation which is the way the two offences appear under the same section heading, and are therefore indistinguishable when entered on a person's criminal history, bail undertaking and other official documents. It would be better if the offences were separated into two sections.

We look forward to receiving your comments in relation to our proposals.

Yours faithfully

Bruce Doyle
President

Queensland Law Society

Quote in reply: Criminal Law Committee

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Office of the Chief Executive

15 October 2010

The Honorable Neil Roberts MP
Minister for Police, Corrective Services and Emergency Services
PO Box 15195
City East Qld 4002

By Post and Email: police@ministerial.qld.gov.au

Dear Minister

REVIEW OF THE POLICE POWERS AND RESPONSIBILITIES ACT 2000

I write to you on the advice of our Criminal Law Committee in regard to the activities of the PPRA Review Committee. Please find **enclosed** the views of the Queensland Law Society in relation to various proposals that were discussed during the review process.

If you have questions regarding the issues raised in this letter, please do not hesitate to contact Ms Binny De Saram, a Policy Solicitor with our office on (07) 3842 5885 or b.desaram@qls.com.au.

I look forward to meeting with you on 5 November 2010.

Yours faithfully

Peter Eardley
President

1. ELECTRONIC RECORDING

a. Mandatory Electronic Recording

Proposal

Require electronic recording of all conversations between investigating officers and a person suspected of an offence from the first point of contact.

The evidential value of electronically recorded conversations is vastly superior to hearsay accounts. Electronic recording of formal interviews with suspects has substantially improved the quality of criminal justice in Queensland. Since its introduction the court system is rarely required to conduct lengthy *voir dire* hearings to resolve disputes about the content of a confession or whether the confession resulted from threats, inducements or other improper conduct.

However, issues continue to arise about alleged inducements and threats made outside the formal interview. For example, in the very recent case of *R v Anderson* [2010] QDC 3 the suspect was twice allowed to visit his pregnant fiancée during the investigation. He confessed to 20 serious offences, including 7 robberies. During the formal interviews he stated that he had not been offered any inducements. At trial, he claimed that the confessions were in fact induced by the promise of meetings with his fiancée. The trial judge found that the failure of the investigating officers to record all of their conversations with the suspect seriously disadvantaged the prosecution. It is of course for the prosecution to prove the confessions were not induced. The confessions were excluded.

Recording all relevant conversations protects both the suspect and the police officers from being misrepresented or misunderstood. It could be expected to have a moderating effect on the behaviour of all parties.

At present, only formal interviews are recorded, and even then only formal interviews conducted during the course of the investigation of indictable offences are required to be electronically recorded.

Many police officers have realised for themselves the benefits of electronically recording searches, arrests and other interactions with suspects. It is now commonplace for police officers to make recordings of their own initiative, usually with equipment purchased for this purpose using their own funds. The *ad hoc* nature of these procedures causes some difficulties for the criminal justice system due to the variety of formats in which sound and video are recorded, and the lack of any system for managing storage, disclosure, retention, and destruction of the recordings.

It is the Society's opinion that the cost and practical implications of implementing this proposal will be mediated by the benefits brought about by a properly instituted electronic recording process. We note that while QPS initially resisted the requirement to electronically record formal interviews, the reasons for such resistance have been demonstrated over time to be entirely unpersuasive. The benefits of the present system of recording interviews are universally acknowledged.

The QPS raised two objections at the Review Committee to an extension of electronic recording. The first was in relation to cost. A figure of between $5 million and $15 million was mentioned. The additional expenditure required apparently took the topic outside the scope of the Review Committee's work. It is submitted that the true cost of equipment, training and data storage should be impartially

assessed, and considered against the savings to be obtained from a reduced incidence of complaints against the police, a reduced incidence of misconduct by the police, and the earlier resolution of criminal cases as a result of better quality of evidence. A pilot scheme would be a useful exercise.

The second objection raised by the QPS was that mandatory recording would not eliminate allegations of improper inducements made by police officers. It is submitted that while some scope would remain for unscrupulous police officers to hold conversations in the absence of an operating recording device, the ubiquitous presence of recording devices would greatly limit the scope for such conduct to occur.

A recommendation was made for the issue to be referred to an internal QPS Policy and Legislation Committee. Given the wider policy and funding implications, it is submitted that this is a reform that would be better considered at Ministerial and Cabinet level.

b. Electronic Recording of All (Participant) Witness Statements

Proposal

Require electronic recording of all statements from witnesses who give a first hand account of events relevant to the offence.

At present, witness statements are usually taken by the police officer who interviews the witness at a police station and types a statement for that witness to sign. It is the Society's opinion that the quality of the witnesses' evidence is often diminished during this process. Important qualifications, hesitation, initial certainty or uncertainty, evident bias and hostility, and extra detail can all be left out of a written statement. Further, the correctness of the statement is reliant on the literacy and comprehension skills of the witness reading it, if they have the patience to do so at the end of the interview.

Many witnesses may be spoken to by police officers shortly after an offence but are not asked to make a statement until some months later when a charge has progressed through the court system and been listed for hearing. Such a process does not produce the most reliable evidence.

It is common practice for the QPS in major investigations to address these problems by electronically recording an interview with a witness, often at the scene of the offence where the witness walks through the scene providing context to the events described.

It is the Society's view that electronic recording of all witness statements would result in better quality evidence, obtained while matters are fresh in the mind of the witness.

In discussions at the review committee the ODPP representative raised concerns about the additional costs of transcribing recorded witness statements. In the same discussion it was mentioned that a witness statement 10 pages long might be the product of interviews conducted over 2 or 3 days. It is submitted that the costs of transcription, if well managed, may be off-set by the increased productivity of police officers who are freed from the responsibility of typing statements; typing accurately at speed not being a skill at which police officers are generally proficient. The disparity between a 3 day interview, and a 10 page statement, gives an indication of the amount of information that is lost by the present process.

The representative of the CMC noted that it has become the standard practice of that organisation for some time to electronically record interviews with all witnesses and the costs have been manageable.

A recommendation was made for the issue to be referred to an internal QPS Policy and Legislation Committee. Given the wider policy and funding implications for the criminal justice system as a whole, it is submitted that this is a reform that would be better considered at Ministerial and Cabinet level.

2. LEGAL ADVICE PROVIDED TO DETAINEES

a. Prohibition against Investigating Officers Referring Suspects to Particular Solicitors

Proposal

To prohibit police officers involved in an investigation from referring suspects or defendants to particular firms or solicitors, including making it a disciplinary offence to do so, and to specify that referrals must be made from a regional lawyer list prepared in accordance with a standardised process.

The Society has been advised by several practitioners that there may be instances where certain law firms in the Brisbane and Sunshine Coast region are allegedly receiving numerous direct referrals. Of concern is that this may be being undertaken in an inequitable practice.

At present, section 34(4) of the *Responsibilities Code* provides that if a relevant person wants to speak to a lawyer and does not know who to call, the police officer must, without unreasonable delay, make available either a "regional lawyer list" or a telephone directory.

Section 34(5)(b) of the *Responsibilities Code* provides that a police officer must not do or say anything with the intention of persuading a relevant person to arrange for a particular lawyer to be present.

However, in practice the provision is ineffective. It is worded narrowly in such a way that it does not prevent officers from making direct referrals. Section 34(5)(b) is only applicable to the investigation of indictable offences. It is limited to persons being formally questioned (not including questioning during a search). Importantly, it does not apply to a suspect who is simply detained (see s415 PPRA) or to a defendant who has been charged. Further, the words "to be present" mean the restriction does not apply where the intention is that the solicitor should give advice over the telephone.

For the above reasons, the Society cannot accept the assurances provided by the QPS to the Review Committee that there are current and effective disciplinary sanctions for police officers who refer work to favoured firms of solicitors.

This position in Queensland can be contrasted to the strict rule in England and Wales which states that "...an officer must not advise the suspect about any particular firm of solicitors" (PACE Code C nfg 6B).

In the Society's submission it would be appropriate for the PPRA to explicitly prohibit police officers involved in an investigation from referring suspects or defendants to a specific firm or solicitor. Indeed, the Society does not understand the policy position of the QPS to be otherwise.

The Society has been concerned that there has been a lack of transparency as to which firms are placed on the existing "regional lawyer lists", and the process by which that has occurred. In the Society's opinion it is important that any such lists represent a comprehensive database of all local practitioners who are available to attend upon an individual in police custody and are competent to

meet the exigencies of that role. To this end, the Society has welcomed the invitation extended by the QPS to submit and maintain an appropriate list.

b. Granting All Detainees the Right to Access Legal Advice

Proposal

To extend the right to access legal advice to every person in police custody at a police station at any time, and also to volunteers being questioned as a suspect.

At present, a person in police custody only has the right to speak to a lawyer if they are about to be questioned in relation to an indictable offence (section 415 and section 418 PPRA). This may be 7 hours after the person was arrested, and even longer after they were first detained under another power e.g. for the purposes of executing a search warrant.

The delay in contacting a solicitor may make it less likely that a solicitor is available to attend when the investigating officers are ready to interview the suspect, and also less likely that the suspect is prepared to wait for the solicitor to attend.

Where a person is detained for several hours, but not questioned, they may be lawfully denied access to legal advice entirely. The opportunity is lost for the detainee to take advice about the lawfulness of forensic procedures that may be performed upon them, the lawfulness of their detention and the time limit that applies to their detention. The opportunity is lost for a lawyer to make representations about the lawfulness of detention, the conditions of the detainee's detention (food, drink, temperature, rest, medical attention), whether it is appropriate to charge and, if so, the nature of the charge; and most importantly, whether a defendant should be granted bail. For example, a lawyer may be able to facilitate identification of a suitable bail address. These are matters that solicitors in England and Wales routinely assist with. It is more rarely the case in Queensland, partly because of the narrow entitlement to legal assistance.

The right to access legal advice operates without difficulty in England. PACE Code C paragraph 6.1 provides:

> *"Unless Annex B applies, all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available from the duty solicitor."*[1]

The right to obtain legal advice under the English scheme is provided to people in custody at police stations.[2] However, it is made clear that, "those there voluntarily to assist with an investigation should be treated with no less consideration... and enjoy an absolute right to obtain legal advice."[3]

As a matter of policy, this proposal from the Society gained some wider support at the Review Committee.

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[1] Annex B provides for limited exceptions where providing the right may jeopardise an investigation.

[2] PACE Code C paragraph 1.10

[3] PACE Code C – note for guidance 1A

Concerns raised by the QPS about the practicality of the proposal at searches, traffic stops, and road-side breath tests can be addressed by limiting the scope of the right to apply to suspects at a police station.

Some reliance is placed by the QPS in this regard on the Operational Procedures Manual which provides:

"... the watchhouse manager should, subject to operational and/or security needs of the watchhouse and where appropriate with the consent of the prisoner.. (i) permit a prisoner reasonable access to a telephone to contact a solicitor... as soon as practicable (iv) permit a prisoner to consult a legal representative of that prisoner's choice (v) permit a prisoner to communicate with a legal representative... in private while having due regard to security and (vi) allow a legal representative to be present with a client during the time when the client is being charged, fingerprinted and photographed, and when consideration is being given to the question of bail."[4]

The guidance in the Operational Procedures Manual is expressed to be service policy, not an order to members. There is considerable scope for police officers to avoid complying with the guidance if it is inconvenient. For example, item (i) may be read strictly to permit only one telephone call. In practice, members of the Society find that these expressions of policy are inadequate to ensure that detainees have ready access to legal advice.

The Society strongly recommends that the right to access legal advice in Queensland be extended to every person in police custody at a police station, and also to volunteers being questioned as a suspect. This right should have the force of statute.

c. Ensuring Solicitors Can Speak to Detainees and Volunteers

Proposal

To amend the PPRA to provide that a detainee or volunteer is provided with the opportunity to speak to a solicitor who contacts the police station, whether in person or by telephone. Also to ensure that a solicitor may attend upon their client in person or by telephone at any time.

At present, a person in police custody only has the right to speak to a lawyer if they are about to be questioned in relation to an indictable offence (section 415 and section 418 PPRA). This right is further limited if a suspect is relying on friends or family to identify and retain a solicitor on their behalf.

In circumstances where a solicitor is retained by the detainee's friends or family and then contacts the police station, there is currently no statutory obligation on the police that requires them to permit the solicitor to speak to the detainee, even if the detainee wishes to do so. The only obligation on the police is to advise the detainee that a lawyer has requested information as to their whereabouts (section 432 PPRA) and, even then, this protection only applies to a person detained for an indictable offence (section 415 PPRA).

The Society has been advised by a number of practitioners of instances where solicitors have been denied access to a detainee in a watch-house as the suspect "has not asked for a solicitor" or "is already being interviewed".

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[4] OPM 16.22.10

In the Society's opinion the obligation under section 418 should be extended to apply to all detainees and volunteers, requiring the police to inform the person of the name and telephone number of the solicitor and to give that person the opportunity to speak to the solicitor if they so wish.

We take this opportunity to note that the Society has also been advised of worrying instances where solicitors have been denied permission to accompany their clients into a watch-house on the grounds that it is not a safe environment for a solicitor. It is particularly concerning that in such instances those same practitioners have also been advised that telephone access to clients has been denied on the grounds that the watch-house does not have sufficient staff to remove the client from their cell, and that staff will not be available for that purpose for some time e.g. "more than 6 hours".

It is our opinion that, again, the English provisions provide a stark contrast to the Queensland legislation and offer a suitable model for reform. PACE Code C paragraph 6.1 provides that all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone. A poster advertising the right to legal advice must be prominently displayed in the charging area of every police station (6.3). If a solicitor arrives at the police station to see a particular person, that person must (unless a limited exception applies) be so informed, *whether or not they are being interviewed*, and asked if they would like to see a solicitor. This applies even if the detainee has declined legal advice or, having requested it, subsequently agreed to be interviewed without receiving advice (6.15). Requests for legal advice, changes of mind, the attendance of a solicitor and the detainee's decision are all matters that must be recorded contemporaneously in the custody record.

In discussions at the review committee the QPS referred to the fact that a suspect in England may be administered a caution that inferences may be drawn from their failure to mention when questioned something they later rely on in court. Such an inference may not of course be drawn in Queensland. It is respectfully submitted that the difference is not relevant in any way to whether a suspect should be informed that a solicitor has contacted the police station on their behalf.

The QPS referred to a requirement in the Operational Procedures Manual to notify a suspect where a legal representative attends. No reference was provided for such a requirement. It is not apparent to the Society that a requirement in those terms is in fact contained in the OPM.[5] Such a requirement does nothing to resolve the difficulty faced by solicitors who telephone a police station to speak to their client.

The Society submits that the right of the suspect to be informed that a solicitor has contacted the police station and is willing to advise them is not adequately protected at present, and should have the force of statute.

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[5] OPM paragraph 16.22.10

3. INTERVIEW RIGHTS

a. Provide that a suspect's "interview rights" apply during a search

Proposal

Extend the application of the following rights to a detainee being questioned during a search:

a) Right to communicate with friend, relative or lawyer (section 418 PPRA);
b) Speaking to and presence of friend, relative or lawyer (section 419 PPRA);
c) Notification of legal aid organisation for a detained Aborigine or Torres Strait Islander (section 420 PPRA);
d) Right of a child to a support person (section 421 PPRA);
e) Right of a person with impaired capacity to a support person (section 422 PPRA);
f) Delay of questioning of intoxicated person (section 423 PPRA);
g) Requirement to administer a caution before questioning (section 431 PPRA);
h) Right to an interpreter (section 433 PPRA);
i) Right to contact embassy or High Commission (section 434 PPRA); and
j) Right to have information and questioning electronically recorded (section 435 and section 436 PPRA).

For example, where a search warrant is executed on the home of a suspected drug dealer, questions will be asked as to who occupies each room in the house, who possessed each item found, how each item was acquired, what notes found in notebooks refer to, even for how long the suspect has been selling drugs. At this stage of the investigation the suspect has no statutory entitlement to be told that they do not have to answer questions, no right to obtain legal advice, and none of the other protections, particularly as to the electronic recording of their answers. This questioning may proceed over a period of several hours. By the time the suspect is taken to the police station for questioning, and then obtains the protection of the safeguards in the PPRA, the investigating officers have often obtained incriminating statements from the suspect sufficient to convict without any further evidence. The real interviews thus occur during the search, rendering the safeguards in the PPRA worthless.

As the current law already provides for exceptions to be made in situations where extending these rights to a detained person would jeopardise the investigation (section 441 PPRA) the Society does not see any reason the rights listed above should not be statutorily provided for during a search.

In the final report of the Review Committee the QPS interpretation of the law was that section 415 of the PPRA did not permit questioning generally about involvement in an offence during the course of the search. Any answers to such questions, the QPS submitted, would be excluded by a court. The Society respectfully submits that this is a mis-statement of the law. Section 415 expressly exempts questioning during a search from the usual procedures and protections. Exclusion of evidence involves the uncertain and difficult task of exercising a judicial discretion.

The Society submits that the law ought to be as the QPS believes it to be; that "where questioning commenced about an indictable offence, the safeguards relevant to questioning required adherence." Given the stated position of the QPS, the Society would expect the QPS to support an amendment to that effect.

b. Require all suspects to be warned before being questioned that they have the right to silence and that their answers could be given in evidence

Proposal

Extend the requirements to caution before questioning (section 431 PPRA) to all persons suspected of having committed an offence.

Section 431 of the PPRA requires police to administer a caution before questioning. However, this requirement only applies to questioning related to a suspected indictable offence (section 414 PPRA) and, even then, not to persons detained for the purposes of a search (see proposal 3a).

The silence of the PPRA in relation to questioning for summary offences creates uncertainty for suspects, police officers, lawyers and courts. It is currently unclear whether a suspect questioned in relation to a summary offence has common law rights in accordance with the *Judges' Rules*. In *Marks v Lynn* [2008] QDC 39 it was said that the *Rules* have never had the force of law in Australia (at [16] citing *Van Der Meer v R* [1988] HCA 56) but that it was the practice of judges in Queensland to have regard to them. However, *Carter's Criminal Law of Queensland* states that the *Judge's Rules* have been held to apply in Queensland, citing *R v Nichols & Ors* [1958] Qd R 200 (*Carter's* paragraph [1245.20]). Further uncertainty is created by the fact that judges in England produced 3 versions of the *Rules*.

In practice, this distinction between summary and indictable offences creates problems where a suspect is purportedly interviewed in relation to a summary offence (e.g. careless driving) but later charged with a related indictable offence (e.g. dangerous driving). This is in fact what happened in *Marks v Lynn* (above).

The Society is unaware of any reason why such a distinction is drawn, especially considering the number of summary offences for which people are actually imprisoned.

We, again, contrast the Queensland position to that in England & Wales where there is a requirement to caution in relation to all offences, whether indictable or summary. PACE Code C paragraph 10.1 provides:

> *"A person whom there are reasonable grounds to suspect of an offence, see Note 10A, must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if... the suspect's answers.. may be given in evidence..."* (Some exceptions are made for circumstances similar to those provided for in section 431(5) and section 441 PPRA).

In New South Wales, every person taken into custody must be cautioned by the custody manager, regardless of the nature of the offence.[6]

A recommendation was made for the issue to be referred to an internal QPS Policy and Legislation Committee. Given the wider policy and funding implications for the criminal justice system as a whole, it is submitted that this is a reform that would be better considered at Ministerial and Cabinet level.

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[6] Section 122 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

c. Provide that a suspect's "interview rights" apply when being questioned in relation to a simple or regulatory (summary) offence

Proposal

To extend the rights in Chapter 15, Part 3 of the PPRA to suspects questioned in relation to simple and regulatory (summary) offences.

At present, a suspect is only provided with the following rights if questioned in relation to an indictable offence:

a) Right to communicate with friend, relative or lawyer (section 418 PPRA);
b) Speaking to and presence of friend, relative or lawyer (section 419 PPRA);
c) Notification of legal aid organisation for a detained Aborigine or Torres Strait Islander (section 420 PPRA);
d) Right of a child to a support person (section 421 PPRA);
e) Right of a person with impaired capacity to a support person (section 422 PPRA);
f) Delay of questioning of intoxicated person (section 423 PPRA);
g) Requirement to administer a caution before questioning (section 431 PPRA);
h) Right to an interpreter (section 433 PPRA);
i) Right to contact embassy or High Commission (section 434 PPRA); and
j) Right to have information and questioning electronically recorded (section 435 and section 436 PPRA).

As outlined in proposal 3b, the Society is unaware of any reason why a distinction is drawn between summary and indictable offences and accordingly recommends that any suspect detained be provided with the listed rights in chapter 15, part 3 of the PPRA.

The Society accepts that there are practical implications involving time and resources affecting questioning for minor offences. Many of those could be overcome by the standard issue of field recording equipment.

Again, a recommendation was made for the issue to be referred to an internal QPS Policy and Legislation Committee. Given the wider policy and funding implications for the criminal justice system as a whole, and the interests of citizen/suspects it is submitted that this is a reform that would be better considered at Ministerial and inter-departmental levels.

4. IDENTIFICATION PROCEDURES

Proposal

To reform identification procedures in Queensland to ensure that:

a) Identification procedures are conducted by police officers independent of the investigation;
b) The faces used in parades, photo-boards and video parades are selected in consultation with the suspect and their legal representative;
c) The suspect's legal representative has an opportunity to observe the identification procedure;
d) The "first descriptions" provided by witnesses are adequately documented, and made available to the suspect and their legal representative before the "faces" are selected;
e) All identification procedures are recorded in both audio and video; and
f) The use of photo-boards is replaced by a video identification system.

It is generally recognised that the evidential value of an identification at an "identification parade" is superior to that based on a selection from a board of 12 photographs (a photo-board identification). A parade involves greater safeguards, including that the suspect must consent, may have a friend, relative or lawyer present, and may both choose and change their position in the parade (section 48 *Responsibilities Code*). Section 49 of the *Responsibilities Code* also requires witnesses to view the parade under similar conditions to the offence e.g. similar lighting, distance and view.

Section 617 of the PPRA permits both procedures outlined in the *Responsibilities Code* and includes additional requirements.

However, in practice there are difficulties obtaining consent and arranging for the attendance of 11 other people of similar physical appearance. Very few, if any, identification parades are actually held in Queensland and photo-board identification is unfortunately ubiquitous.

At present, photo-boards are prepared by officers involved in the investigation, who often have an emotional investment in a "positive" identification. The suspect and their lawyer have no say in the compilation of the photo-board and are not present when the witness views the board. The identification procedure is usually recorded by the investigating officer on an audio device, which fails to remove suspicion that the witness may have been prepared before the recording began, or prompted by some gesture or other visual signal. Further, the photo-board procedure is often conducted as the final stage of taking a statement from the witness, leading to uncertainty as to whether the witness was reminded of earlier descriptions, asked leading questions about identifying features, or that the description in the statement was influenced by viewing the photo-board.

The dangers of mistaken identification by photo-board were illustrated starkly in the recent case of *R v Carkeet* [2008] QCA 143. Mr Carkeet was identified from a photo-board by 2 witnesses and convicted of armed robbery. Sadly, after Mr Carkeet had served his sentence, fingerprint evidence established his innocence beyond reasonable doubt. The Society's concerns about photoboard identification do not arise from the case of *Carkeet*. It is simply a recent example of how this method of identification can lead to the arrest, charge, conviction (even by inducing a plea of guilty) and imprisonment of an entirely innocent person.

Australian courts have been critical of the photo-board procedure for many years. Justice Mason, as he then was, in the High Court said in *Alexander v R* (1981) 145 CLR 395 that one of the problems that afflicts identification evidence is "the use by police of methods of identification which, though well suited to the investigation and detection of crime, are not calculated to yield evidence of high probative value in a criminal trial (at 426-427)."

In *Pitkin v R* [1995] HCA 30 at 38 the High Court said:

> "The use of photographs of suspects by law enforcement agencies for the purpose of identifying an offender is a necessary and justifiable step in the course of efficient criminal investigation. Nonetheless, it is attended by some danger of consequential and unfair prejudice to the accused."

The superiority of a video identification procedure was recognised 15 years ago in the Queensland Court of Appeal in the case of *R v Murphy* [1995] QCA 568 where Pincus JA observed:

> "Identification by comparing video images appears to be a promising technique; it can enable the witness conveniently to observe and compare the appearance of quite a number of rather

similar people, depicted in the course of movement. I should add that the practice, adopted in the present case, of taking a video record of the witness' responses during the process of identification seems a very useful one."

In the same case Thomas J outlined the factors in favour of identification by parades and noted the rarity of the procedure in Queensland, in part due to lack of training and facilities:

"A warning should therefore be sounded that continuation of the position as it has been described in this case will inevitably lead to rejection by the Courts of evidence so obtained, with undesirable consequences. Unless and until police stations in populated areas have a two-room facility with a double-sided mirror the Commissioner's direction [to hold parades] will be an empty exhortation."

Once again, an idea of best practice can be gleaned from England & Wales, where identification procedures are conducted at dedicated "identification suites" by police officers independent of the investigation, under the supervision of an Inspector. The procedures are contained in a comprehensive Code, PACE Code D, which provides a useful model for reform in Queensland.

Code D provides that a record shall be made of the suspect's first description as first given by a potential witness. This record must be made and kept in a form which enables details of that description to be accurately produced from it, in a visible and legible form, which can be given to the suspect or the suspect's solicitor. The record must be made before the suspect takes part in an identification procedure. A copy of the record shall be given to the suspect or the suspect's solicitor before any identification procedure is carried out (Code D 3.1). We note in passing that provisions about first descriptions do appear in the QPS Operational Procedures Manual, but they are observed more often in the breach.

An identification procedure *must* be conducted where a witness has purported to identify a suspect, or has a reasonable prospect of being able to identify a suspect and the suspect disputes being the person the witness has seen (Code D 3.12).

The presumption is that the identification procedure will be by video parade (Code D 3.14) unless this is impractical.

The suspect is given notice of their legal rights. The notice includes a warning about the consequences of altering their appearance, whether the witness has been shown other photographs, artist's sketches or composite images, and that they or their solicitor will be given a copy of the first descriptions (Code D 3.17)

If the suspect consents, a short video is taken of the suspect, looking straight ahead and to each side. The police have access to vast database of similar videos and select a number with similar physical features to the suspect, usually 20 or 30. The suspect and their lawyer are consulted and, usually by agreement, 8 of those videos are selected to be included in the parade. Importantly, the suspect and their lawyer have been given the first descriptions so have an opportunity to judge the fairness of the selection. Any images or description released to the media must also be disclosed e.g. if the witness described a man with braided hair, the lawyer can usually ensure that the suspect is not the only person in the parade with braided hair (Code D, Annex A para.8) Nine versions of the parade are then saved onto a disc. In each version the suspect is in a different position.

In the next stage, the witness views the parade. The suspect is not present but their lawyer may be. The procedure is recorded on video (Annex A para.9), and a written record is also made (paragraphs

17-18). Moments before the witness enters the room, the lawyer nominates the suspect's position in the parade, thus eliminating any suggestion that the witness has been directed to a particular number.

Mobile "identification suites" allow the Metropolitan Police to conduct identification procedures swiftly in urgent cases, and in awkward locations, including prisons.

The introduction of the video identification procedure in England and Wales has markedly increased confidence in the reliability and fairness of identifications.

The Society submits that the quality and reliability of identification evidence in Queensland would be significantly enhanced by the adoption of video identification technology, backed by a statutory presumption in favour of its use, and a rigorous Code of Practice. Exceptions to the presumption would apply, as they do in England, in situations where, due to urgency or perhaps a remote location, other procedures would be more appropriate.

5. POST SEARCH APPROVAL APPLICATIONS IN REGISTER OF ENFORCEMENT ACTS

Proposal

To include post-search approval applications in the register of enforcement acts.

Regulations 56 and 58 currently require that information regarding searches and search warrants be recorded in the central register of enforcement acts. However, there is no requirement for an application for post-search approval to be recorded.

The PPRA Review Committee, when considering the operation of the post-search approval regime, was unable to access data about the number of applications and the proportion which were granted.

The Society recommends that an amendment be made, requiring inclusion in the register of:

a) when, where and to whom the application for a post-search approval order was made, and
b) whether the order was granted.

The power to search without warrant involves a significant intrusion into the lives and privacy of ordinary citizens. The Society submits it is essential that there be a publicly available record of the number of times this power is being exercised, and whether the courts are providing effective oversight of its use.