LEGISLATIVE ASSEMBLY OF QUEENSLAND

PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE

Report on the Review of the Criminal Justice Commission's Report on a Review of Police Powers in Queensland

Volume IV: Suspects Rights, Police Questioning and Pre-Charge Detention

Printed under section 4(2) of the *Parliamentary Papers Act 1992* pursuant to the resolution of the Committee made on 12 May 1995
Report No. 27
12 May 1995

LEGISLATIVE ASSEMBLY OF QUEENSLAND

PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE

Report on the Review of the Criminal Justice Commission's Report on a Review of Police Powers in Queensland Volume IV: Suspects' Rights, Police Questioning and Pre-Charge Detention

12 May 1995

Report No. 27

PREVIOUS REPORTS OF THE PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE

	REPORT	DATE TABLED
1.	Progress Report of the Committee being the Minutes of Evidence taken on 16 and 17 July 1990 at a public hearing in relation to the Report of the Criminal Justice Commission entitled "Report on Gaming Machines Concerns and Regulations".	21 August 1990
2.	The Committee's Report No. 1 Relating to the Report of the Criminal Justice Commission entitled "Report on Gaming Machine Concerns and Regulations".	4 September 1990
3.	Progress Report of the Committee being the Minutes of Evidence taken on 6 and 7 August 1990 at a public hearing in relation to the Report of the Criminal Justice Commission entitled "Reforms in Laws Relating to Homosexuality - An Information Paper".	4 September 1990
4.	The Committee's Report No. 2 into the Report of the Criminal Justice Commission entitled "Reforms in Laws Relating to Homosexuality - An Information Paper".	2 October 1990
5.	Report Into Allegations made in the South Australian Legislative Council on 10 October 1990 by Mr Ian Gilfillan, Leader of the Australian Democrats against the Criminal Justice Commission's Director of Operations, Commander Carl Mengler.	4 December 1990
6.	Report Into the issue of legal representation of witnesses at public hearings of the Parliamentary Criminal Justice Committee.	6 December 1990
7.	Minutes of Evidence taken on 15 April 1991 at a public hearing between the Parliamentary Criminal Justice Committee and the Criminal Justice Commission and other material provided by the Commission to the Committee in relation to the roles and functions of the Committee and the Commission.	22 May 1991
8.	Minutes of Evidence taken on Friday 24 May 1991 in relation to the Committee's review of its monitoring and reviewing functions and related matters.	17 June 1991
9.	Review of the Committee's operations and the operations of the Criminal Justice Commission Part A, Submissions, Volume 1 - Public Submissions, Volume 2 - CJC Submissions and Minutes of Evidence taken on 6 and 13 June 1991; 2(a) and 2(b).	16 July 1991
10.	Report of the independent investigation into the allegations made by Robert David Butler and Channel 7 regarding former Inspector John William Huey and the Queensland Criminal Justice Commission.	16 July 1991
11.	The Term of Sir Max Bingham QC, Chairman of the Criminal Justice Commission.	2 August 1991
12.	Report on Prostitution.	12 November 1991
13.	Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission.	3 December 1991
14.	Report of the names of the Members of the 1986-1989 Queensland Legislative Assembly referred to in the Criminal Justice Commission's *Report on an investigation into possible misuse of Parliamentary travel entitlements by Members of the 1986-1989 Queensland Legislative Assembly* (December 1991)	7 February 1992

	REPORT	DATE TABLED
15.	Review of the recommendations arising out of the Criminal Justice Commission's *Report on an Investigation into Possible Misuse of Parliamentary Travel Entitlements by Members of the 1986-1989 Queensland Legislative Assembly*.	13 April 1992
16.	Report on the public hearing held on 25 June 1992 into allegations made by Mr Richard Chesterman QC (past member of the Misconduct Tribunals), on 23 June 1992 in *The Courier-Mail* and *The Australian* newspapers.	13 July 1992
17.	The Committee's recommendations on changes to the method of appointment and conditions of service of members of the Misconduct Tribunals.	28 July 1992
18.	Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission. Part C - A report pursuant to section 4.8(I)(f) of the *Criminal Justice Act 1989-1992*.	10 November 1992
19.	Review of the Criminal Justice Commission's *Report on S.P. Bookmaking and Related Criminal Activities in Queensland (August 1991)*.	23 September 1993
20.	Review of the Criminal Justice Commission's use of its powers under section 3.1 of the *Criminal Justice Act 1989*. Part A - Submissions and Minutes of Evidence taken on 30 April 1993.	12 May 1993
20.	Report of a Review of the CJC's use of its power under section 3.1 of the *Criminal Justice Act 1989*. Part B - Report, Conclusions and Recommendations	23 September 1993
21.	Report into allegations made by Robert David Butler and Christopher Charles Adams regarding former Superintendent John William Huey and the Criminal Justice Commission.	9 November 1993
22.	A review of the past twelve months operation of the Parliamentary Criminal Justice Committee of the 47th Parliament.	10 December 1993
23.	Review of the Criminal Justice Commission's *Report on a Review of Police Powers in Queensland* Volumes I-III. Part A - Minutes of Evidence taken on 16 and 17 December 1994.	17 February 1994
	Part B - Comment, Analysis and Recommendations	2 August 1994
24.	Report of the unauthorised release and publication of a Committee document	16 February 1994
25.	Report on the Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters.	5 August 1994
26.	A report of a review of the activities of the Criminal Justice Commission pursuant to s.118(i)(f) of the *Criminal Justice Act 1989*.	21 February 1995

47TH PARLIAMENT

CHAIRMAN:	Mr K H Davies MLA, Member for Mundingburra
DEPUTY CHAIRMAN:	Hon N J Turner MLA, Member for Nicklin
MEMBERS:	Mr T A Barton MLA, Member for Waterford
	Mrs L R Bird MLA, Member for Whitsunday
	Mr D J Briskey MLA, Member for Cleveland
	Hon V P Lester MLA, Member for Keppel
	Dr D J H Watson MLA, Member for Moggill
RESEARCH DIRECTOR:	Mr N J Laurie
SENIOR RESEARCH OFFICER:	Ms K L Newton

TABLE OF CONTENTS

CHAIRMAN'S FOREWORD

The primary function of the Parliamentary Criminal Justice Committee under section 118(1)(a) of the *Criminal Justice Act 1989* (Qld), ("the Act") is:

> *(a) to monitor and review the discharge of the functions of the Commission ...*

more specifically, under section 118(1)(c) of the *Criminal Justice Act 1989* the Parliamentary Committee is:

> *to examine the annual report and other reports of the Commission and report to the Legislative Assembly on any matter appearing in or arising out of such report.*

Mr G E Fitzgerald QC in his *Report of a Commission of Inquiry Pursuant to Orders in Council* (Fitzgerald Report) indicated that a review of police powers in Queensland was essential for the proper administration of criminal justice. Whilst Mr Fitzgerald made no specific recommendations in respect of police powers, he provided a framework for debate, indicating that it was necessary to strike a balance between civil liberties and law enforcement and warning that there may be instances of unjustified calls for increased police powers.

An issues paper entitled *Police Powers in Queensland*, prepared jointly by the office of the Minister for Police and Emergency services and the Criminal Justice Commission, was released in September 1991. The issues paper was the starting point for a comprehensive review of police powers in Queensland. As a result of this issues paper, the Commission received numerous submissions on police powers from various individuals and organisations.

On 4 June 1993 Mr R S O'Regan QC, Chairman of the Criminal Justice Commission, presented to the Honourable the Speaker and myself, Volumes I and II of the Commission's *Report of a Review of Police Powers in Queensland*. On 10 November 1993, Mr L F Wyvill QC, the then Acting Chairman of the Commission, presented to Mr Speaker and myself Volume III of the report.

Volumes I-III of the Commission's report focused on the following key areas:

(i) Consolidation of police powers;

(ii) Entry, search and seizure;

(iii) Arrest without warrant;

(iv) Demand, name and address;

(v) Move-on powers.

On 6 June 1994 Mr R S O'Regan QC, Chairman of the Criminal Justice Commission, presented to the Honourable the Speaker and myself, Volumes IV of the Commission's *Report of a Review of Police Powers in Queensland - Suspects Rights, Police Questioning and Pre-Charge Detention*. On 28 October 1994, Mr O'Regan presented to the Honourable the Speaker and myself Volume V of the Commission's report - *Electronic Surveillance and Other Investigative Procedures*.

In fulfilling its obligations to examine the Commission's report and to report thereon to the

Legislative Assembly, the Parliamentary Committee has undertaken an extensive, detailed and independent review of police powers in Queensland.

In the review process, the Committee has taken the view that the onus rests on those seeking more police powers to justify their claims.

As part of the review process, the Parliamentary Committee called for and received a number of written submissions relating to Volumes IV and V of the Commission's report from members of the public and interested parties. The various submissions received by the Parliamentary Committee were tabled in the House on 27 October 1994 and 21 February 1995 respectively.

During the latter part of 1993 the Parliamentary Committee visited Wellington, Perth, Hobart, Melbourne and Sydney meeting with various individuals and organisations with considerable knowledge and experience in the area of police powers. The Parliamentary Committee's objective in visiting these cities was to gain a greater understanding of the nature and extent of police powers within the various jurisdictions, to make a comparative assessment of police powers, and to receive feedback from eminent and experienced commentators. Although Volumes IV and V of the Commission's report had not been released at that stage, the Committee was aware of the issues to be addressed in those volumes. These issues were discussed during the visits to the above jurisdictions.

Following the release of Volume IV, the Committee visited Wellington, Auckland, Adeliade and Sydney. This visit did not solely relate to the Committee's review of police powers. The Committee's three year review of the CJC and the review of the Commission's report on Cannabis and the Law were also objects of review by the Committee during this visit.

On 5 October 1994 and 12 December 1994 the Parliamentary Committee conducted public hearings into Volumes IV and V respectively, at which a wide cross-section of individuals and organisations were called to give evidence in relation to the Commission's reports and police powers in general. The Minutes of Evidence of the public hearings were tabled in the House on 27 October 1994 and 21 February 1995.

This report, being the Parliamentary Committee's review of the Commission's report Volume IV, contains the Committee's comment, analysis and recommendations.

Chapter 4 contains a general overview of the Committee's recommendations.

The Committee has, it believes, undertaken this review in accordance with the parameters laid down in the Fitzgerald Report, namely, to strike a balance between individual rights and freedoms and the public interest.

However, as the Hon. Mr Justice Michael Kirby AC CMG has observed:

> *This time-honoured nostrum is easier to state than to apply. It does not answer questions so much as raise them: As we both expected and found, striking a balance which will satisfy everyone on any given issue is not an easy task. If attitudes to law and order questions can be caricatured as a continuum, with police spokesmen at one end and organised civil libertarians at the other, then a solution pitched nicely at the half-way mark is at least as likely to provoke criticism from sides as praise.* (ALRC Report No.2 1975)

Its review of the Commission's report, has at all times been cognisant of the following matters:

- that police powers not be increased without a demonstrated need for such increase;

- that fundamental rights, such as the right to silence and the right to personal liberty, only be trespassed upon where there is a demonstrated need;

- that any proposed regulated scheme is consistent with prior recommendations of the Committee;

- that any proposal be economically and operationally practicable; and
- that all alternatives be considered.

The Parliamentary Committee does not support the Commission's recommendations for a regulated scheme as outlined in Volume IV.

There are a number of reasons why the Committee rejects the Commission's proposed regulated scheme.

The Commission's recommendations regarding pre-charge detention are contingent upon the introduction of a free legal advice scheme. The Committee does not believe that such a scheme is economically or practicably viable.

The Committee is of the opinion that the Commission's proposed scheme will increase the incidence of arrest.

The Committee is convinced that any scheme which revolves around detention for questioning is inherently at odds with the right to silence. Such a scheme is also at odds with the concept of voluntariness which is the basis for admission of confessional evidence. The Commission has recommended that a person be given a caution regarding his right to remain silent before questioning. However, if a detained person refuses to answer questions, he may nonetheless remain in detention. The continued detention of a suspect who has indicated that he/she does not wish to answer questions is inconsistent with an election to remain silent. The fear is that the act of detention may itself *induce* a detained person to not exercise the right to silence, and perhaps, *induce* a confession that is false.

The Committee is sceptical of the attempt to curb abuse by a detailed legislative scheme. Legislation cannot cure all evils. A legislative scheme will be equally open to abuse.

Importantly, the Committee recognises that it is impossible to cater in legislation for all possible scenarios.

The Committee recognises that there are uncertainties and deficiencies in the current law. The Committee also appreciates that from time to time abuses occur within the current system. However, the Committee does not believe that the Commission's regulated scheme will prevent abuses by police, not will it cater for every eventuality.

The Commission only really acknowledges one objection to a regulated scheme, namely, that police should not be rewarded for ignoring the law through the legalisation of their practices.

However, the Commission appears to have oversimplified the rationale for this objection.

The Committee believes that the basis for this argument is that police practices in detaining persons for questioning is inherently undesirable, not that police should be rewarded for participating in

these practices.

The argument is best expressed that the attempt *"to recognise reality and bring the law in the books closer to the practice on the ground"* is in fact legalising undesirable police practices. (Philips Commission 1981:110) (CJC 1994:673)

The Common law has jealously guarded the right to personal liberty and the right to silence. It has also jealously guarded against the individual being subject to arbitrary arrest and detention for the purposes of questioning. The regulated scheme proposed by the Commission, if accepted, would substantially alter the balance that has been struck during the course of this State's legal history.

If detention for questioning is allowed then it is difficult to define how far police can go in the interrogation of suspects.

The Committee believes that the proposed regulated scheme will still be open to abuse by police who are so inclined. In particular, the Committee is convinced that elements of the Commission's recommendations, such as "time-out" provisions, are readily open to abuse. In addition, the Committee is convinced that a number of safeguards, such as custody officers and the free legal advice scheme, will in reality be inefficient and ineffective.

Confessions are important in the solving of crime. Hence it flows that it is in the public interest that persons not be deterred from voluntarily making confessions as to their involvement in criminal activities.

If the utilisation rate of the proposed free legal advice scheme is high, the Committee fears that the number of confessions obtained will decrease accordingly. The Committee is of the opinion that most lawyers will advise their clients not to answer questions posed and to exercise their right to silence. This is not in the interest of the community. However, ironically the community will be paying for this advice. This advice may also not always be in the interest of the client.

In addition, the Committee is concerned that an over regulated regime may result in an increase in the exclusion of confessional evidence as a result of "technical" breaches of the regulations.

As a consequence of the Committee's rejection of the Commission's report, the Committee's alternative is outlined in Chapter 12.

The Parliamentary Committee is heartened by the interest that has been shown in this important issue by members of the community. Indeed, the Parliamentary Committee has been impressed by the depth and quality of debate which has been balanced, informative and constructive.

On behalf of the Committee, I record my thanks to the various individuals and organisations who have participated in the review process undertaken by the Committee.

On behalf of the Committee, I wish to acknowledge the work of the Committee Research staff, Mr Neil Laurie Barrister-at-Law, Research Director, Mrs Michele Rosengren, former Senior Research Officer, Ms Kerryn Newton, Senior Research Officer and Ms Sandy Rowse of the Committee Secretariat.

Ken Davies MLA
Chairman
12 May 1995

CJC RECOMMENDATION	PCJC RECOMMENDATION
18.1 Recommendation - Scope of the Regulated Scheme The Commission recommends the introduction of a regulated scheme governing police dealings with suspects who have been arrested and those who are voluntary attendees, where relevant. The scheme should contain legislative obligations on police officers to inform suspects of their rights and status; the provision of free legal advice to suspects; and legislative provision for limited pre-charge detention for questioning and other investigative purposes. A suspect should be defined as a person who is in the company of a police officer in a police station, police vehicle or police establishment, or is otherwise under police control and is either being questioned, or is to be questioned, to determine his or her involvement (if any) in the commission of an offence. The Commission's recommendations regarding pre-charge detention are contingent upon the introduction of a free legal advice scheme.	**5.5** The Committee rejects the Commission's Recommendation 18.1 The Committee rejects the Commission's definition of suspect as contained in CJC Recommendation 18.1.
19.1 Recommendation - Obligation to Inform Suspect of Status The Commission recommends that when a police officer requests a suspect to go to, and/or remain at, any place designated by the police officer, the officer should inform the person that he or she is either under arrest, or is not under arrest and is therefore free to leave police company at any time unless and until arrested. If the police officer makes a decision at any time that the person is no longer free to leave, the person should be informed immediately that he or she is under arrest.	**6.1.5** The Committee amends the Commission's Recommendation 19.1. The Committee recommends that police operational procedures made pursuant to the proposed *Police Powers and Procedures Act* should require that, where practicable, when a police officer requests a suspect to go to, and/or remain at, any place designated by the police officer, the officer should inform the person that he or she is either under arrest, or is not under arrest and is therefore free to leave police company at any time unless and until arrested. If the police officer makes a decision at any time that the person is no longer free to leave, the person should be informed immediately that he or she is under arrest.
19.2 Recommendation - The Right to Remain Silent	**6.2.5**

CJC RECOMMENDATION	PCJC RECOMMENDATION
The Commission recommends that the right to remain silent should be retained in its present form. To this end the Commission recommends that legislation should make it clear that the proposed scheme of pre-charge detention does not in any way derogate from the right to remain silent.	The Committee rejects the Commission's Recommendation 19.2. The Committee recommends that the right to silence should remain in its present form. However, the Committee does not believe that to achieve this aim it is necessary to embody the right in legislation. The Committee believes that the Commission's proposed regulated scheme, involving detention for questioning, is itself inherently inconsistent with the right to silence. The Commission's Recommendation 19.2 will not cure this inherent inconsistency.
19.3 Recommendation - Obligation to Caution Suspects The Commission recommends that, prior to any questioning, a police officer must caution a suspect in the following terms: > You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer any questions, anything you say will be recorded and may be introduced as evidence in court.	**6.3.5** The Committee amends the Commission's Recommendation 19.3. The Committee recommends that the police operational procedures made pursuant to the proposed *Police Powers and Procedures Act* should provide that, prior to questioning, a police officer must caution a suspect in the following terms: > You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer any questions, anything you say will be recorded and may be introduced as evidence in court. However, the Committee does not support the Commission's definition of suspect. The Committee recommends that suspect should be defined as "any person who a police officer suspects on reasonable grounds was involved in the commission of an offence".

CJC RECOMMENDATION	PCJC RECOMMENDATION
20.1 Recommendation - Commencement of Detention The Commission recommends that the pre-charge detention scheme should commence at the point of arrest. Nothing in the proposed scheme is to be taken to confer any power to detain a person not under arrest.	**7.1.5** The Committee rejects the Commission's Recommendation 20.1.
20.2 Recommendation - Procedure Following Arrest - Determining Need for Pre-Charge Detention The Commission recommends that the following procedure apply in all cases where a person has been arrested: Upon being arrested, the person is to be taken directly to the watchhouse or other appropriate facility to be charged and considered for bail, unless the police officer who makes the arrest believes there are grounds for detaining the person for one or more designated investigative and/or administrative purposes. If the officer considers that such grounds exist, the person is to be taken to the Custody Officer at the nearest police establishment with the equipment and facilities needed to perform the required functions. The Custody Officer, upon being satisfied that the person was lawfully arrested, may authorise the detention of the person for a specified period (see Recommendation 20.3) on the grounds that it is necessary to: · enable such further investigation and inquiries as are reasonably necessary to determine whether a prosecution will be launched and, if so, the nature of the charges to be laid · complete any necessary documentation which requires the presence of the detained person · establish the identity of the person	**7.2.5** The Committee rejects the Commission's Recommendation 20.2.

CJC RECOMMENDATION	PCJC RECOMMENDATION
· conduct other authorised investigative procedures.	
20.3 Recommendation - Maximum Period of Pre-Charge Detention The Commission recommends that the Custody Officer be able to authorise detention of an arrested person for a reasonable period not exceeding four hours. The reasonable period is to be determined by the Custody Officer by reference to the relevant circumstances including: · whether the presence of the arrested person is necessary for the conduct of the investigation which is intended to be conducted after arrest · the number and complexity of matters under investigation · whether the person has indicated a willingness to make a statement or answer questions · whether a police officer reasonably requires the time to prepare for any interview of the person in custody · whether appropriate facilities are available to conduct an interview or other investigations · the number and availability of other persons including co-offenders, victims etc. who need to be interviewed or from whom statements need to be obtained · any need to visit the place where the alleged offence is believed to have been committed	**7.3.5** The Committee rejects the Commission's Recommendation 20.3. However, if the Commission's proposed scheme is adopted by the Parliament, the Committee would recommend that detention for questioning be for a reasonable time.
· the total period of time during which the person has been in the company	

CJC RECOMMENDATION	PCJC RECOMMENDATION
of police · the time taken for police to attend at the place where the arrested person is being held (e.g. where a person has been arrested on a warrant) · the time taken to complete any forensic examinations necessary. The operation of this fixed maximum time period should be reviewed after 18 months.	
20.4 Recommendation - Time-Out Periods The Commission recommends that time-out periods should be disregarded when calculating the relevant time period for detention. Questioning of the arrested person is not to take place during a time-out period. The purposes for which time-outs should be allowed include: · time reasonably required to: * convey the person from the place of arrest to the nearest premises with appropriate facilities * make and dispose of an extension application (see below) * process the person through the watchhouse.	**7.4.5** The Committee rejects the Commission's Recommendation 20.4.
· time questioning is suspended or delayed: * to allow a person to communicate with legal practitioner, friend or relative or consular official * to allow a legal practitioner, friend or relative or consular official to arrive at the place of questioning * to allow a person to receive medical attention * because the Custody Officer believes the person to be intoxicated	

CJC RECOMMENDATION	PCJC RECOMMENDATION
* to allow for identification procedures to be arranged and conducted * to allow for a reasonable rest period.	
20.5 Recommendation - Extension of Detention Period Beyond Four Hours The Commission recommends as follows: There should be a provision that before the end of the initial four hour period a police officer may apply to a magistrate to extend the period of detention for a further period of up to eight hours. In exceptional circumstances, where police have been unable to complete their investigations within the extended period, an application for further extension may be made to a Supreme Court judge who shall specify the further period of detention authorised.	**7.5.5** The Committee rejects the Commission's Recommendation 20.5.
Provision should be made for applications to be made by telephone where appearance before a magistrate or a Supreme Court judge is not practicable because of the time of day or the remoteness of the location. The arrested person or his or her legal representative should have the right to be heard on an application for extension. In the case where the application is for an extension for the purpose of further questioning of the person, the application shall not be granted unless the person indicates to the court his or her willingness to be interviewed further. In any application the onus is on the police officer to satisfy the judicial officer that: · the investigation is being conducted diligently and expeditiously; and	

CJC RECOMMENDATION	PCJC RECOMMENDATION
· a further period of detention without charge is reasonably necessary to preserve or obtain evidence or to complete the investigation; and · there is no reasonable alternative means of obtaining the evidence other than by the continued detention of the person in custody; and · circumstances exist which made it impracticable for the investigation to be completed within the four hours (see those circumstances relevant to determining a 'reasonable period') OR other circumstances of emergency made it impracticable for the investigation to be completed within that time.	
20.6 Recommendation - Procedure at End of Detention Period The Commission recommends that once the authorised period of detention has expired (including any authorised extension) the police must either: · release the person without charge · release the person on the basis that a summons has issued or will issue against the person · take the person to the watchhouse or other appropriate facility for the purpose of being charged and * released on bail; or * taken before the first available Magistrates Court. Where a Magistrates Court is not immediately available, no further questioning shall be allowed of the person in custody.	**7.6.5** The Committee rejects the Commission's Recommendation 20.6.
20.7 Recommendation - Provision for Re-Arrest	**7.7.5**

CJC RECOMMENDATION	PCJC RECOMMENDATION
The Commission recommends that, once released, a person shall not be re-arrested without warrant and subject to further investigative detention for offence(s) which the person has previously been arrested, unless new evidence justifying a further arrest has come to light since the release.	The Committee rejects the Commission's Recommendation 20.7.
20.8 Recommendation - Time Limits for Voluntary Attendees The Commission recommends that after a period of four hours and at the end of a further eight hours, taking account of time-out, if the voluntary attendee is still in attendance at the police station, the voluntary attendee and the police officer should be required to appear before a magistrate and satisfy the magistrate that the person freely agrees to remain at the police station and for questioning to continue. Where it is impractical for them to appear before a magistrate, the hearing should be conducted by telephone.	**7.8.5** The Committee rejects the Commission's Recommendation 20.8.
21.1 Recommendation - Suspect's Right to Free Legal Advice The Commission recommends that the Custody Officer (see Chapter Twenty-two) be required to advise the suspect of his or her right to contact a lawyer. The Custody Officer should advise the suspect that if he or she does not have a lawyer, a free and independent legal advice scheme is available to provide the services of a lawyer at the police station, or, in remote areas, over the telephone. Where a suspect indicates a wish to communicate with a lawyer, the Custody Officer should arrange for the suspect to do so in private and must defer questioning and other investigative procedures involving the suspect until that has occurred. Where the suspect indicates a desire to have a lawyer present for an interview or other procedure, the interview or other procedure should be deferred until the lawyer arrives and has consulted with the suspect.	**8.5** The Committee rejects the Commission's Recommendation 21.1 If the Parliament accepts the Commission's scheme (together with the free legal advice service) the Committee suspects that the balance between law enforcement and individual rights will be upset. This in turn will probably result in pressure to amend the right to silence. Therefore, the Committee recommends that if the Parliament accepts the Commission's scheme (including the free legal advice scheme) then the Parliament should also consider at the outset whether the right to silence should be modified in order to enable a general discretion to permit adverse inferences to be drawn against a suspect who, despite all the safeguards of the Commission's report including video taping and free legal advice, refuses to answer questions.
Where a lawyer having agreed to attend does not arrive within a reasonable time (up to two hours) the Custody Officer should make an attempt to contact another	

CJC RECOMMENDATION	PCJC RECOMMENDATION
lawyer. In such circumstances the suspect is not to be questioned until he or she has had access to legal advice.	
22.1 Recommendation – The Custody Officer The Commission recommends that, where practicable, a senior police officer who is independent of the investigation should exercise the functions of the Custody Officer. Where no officer independent of the investigation is available, approval for one of the investigating officers to exercise the functions of Custody Officer should be sought by telephone from a commissioned officer.	**9.1.5** The Committee rejects the Commission's Recommendation 22.1.
22.2 Recommendation – The Role of the Custody Officer The Commission recommends that the responsibilities of the Custody Officer should be specified in legislation. These responsibilities should include: · informing the suspect of his or her rights · determining whether pre-charge detention is warranted · authorising investigative procedures involving the suspect · identifying and attending to any 'special needs' of the suspect · ensuring that the suspect has medical assistance, rest and refreshment · ensuring proper custody records are maintained. As far as possible the new requirements should be integrated with current QPS procedure.	**9.2.5** The Committee rejects the Commission's Recommendation 22.2.
23.1 Recommendation - Notification of Breaches The Commission recommends that where, in a criminal proceeding, it is revealed that a police officer may have contravened a statutory duty or a general instruction issued by the Commissioner of Police, the Director of Prosecutions or	**10.1.5** The Committee amends CJC Recommendation 23.1 The Committee recommends that where, in a criminal proceeding, it is revealed

CJC RECOMMENDATION	PCJC RECOMMENDATION
the magistrate who heard the matter, should be responsible for informing the Commissioner of Police of any breach that may warrant criminal, disciplinary or remedial action. The referral should be made even if the court does not exclude any evidence obtained in breach of these requirements.	that a police officer may have contravened a statutory duty or a general instruction issued by the Commissioner of Police, the person prosecuting the matter should be responsible for informing the Criminal Justice Commission of any breach that may warrant criminal, disciplinary or remedial action. The referral should be made even if the court does not exclude any evidence obtained in breach of these requirements. The obligation to refer should not be contained in statute. In the case of police prosecutors, the Commissioner, and in the case of Crown Prosecutors, the Director of Prosecutions should issue a direction explaining the criteria and process, for referral. The obligation to refer should not be placed on any court. However, a court may at its discretion recommend any further action that it deems necessary.
23.2 Recommendation – Legislative Recognition of Exclusionary Rules The circumstances under which unlawfully or improperly obtained evidence is to be admitted in court proceedings should be defined in legislation.	**10.2.5** The Committee rejects the Commission's Recommendation 23.2.
23.3 Recommendation – Admissibility of Unrecorded Confessions or Admissions The Commission recommends that all interviews of suspects undertaken by the police must be electronically recorded. The Commission further recommends that legislation be introduced stating that any unrecorded confession or admission not electronically recorded or confirmed on audio or video tape should be inadmissible in a criminal proceeding, unless the prosecution establishes on the balance of probabilities that the circumstances in which the confession or admission was made were exceptional and justify	**10.3.5** The Committee rejects the Commission's Recommendation 23.3.

CJC RECOMMENDATION	PCJC RECOMMENDATION
reception of the evidence.	

THE PCJC'S ALTERNATIVE

Conclusion

The Committee concludes the following:

- **It is of central importance that any rules made in relation to police questioning of suspects, whether pre or post arrest, must recognise and entrench that questioning can only take place when the suspect consents to that questioning. It is also of importance that the rules relating to police questioning of suspects not be structured so as to increase the use of the power to arrest. The Committee notes the words of the now Chief Justice of the High Court, the Hon Sir F G Brennan QC:**

  ... when a person is arrested, he is thereby affected by physical and psychological constraints. He is neither legally nor actually free and he is conscious of the power which authorities then have over him. In such a situation he ought not to be subject involuntarily to the exercise of the interrogator's powers.

- **There is no objection to police questioning suspects after arrest, providing that the suspect consents to that questioning, the suspect consents to the resulting delay caused by that questioning to him/her being taken before a Magistrate, and the suspects consent is electronically recorded. As stated by Mr Michael Shanahan representing the Legal Aid Office (Queensland):**

  ... if a person is prepared to talk, cooperate and answer questions voluntarily and in an informed way, whether it is prior to or post-arrest is not relevant. It is a voluntary decision that they have made to cooperate. People do confess to crimes. In many cases, it is an indication of remorse. It would be improper for a system to try to stop that. If a person makes an informed decision to confess, the system should accommodate that. Whether it is prior to arrest or after is not relevant. The fact that it should be voluntary is important.

- **Prior to questioning a suspect about his/her involvement in an offence, police must inform a suspect:**

  - **Whether or not they are under arrest.**

  - **If the person is not under arrest, that they are free to leave.**

  - **If they are under arrest, that they have an option to be taken before a magistrate or to participate in a record of interview.**

  - **Of their right to silence in the following terms:**

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

- **The above matters should, where practicable, be recorded.**

- **Audio visual recording provides excellent protection for both police and the suspect. Therefore, interviewing of suspects (including the giving of all warnings) must be undertaken in accordance with the procedures currently set out in the *Electronic Recording of Interviews and Evidence Manual.***

- **A suspect should be defined as "a person who a police officer reasonably suspects was involved in the commission of an offence".**

- **Special rules are required for suspects who may be under a disability.**

Recommendation

The Committee recommends that:

- **The proposed *Police Powers and Procedures Act,* previously recommended by the Committee, provide a definition of suspect as follows:**

  "a person who a police officer reasonably suspects was involved in the commission of an offence".

- **The proposed *Police Powers and Procedures Act* provide that the Commissioner of Police be required to issue police operational procedures, providing a code which regulates the manner in which powers under the Act are exercised, including procedures for the questioning of suspects.**

- **The rules of practice known as the Judges' Rules, as amended by the Committee's recommendations in this report, be incorporated within police operational procedures made pursuant to the proposed *Police Powers and Procedures Act.***

- **The police operational procedures are to be tabled in the Parliament by the Minister within ten sitting days of being issued or amended.**

- **The police operational procedures are to provide that prior to questioning a suspect about his/her involvement in an offence police must inform a suspect:**

  - **Whether or not they are under arrest.**

  - **If the person is not under arrest, that they are free to leave.**

  - **If they are under arrest, that they have an option to be taken before a magistrate or to participate in a record of interview.**

  - **That they may consult with a lawyer or other advisory.**

  - **Of their right to silence in the following terms:**

    You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any

questions. If you wish to make a statement or answer any questions, anything you say will be recorded and may be introduced in evidence in court.

- **The above cautioning should, where practicable, be recorded.**

- **That the operational procedures provide that the interviewing of suspects (including the giving of all warnings) must be undertaken in accordance with procedures similar to those currently contained within the *Electronic Recording of Interviews and Evidence Manual.***

- **That the operational procedures provide special provisions for suspects who may be under a disability.**

The Committee recommends that the *Police Powers and Procedures Act* contains a provision that states:

> **It is an exception to s.552 of the *Criminal Code* and s.69 of the *Justices Act* (clause 297 and 199 of the *Criminal Code Bill 1994*) if the arrested person otherwise consents provided that:**
>
> **(a) he has been cautioned in accordance with the operational procedures made pursuant to the *Police Powers and Procedures Act.***
>
> **(b) the giving of the caution, his acknowledgment of the caution and his decision to voluntarily answer questions posed to him and the subsequent interrogation are recorded in accordance with the operational procedures concerning electronic recording of interviews; and**
>
> **(c) the delay in taking the arrested person before a magistrate not be unreasonable in all the circumstances.**

The Committee recommends that the current law relating to the admissibility and exclusion of confessional evidence and the judges' discretion to exclude such evidence remain unaltered.

1. INTRODUCTION

1.1 The Fitzgerald Report and the background to the Commission's Report

The genesis of the Commission's review of police powers was the *Report of a Commission of Inquiry Pursuant to Orders in Council* (the "Fitzgerald Report"). The Fitzgerald Report (1989:377) recommended that the CJC, as an essential part of its immediate functions, undertake investigation, review, reform and consideration of criminal justice matters arising from the report, including:

> *comprehensive review of all investigative powers, to critically examine the use of current powers, assess the need for other or more powers, and upgrade control of investigative powers, including:*
>
> *(a) adequate supervision by responsible senior officers;*
> *(b) external judicial control of powers;*
> *(c) restriction of the use of powers to designated people or offices;*
> *(d) making misuse of powers and information offences; and*
> *(e) exclusion of the admissibility of illegally obtained evidence.*

Earlier the report (1989:177) stated:

> *There is a risk that ordinary law abiding people will over-react to the threat of crime and demand excessive measures, instead of the reasoned and limited moves which are necessary.*
>
> *If law and law enforcement do not keep pace with social needs, there is the possibility that the stresses of the system and public frustration with it will become apparent through unsavoury and misguided attempts to redress the balance. There may be pre-trial publicity, evidence may be obtained by illegal means or fabricated and allegations and innuendos may be made and published by politicians and the media.*
>
> *It is beyond the scope of this Inquiry to recommend the granting of specific powers and to whom and under what circumstances they should be granted. Mechanisms by which those decisions can be better made, by better informed people, are recommended later in this report.*
>
> *The following is a list of some of the measures which should be considered in any comprehensive review of powers relevant to law enforcement:*
>
> · *the use of arrest powers (or detention powers) to allow subsequent involuntary interrogation;*
>
> · *the compulsory production of documents and property;*
>
> · *the compulsion to require people to answer questions;*
>
> · *the entry and search of premises;*
>
> · *the seizure and removal of property;*
>
> · *the involuntary obtaining of evidence by bodily searches;*
>
> · *the interception of conversations and communications;*

- *the forfeiture of assets where there are reasonable grounds for suspecting that they may have been obtained from criminal activity;*

- *the imposition of an onus upon persons convicted of a specified serious offence to establish that their property was legitimately acquired;*

- *the freezing of assets pending trial;*

- *circumscription of the ability of witnesses granted immunity from prosecution to take advantage of that privilege when they have made false allegations or may be guilty of other dishonesty;*

- *physical and electronic surveillance;*

- *the collection of intelligence about the movement of criminals from airports and other transport centres;*

- *the infiltration of criminal groups;*

- *the use of informants and indemnities including the provision of lesser charges or penalties for criminals who assist in an investigation.*

In September 1991 the Criminal Justice Commission (the "CJC" or the "Commission"), in conjunction with the office of the Minister for Police and Emergency Services, released an issues paper entitled *Police Powers in Queensland* ("the issues paper").

The release of the issues paper was the start of the Commission's largest research project to date, a comprehensive review of police powers in Queensland.

The Commission's review of police powers in now complete. The Commission's report numbers five volumes:

- On 4 June 1993 Mr R S O'Regan QC, Chairman of the Commission, presented to the Honourable the Speaker and the Chairman of the Committee, Volumes I and II of the Commission's report.

  Volume I focused on providing an overview of police powers in Queensland and discussed the issue of consolidation.

  Volume II provided a discussion and recommendations for reform of police powers of entry, search and seizure.

- On 10 November 1993 Mr L F Wyvill, the then Acting Chairman of the Commission, presented to the Honourable the Speaker and the Chairman of the Committee, Volume III of the Commission's report.

  Volume III focused on three police powers, namely:

  - Arrest without warrant;

  - Demand name and address; and

  - Move-on powers.

- On 6 June 1994 Mr O'Regan presented to the Honourable the Speaker and the Chairman of the Committee, Volume IV of the Commission's report.

  Volume IV is the subject of this report by the Committee.

- On 28 October 1994 Mr O'Regan presented to the Honourable the Speaker and the Chairman of the Committee, Volume IV of the Commission's report.

  Volume V focuses on the following matters:

  - Listening Devices and other forms of electronic surveillance;
  - Body searches and examinations;
  - Fingerprints and other particulars;
  - Identification by Eyewitnesses; and
  - Crime scene preservation.

- Finally, on 15 February 1995 Mr O'Regan presented to the Honourable the Speaker, a review of telecommunications interception entitled *Telecommunications Interception and Criminal Investigation In Queensland: A Report*. The issues raised in this report were intended by the Commission to be included in Volume V. However, the Commission determined to deal with the topic in a separate report because it raised *distinct legal and policy issues*.

The Committee's review of the Commission's reports is also in its final stages.

In August 1994 the Committee released its Report No. 23B entitled *Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I-III Part B - Comment, Analysis and Recommendations*. That report concluded the Committee's review of Volumes I-III of the Commission's report.

This report concludes the Committee's review of Volume IV of the Commission's report.
The Committee's review of Volume V is well advanced and the Committee's report on the matter will be released by the Committee in the near future.

The Committee has also commenced the review of the Commission's report on Telecommunications Interceptions. An advertisement for public submissions has been placed and a public hearing on the report is scheduled for 19 April 1995.

1.2 The Role of the Parliamentary Criminal Justice Committee

What is the role of the Committee in the review process?

Section 118 (a)(c) of the *Criminal Justice Act 1989* provides that the role of the Parliamentary Criminal Justice Committee ("PCJC") includes:

> *to examine the annual report and other reports of the Commission and report to the Legislative Assembly on any matter appearing in or arising out of such a report.*

The Fitzgerald Report (1989:140-141) noted that reform of the criminal justice system should not be undertaken in an ad hoc manner. Importantly, it was emphasised that reform should be made after real research had been undertaken.

The Fitzgerald Report (1989:104-141) noted:

> *In the field of criminal justice, identifying the options and understanding their merits and drawbacks is technical and difficult. Individual politicians, with their limited time, resources and training, and even party machines cannot by themselves adequately analyse complex proposed legislation. This is even more the case when the legislation is presented in an urgent reactive way to the Parliament.*

...

> *The Parliament must identify objectives and provide (or attract) the resources to attain them. In that, it must be given objective advice. Recommendations elsewhere in this report for the presentation of competing viewpoints by a permanent independent agency address that need.*
>
> *Enactments must be considered for their impacts upon a whole structure, particularly impact on the administration of criminal justice.*

Later, the Fitzgerald Report (1989:316) recommended the formation of the Research and Co-ordination Division within the CJC. It was envisaged that the task of the Division was to research and prepare reports for the Commission's consideration. It was clearly intended that these reports were to be tabled in the Parliament.

However, the role of the Commission in relation to law reform is merely to provide objective independent advice. It was never intended that the Parliament be obliged to blindly accept the advice tendered by the Commission.

It must be recognised that the Commission's reports are not omnipotent. The Commission's reports merely represent one view of law reform. The Commission's reports, like any reports from law reform bodies, are not immune from objective criticism.

Often such reports strive to achieve idealistic objectives and do not appreciate economic realities.

Importantly, law reform bodies are unelected and often have no appreciation of the views of community. The Director of Prosecutions in his submission to the Committee stressed this aspect:

> *A word of warning needs to be issued. Law Reform Commissions are not elected. They do not have to answer to the electorate. Many of their proposals are not enacted by parliaments because the people's elected representatives regard them as not reflecting the will of the people - their ultimate masters.*

The Committee conceives its role as being to assist the Parliament to achieve a greater appreciation of the report, and, when the Committee believes appropriate, to put forward alternatives. The Committee has sought to fulfil its role by promoting public debate on the Commission's report through calling for public submission's, undertaking research and discussions in other jurisdiction, holding public hearings and, finally, by reporting the Committee's review and conclusions to the Parliament.

The Committee appreciates that the Parliament may ultimately reject the findings of the Committee. However, the Committee's review and report process can only but enhance the prospects of informed outcomes.

1.3 The PCJC Review Process

1.3.1 Submissions

On 3 September 1994 the Committee called for public submissions in relation to the issues raised in Volume IV of the Commission's report. The closing date for the submissions was 30 September 1994. However, the Committee did accept some submissions received after this date.

In response the Committee received seven written submissions from the following groups and individuals:

- The Queensland Police Service;

- The Legal Aid Office (Queensland);
- The Queensland Law Society Inc;
- The Director of Prosecutions;
- The Crown Prosecutors Association of Queensland;
- The Aboriginal and Torres Strait Islanders Corporation (QEA) for Legal Services; and
- Mr Robert Sibley, Senior Lecturer in Law, Faculty of Law, Queensland University of Technology.

The above submissions were authorised for release by the Committee pursuant to the *Parliamentary Papers Act 1992* and were subsequently tabled in the Parliament by the Chairman of the Committee on 27 October 1994.

1.3.2 Public Hearing

On 5 October 1994 the Committee conducted a public hearing in relation to its review of Volume IV of the Commission's report.

Ten witnesses gave evidence before the Committee at the public hearing.

The witnesses who appeared and gave evidence and the groups they represented were as follows:

- Acting Commissioner of Police, Mr William Aldrich, Mr Greg Thomas and Mr Peter Slater represented the Queensland Police Service.
- Mr Michael Shanahan represented the Queensland Legal Aid Office.
- Mr Robert Sibley, Senior Lecturer in Law, Queensland University of Technology.
- Mr John Jerrard QC and Mr Daniel O'Connor represented the Bar Association of Queensland.
- Mr John O'Gorman represented the Queensland Police Union of Employees.
- Mr Bill Potts represented the Queensland Law Society.
- Mr Tim Carberry represented the Aboriginal and Torres Strait Islander (QEA) Legal Service.
- Mr Terry O'Gorman represented the Queensland Council for Civil Liberties.

The official Hansard of the public hearing was tabled in Parliament by the Chairman of the Committee on 27 October 1994.

1.3.3 Visits to Other Jurisdictions

The Committee, realising that the review of the five volumes of the Commission's report on police powers would be the major research project of the Committee during the 47th Parliament, made attempts prior to reporting on Volumes I-III of the Commission's report, to visit other jurisdictions.

The objectives of these visits were as follows:

- To gain a greater understanding of the nature and extent of police powers in other jurisdictions.
- To make a comparative assessment of police powers between Queensland and other

jurisdictions.

- To examine and evaluate police powers in relation to detention for questioning and post arrest procedures in other jurisdictions.

- To gain an understanding of the legislative basis for the exercise by Police of their powers in relation to entry, search and seizure.

- To gain an understanding of the legislative basis for the exercise by Police of their powers in relation to arrest, demand name and address, move on and breach of the peace.

- To understand the perspective of authorities in other jurisdictions as to the nature and extent of police powers.

- To evaluate legislative reform in relation to police powers in other jurisdictions.

- To forge links between the Committee and its counterparts in other jurisdictions.

During the latter part of 1993 the Committee visited Wellington, Perth, Hobart, Melbourne and Sydney. Although Volumes IV and V of the Commission's report had not been released at that stage, the Committee was aware of the issues to be addressed in those volumes. These issues were discussed during the visits to the above jurisdictions.

The programme for the visits was as follows:

Wellington

- Police Complaints Authority - Meeting with Sir John Jefferies (Former High Court Judge).

- NZ Select Committee - Justice and Law Reform.

- New Zealand Law Society - Meeting with representatives of Criminal Law sub-committee and members of the legal profession.

- New Zealand Police Service - Meeting with Deputy Commissioner Ian Bird, Assistant Commissioner Allan Galbraith (Crime and Operations) and David Kerr (Chief Legal Adviser).

- Professor Warren Young - Faculty of Law, Victoria University Wellington.

- NZ Law Commission - Meeting with Commissioner Les Atkins QC and The Hon Mr Justice Wallace in relation to recommendations on Police Questioning.

- Chief Judge Dame Sylvia Cartwright and Judges of District Courts of New Zealand.

Perth

- Law Reform Commission (WA) - Meeting with Dr Peter Handford (Ex Officer).

- Law Society of WA - Meeting with Mr Ted Sharp (President), Mr Michael McPhee (Vice President), Mr Peter Martino (Vice President), Mr Pino Monaco (Treasurer), Mr Peter Fitzpatrick (Executive Director), Ms Gillian Braddock (Convenor - Criminal Law Committee), Ms Judith Fordham (Criminal Law Committee), Mr John Cameron (Criminal Law Committee).

- Hon Mr Justice David Malcolm AC and Chief Justice of WA and Judges' of the Supreme Court.

- Hon Bob Wiese MLA, Minister for Police.

- Director and Staff of the Legal Aid Commission (WA).
- Richard Utting, Barrister-at-Law.
- His Honour Chief Judge Keenan and Judges' of District Courts.
- Commissioner of Police, Mr Brian Bull, the Deputy Commissioner of Police, Mr Frank Zanetti and Assistant Commissioner (Policy, Planning and Evaluation), Mr Peter Skehan.
- The Director of Public Prosecutions, Mr JR McKechnie QC.
- The Civil Liberties Council WA.

Hobart

- Office of the Director of Public Prosecutions, Tasmania.
- Hon Henry Cosgrove QC - Former Chairman of Law Reform Commission and Supreme Court Judge.
- Professor Don Charmers - Dean, Faculty of Law, University of Tasmania.
- Ms Therese Heaning - Faculty of Law, University of Tasmania.
- Commissioner John Johnston - Commissioner of Police for Tasmania.
- The Law Society of Tasmania.

Melbourne

- Legal Aid Commission of Victoria.
- Victorian Police Association.
- Law Institute of Victoria, Criminal Law Sub-Committee.
- Commissioner Neil Comrie - Commissioner of Police, Victoria.

Sydney

- Director of Public Prosecutions (NSW) - Mr R Blanch QC.
- Associate Professor Mark Findlay, Institute of Criminology - Faculty of Law University of Sydney.
- Acting Commissioner Taylor - NSW Police Service and representatives of the NSW Police.
- Mr Ken Horler QC - NSW Council for Civil Liberties.
- Hon Mr Justice Kirby AC CMG - President of the Court of Appeal - Supreme Court of NSW.
- Aboriginal Legal Service (NSW).
- Members of the Executive of the Law Society of New South Wales and Criminal Law Sub-Committee.

Following the release of Volume IV, the Committee visited Wellington, Auckland, Adelaide and Sydney. This visit did not solely relate to the Committee's review of police powers. The Committee's three year review of the CJC and the review of the Commission's report on *Cannabis*

and the Law were also objects of review by the Committee during this visit.

Prior research revealed a pro bono legal advice service for suspects in police custody was being considered for operation in New Zealand. A pilot scheme for the provision of legal advice funded by the New Zealand Government had commenced shortly before the Committee's visit to New Zealand. Further, at the time of the Committee's visit legislation governing the implementation and funding of a permanent free legal advice scheme for persons detained by police, was imminent.

Considerable research had been undertaken in New Zealand in respect of detention of persons by police for questioning and the provision of free legal advice.

The Committee's visit to New Zealand was timely. On 2 October 1994, only four days before the Committee's arrival in Wellington, the New Zealand Law Commission released its report on *Police Questioning*, which canvassed issues similar to those in Volume IV of the Commission's Report.

During the visit the Committee also fortuitously met with Dr John Baldwin who happened to be visiting New Zealand. Dr Baldwin from the University of Birmingham in England has been involved in a number of studies concerning the English *Police and Criminal Evidence Act 1984* (PACE) scheme.

The practicalities of implementing a regulated system of detention and the provision of free legal advice were communicated by briefings and discussions in Wellington and Auckland, and was of considerable assistance to the Committee in its review of Volume IV of the Commission's Report.

The programme of the Committee's visit, as it related to police powers, was as follows:

Wellington

- Police Complaints Authority - Meeting with Sir John Jefferies (Chairman) and Mr Euan Robertson (Deputy Chairman).
- Professor Warren Young - Faculty of Law, Victoria University, Wellington.
- Legal Services Board of New Zealand - Meeting with Mr David Smith (Executive Director).
- Professor John Baldwin - Birmingham University.
- New Zealand Police Service - Meeting with Deputy Commissioner Ian Bird, Assistant Commissioner Allan Galbraith (Crime and Operations), Mr David Kerr (Chief Legal Adviser) and Mr Les McCarthy (Officer in Charge: Internal Affairs).
- New Zealand Police Association Incorporated - Meeting with Mr Steve Hinds (President), Mr Graham Harding (Secretary) and the Board of Directors.
- NZ Select Committee on Justice and Law Reform - Meeting with Mr Alec Neill MP, the Hon Roger McClay MP, Mr Brian Neeson MP, Mr Clem Simich MP, the Hon Philip Goff MP and Mr George Hawkins MP.

Auckland

- Auckland Council for Civil Liberties - Meeting with Mr Barry Wilson (President).
- Criminal Bar Association Of New Zealand - Meeting with Mr Isaac Koya (President), Mr Jim Boon (Barrister), and Mr Colin Amery (Barrister).
- New Zealand High Court - Meeting with the Honourable Justice Dame Sylvia Cartwright, the Honourable Justice Bruce Robertson (Executive Judge for Auckland) and the Honourable Justice David Morris of the High Court of New Zealand.

Adelaide

- The Honourable Wayne Matthew MLA, Minister for Emergency Services.

- South Australian Police Service - Meeting with South Australian Commissioner of Police, Mr D A Hunt and senior officers.

- South Australian Police Complaints Authority - Meeting with Mr Peter Boyce (Director).

1.3.4 The Sub-Committee

On 18 October 1994 the Committee resolved to form a sub-Committee to expedite the Committee's review process in relation to Volumes IV and V. The sub-Committee comprised the Chairman Mr Ken Davies MLA, Mr Darryl Briskey MLA, Mr David Watson MLA and Mr Tom Barton. The Honourable Neil Turner MLA also attended one of the sub-Committee's meetings.

To date the sub-Committee has met on three occasions.

2. GENERAL PRINCIPLES

2.1 Introduction

Before proceeding to examine the issues discussed and the recommendations made in Volume IV, it is first necessary to examine the present law relating to suspects' rights and police questioning of suspects.

This chapter attempts to provide a summary of the current law and practice relating to these matters.

2.2 The Importance of Police Questioning

The role that police questioning plays in the criminal investigation process has been the subject of considerable research. It seems to be agreed that its primary function is to obtain confessions. However, as the Commission's report noted, collateral functions have been identified, such as:

- detecting crime;
- obtaining evidence against alleged accomplices;
- clearing up unsolved crimes; and
- recovering stolen property.

The following additional functions were noted in the Queensland Police Service's submission:

- negativing defences and alibis; and
- establishing that a person did not commit an offence.

This last proposition is supported by the results of studies quoted in the Royal Commission on Criminal Procedure (the Philips Commission, 1981:19). There it was recognised that a substantial minority of suspects are in fact released because questioning fails to establish a case against them. The Commission cited the studies of Irving (1980), Softley (1980) and Steer (1980) which indicated that up to 20 percent of persons arrested were not proceeded against.

It has been suggested that the importance of police questioning is overrated. In response the Philips Commission ordered research to be conducted. The results revealed:

- a strong correlation between the information given by suspects and a conviction; and
- a high percentage of suspects who made a full or damaging admissions. (1981:19)

The suggestion was again considered by Woods in 1990. After studying a great deal of British (including some of that referred to by the Philips Commission) and American research he concluded that:

- confessions are needed in an average of 18-20 percent of all cases. (1990:233)
- this reflected a mistaken assumption that confessions and police interrogation are of vital importance to the criminal process (1990:239) and that interrogation has serious limitations (1990:240); but
- this does not mean that police interrogation has no importance as there will be situations where it is vital to strengthen a case or solve crime. (1990:240)

Woods stresses that there are other means of gathering evidence, apart from questioning of suspects, on which to base a successful prosecution.

The submission by the Queensland Police Service (QPS) notes the Commission's reference to the Woods report. The Service's submission states:

> *At page 659 of Volume IV of its report the Commission refers to research by Woods (1990, p. 233) which suggests that:*
>
> *"... British and American research has consistently shown that, in around 18-20 per cent of cases, confessions were needed to obtain a conviction."*
>
> *Accordingly, the following table has been developed from a sample of the Queensland Police Service 1992-1993 Statistical Review. It shows the type of offence committed, the number reported, the number cleared and, on extrapolating Wood's research to Queensland, the number of those offences cleared which would have relied on a confession to secure a conviction.*

Offence	***Reported***	***Cleared***	***Confession***
Murder	*67*	*63*	*12*
Att. Murder	*142*	*128*	*24*
Serious Assault	*6789*	*4793*	*911*
Sexual Offences	*4330*	*3104*	*590*
Robbery	*1783*	*643*	*122*
Break and Enter	*61965*	*8683*	*1650*
Stealing	*92732*	*21056*	*4001*
Vehicle Theft	*16676*	*3240*	*616*
Fraud	*16690*	*12650*	*2403*

> *Note: The "Confession" column statistics are calculated at an average 19 per cent and rounded to the closest number.*

The Philips Report concluded that:

> *there can be no adequate substitute for police questioning in the investigation and, ultimately, in the prosecution of crime.* (1981:70)

Australian support for the above conclusion can be readily cited. The Report of the Review Committee of the Commonwealth Criminal Law, *Interim Report: Detention Before Charge* (Chairperson: Sir Harry Gibbs, 1989) at page 30 stated:

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

Curial support for the proposition that the interrogation of suspects, which results in confessions,

can also be readily cited.

It was said by Erle J in *R v Baldry* (1852) 169 ER 568 at 574:

> *A confession ... well proved ... is the best evidence that can be produced.*

The importance of confessions was also highlighted in the submission made by the Director of Prosecutions:

> *The importance of the right to question can not be overstated. In many aspects of our criminal law judges are required, either as a matter of law or as a matter of practice, to warn jurors against accepting the evidence of persons falling into certain categories, if there is no corroboration. Children and complainants in respect of sexual offences fall within the requirement. Often children are complainants in respect of sexual offences. Without corroboration, obtained by fair questioning, the chances of convicting child molesters are very remote indeed. Are we to deny justice to victims of child molestation by requiring a police officer to warn, to caution, as soon as he or she merely "suspects" the person to be interrogated?*
>
> *The focus should be upon determining when, in the interests of justice, the caution should be required to be administered. In answering that question a correct balance should be struck between protecting the suspect against oppressive or unfair questioning and the need to bring to justice persons who make confessions of their guilt or make statements which assist in the ascertainment of the truth by tending to confirm the evidence of a victim.*
>
> *The Commission's statement at page 659 lines 2 and 3 that a strong prosecution case can often be mounted without resort to confessional evidence ignores the reality that where crimes are committed in secret (as in the defendant's home) or in a darkened alleyway (as where a woman is seized and ravished) the chances of obtaining evidence sufficient to convict will inevitably depend on "confessional" material. Notwithstanding that statement, there is an apparent recognition that questioning properly conducted is an essential part of the modern police function.* ***The truth is, as any practitioner in the field of criminal law would readily recognise, that a confession "properly" obtained seals the guilt of the accused, but without it, the prosecution having to prove its case to 12 persons beyond any reasonable doubt, the chances of victims obtaining justice are minimal indeed.*** (1994:86) [Emphasis added]

Despite the importance of questioning to the investigation of crime, neither the common law nor statute law in Queensland has ever conferred upon the police a general power to arrest or detain a person for the purpose of interrogation.

2.3 Confessional Evidence

2.3.1 Definition of a Confession

At common law a "confession" has been defined as a statement or admission that is *either a direct admission of guilt, or of some fact or facts which may tend to prove the prisoner's guilt at the trial.* (per O'Connor J in *Attorney-General of NSW v Martin* (1909) 9 CLR 713 at 732)

As stated earlier, the primary purpose of police interrogation is to obtain confessions. Therefore it is important to understand the basis for the admissibility of confessional evidence.

2.3.2 The Rule Against Hearsay

The following exposition of the rule against hearsay has been stated with approval by the House of

Lords:

> *an assertion other than one made by a witness while testifying in the proceedings is inadmissible as evidence of any fact asserted.* (*R v Sharp* [1988] 1 All ER 65 at 68)

Importantly, the rule only applies to statements offered as to the truth of what another person said or wrote. Evidence is not hearsay, and therefore is admissible, if it is introduced not to prove the truth of the statement, but the fact that it was made.
Subramaniam v Public Prosecutor [1956] 1 WLR 965 at 969.

Thus, in most cases, a confession is merely hearsay.

2.3.3 Confessions as an Exception to the Hearsay Rule

At common law confessions can be admitted in evidence as an exception to the rule against hearsay if made voluntarily. The rationale for confessions being admissible is the inherent reliability of such statements, that is, a voluntary statement which is adverse to its own maker is more likely than not to be true.

The general rule is that the whole confession, whether damaging or self-serving, is evidence of the facts asserted. (*R v Cox* [1986] 2 Qd R 55 at 63-65) However, less weight may be given to the self-serving portions. This latter proviso is in line with the principle that a self-serving statement is not evidence of the facts which it asserts. In *R v Beck* [1990] 1 Qd R 30 at 33, Macrossan C.J. said:

> *Self-serving portions of statements of accused persons which in other parts contain admissions, go into evidence as part of a whole which is admissible against the accused for the very reason that admissions against interest are contained within the statements. The self-serving portions if they stood alone would not be admissible: they are hearsay, unsworn, out of court statements. The entry into evidence of such statements containing self-serving features means that the jury can give to the statements such weight as they think they deserve. The jury are quite entitled to have in mind the possibility that self-serving portions of an accused's statement may not be as reliable as those parts which are against interest.*

2.3.4 Voluntariness

As previously stated a confession will only be admissible if it is voluntary. "Voluntary" in this sense does not mean "volunteered" but *made in the exercise of a free choice to speak or be silent.* (*Collins v R* (1980) 31 ALR 257 at 307)

The Australian Law Reform Commission in its report *Criminal Investigation: No. 2 Interim Report 1975* (ALRC) at paragraph 151 stated that the voluntariness rule was justified in two ways:

- there is a risk that confessions produced by threat or inducement from a person in authority will be false; and
- to discourage undesirable police practices.

The common law position as to voluntariness was well stated by Dixon J in *Mc Dermott v R* (1948) 76 CLR 501 at 511:

> *At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him...unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If the statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But*

it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made.

The position in Queensland is also altered in part by s.10 of the Criminal Law Amendment Act 1894 which provides:

> *No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown.*

The following observations should be noted:

- Section 10 is not restricted to trials for indictable offences, but extends to all criminal proceedings.

  It has been held that "confession" in s.10 has the same meaning as at common law. (*R v Doyle* [1987] 2 Qd R 732 at 744)

- If a suspect makes an admission as a result of a threat of detriment or a promise of material benefit, an inducement has occurred. Although warnings to be truthful are not inducements, generally any statement including "You had better..." by the person in authority is likely to render the statement inadmissible. (Forbes,1992:287-288)

- In Queensland confessions obtained by violence, oppression or duress are still covered by the common law.

- The Crown bears the onus of proving that a confession is voluntary on the balance of probabilities. (*Cleland v R* (1983) 151 CLR 1 at 19)

2.4 The Rights of a Suspect

2.4.1 The Right to Personal Liberty

The historical, and present day, importance of the right to personal liberty was discussed by Mason and Brennan JJ in *Williams v The Queen* (1986) 161 CLR 278 at 292, where their Honours stated:

> *The right to personal liberty is, as Fullager J described it, "the most elementary and important of all common law rights. Trobridge v Hardy (1955) 94 CLR 147 at p.152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause". Commentaries on the Laws of England (Oxford, 1765),Bk.1 pp. 120-121, 130-131. He warned:*
>
> > *Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities.*
>
> *That warning has been recently echoed. In Cleland v The Queen, Deane J said:*
>
> > *It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.*
>
> *The right to personal liberty cannot be impaired or taken away without lawful*

authority and then only to the extent and for the time which the law prescribes.

This was reiterated by their Honours later at p.299:

> *The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished.*

In accordance with this right, there is no power to detain a person merely for questioning. Any arrested person must be brought before a Magistrate as soon as practicable. This is a well established principle of the common law which, as will be discussed later, is recognised by statute in Queensland.

Infringement of this right to personal liberty forms the basis of many of the issues in Volume IV of the Commission's report. Therefore, a central question to be answered is whether there is *sufficient cause* to extend to police the power to detain a person for questioning.

2.4.2 The Right to Silence

In *Rice v Connolly* [1966] 2 Q.B. 414 at 419 Lord Parker when discussing the right to silence stated:

> *... and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority ...*

The right does not only mean that an individual is under no legal obligation to answer questions, also it implies that the refusal to answer questions should not be used against that individual.

From this implication has emerged a contentious issue: can an inference of guilt be drawn from an accused's failure to answer questions? It is argued by some that such an inference should be able to be drawn. But, as Greer (1990: 710) points out, any inference of guilt drawn from such a refusal is in itself an abolition of the right to silence.

The theories behind the origin of the right to silence were previously noted in the Committee's Report No.23B, *Police Powers in Queensland Volumes 1-111* (1994:228).

In that report the Committee noted that whatever the origins of the right to silence, there is no doubt that it is now entrenched in our legal system. It is inextricably bound with the foundation of the criminal justice system in Australia, that is, the onus is on the prosecution to prove a case against the accused and to do so beyond reasonable doubt.

Some have contended that the right to silence interferes with the enforcement of criminal law and in effect hinders the innocent and helps the guilty. Not surprisingly police have been major proponents of this argument.

In its submission to the Committee the QPS, after reviewing arguments for an alteration to the right to silence, made some relevant observations. At page 19 of that submission it was noted:

- *Guilty persons have been acquitted due to the rule which allows them to refuse to answer questions and prevents a court drawing an inference from that refusal.*

- *The right to silence rule is an historical anachronism. That which the rule was originally designed to prevent no longer occurs. There is no longer a Court of the Star Chamber, the ecclesiastical Court of High Commission, trial by ordeal or interrogation with torture. Therefore, there is no longer a*

need for such a restrictive rule.

- *Excellent legal advice is available for a suspect from the earliest point in which he/she becomes involved in a police investigation.*

- *Electronic recording of interviews is now used for all indictable offences for which a person is questioned by police. Therefore, a person cannot justify remaining silent on the basis that his/her comments would be misrecorded.* (1994:19)

However, there are strong arguments supporting the retention of the right to silence. These were stated in the Committee's prior report (1994:228) as including:

- *To abandon the right is to abandon the current criminal law system. Trials would revert to being conducted in an inquisitional manner, rather than in an adversarial manner.*

- *One possible consequence is that prosecutions may be launched on the basis of evidence that may be obtained from forcing the accused to give evidence, rather than on the basis of available evidence which may be able to prove guilt.*

- *There is no need to remove the right to silence, the current system is adequate. Contrary to popular belief, most accused are convicted on independent evidence or their own voluntary confession without the need for forcing the accused to give evidence or answer questions.*

- *The rule abides with the notion of "fairness" embedded in the Australian ethos.*

- *To remove the right, and force the person accused to answer questions, is to assume that the accused knows relevant evidence. Therefore, the accused is not innocent until proven guilty, rather he/she is guilty until he/she proves himself/herself innocent, even in circumstances where he/she is unable to give any relevant information.*

Abolition of the right to silence before trial has been canvassed by numerous Commissions, including the following, which have concluded with a negative response:

- The Australian Law Reform Commission. (1975:para 150)

- The New South Wales Law Reform Commission. (1990:123) The Commission also made a valid point that the right contains *an important underlying democratic value*. That is, it gives a right to the citizen as against the State which has massive resources and power.

- The majority of the Royal Commission on Criminal Justice. (Runciman Report, 1993:54)

- The New Zealand Law Reform Commission Report. (1994:32)

- The Consultative Committee on Police Powers of Investigation. (Coldrey Report, 1986:14)

The Queensland Law Society in its submission to the Committee made the following comment:

> *The Committee [referring to the QLS Committee] believes that the right to silence is quite fundamental and that anyone advocating its abolition or attenuation should provide hard evidence to demonstrate that the right to silence is being so relied upon by such a multiplicity of defendants that the investigative process across the board is being thwarted.* (1994:75)

Some studies have shown that despite suspects being advised of their right to silence, it is a right not always exercised. (NSWLRC:122)

Research noted in the Runciman Report showed that despite the caution being given, the majority of suspects make statements to the police. (1993:50) Only a small minority refuse to answer all or some of the questions put to them.

2.4.3 The Right to a Lawyer

There is no enforceable common law or "constitutional" right to legal assistance, at a police station, in the absence of any specific statutory guarantees. In Queensland there is no statutory right to a lawyer. (*McInnis v The Queen* (1979) 143 CLR 575)

As the ALRC noted:

> *The right to consult with a lawyer during the course of pre-trial police investigations is one of those traditionally claimed civil rights to which almost universal obeisance is paid in principle, but which is greeted with very great circumspection in practice by law enforcement authorities.* (1975:para 105)

In *McInnes* the High Court held that an accused has the right to be represented by counsel but there is no right to be provided with counsel at the public expense, even if the offence involved is a serious one. (see Barwick J at p.579)

However, a different line has since been taken by the High Court in *R v Dietrich* (1992) 67 ALJR, where *McInnes* was not followed. There the court held that an accused has a right to a fair trial and without representation the case should be adjourned. It seems that the trial will be unfair if the offence charged is a serious one. The conclusion seems to be that an accused has a right to legal representation in the case of a serious criminal charge at the trial stage of proceedings. However, *Dietrich's case* is limited to the trial stage of proceedings.

The Queensland Police Services Operational Procedures Manual states:

> *ORDER*
>
> *Members are to allow suspects being interviewed to contact a legal representative upon request. Access to a telephone is to be provided, and, if necessary a telephone directory.*

As to the value of a lawyer, it is contended that lawyers provide advice on numerous matters including:

- the right to remain silent;
- the possible offences involved and the standard of proof; and
- informal matters such as procedures.

However, in his submission to the Committee the Director of Prosecutions questioned whether the presence of a lawyer is essential to safeguard the rights of a person in pre-trial custody:

> *Of course it would be of advantage to have a lawyer at his or her elbow but would it be impossible to devise a scheme that would ensure fair play without the intervention of lawyers? After all, there must be a limit to the advice that a lawyer can give, and it must be either to speak or not to speak. And there can be no guarantees, the lawyer not knowing the truth, that the advice given will be sound in the particular case.* (1994:88)

A more contentious issue is whether encouraging suspects to have access to a lawyer prior to charge is in the public interest.

2.5 Origins and Development of Legal Restrictions on Police Questioning of Suspects

2.5.1 History

As previously stated, it is a common law rule that a person cannot be detained simply for the purpose of questioning and that an arrested person can only be questioned until such time as it is reasonably practicable to bring him before a Justice. The NSWLRC Report contains a historical background behind the development of this rule. A brief summary of that background is warranted in order to comprehend the current position.

Initially, it was the responsibility of the Star Chamber and the ecclesiastical courts to question and investigate persons suspected of committing criminal offences. A defendant was summoned without knowledge of the charge against him and examined on oath. In an attempt to obtain desired confessions from the accused such interrogations sometimes extended to torture. The Star Chamber and the ecclesiastical courts were abolished in 1641.

In the mid-sixteenth century, two statutes were passed, which changed the role of the justice. A person arrested for felony was to be brought before two justices. Prior to considering bail, the justices were to examine the accused and to record in writing any evidence against him.

In addition, justices had an inquisitorial role. They interrogated the accused in order to obtain confessions and collected statements from witnesses. In effect the justice was a combined police officer and Magistrate.

The establishment of a police force in 1829 signified a change in this process. Police gradually assumed the tasks of arresting suspects, investigation and interrogation.

Around the same time some important statutes were passed. The first series in 1826 extended the power of justices to examine arrested persons accused of committing misdemeanours as well as felonies. Later in 1848 these were repealed and replaced by the *Indictable Offences Act* which established a procedure resembling a committal hearing. Perhaps most importantly there was effectively a change to presume the accused innocent.

Stephen, *A History of the Criminal Law in England* (Vol 1, Macmillan, London, 1883) 217, observed:

> *Speaking generally, the difference between the procedure established in the 16th century and the procedure of the 19th is that under the first the magistrate acts the part of public prosecutor, whereas under the second he occupies the position of a preliminary judge.*

In 1825 (whilst the role of the justice was still inquisitorial) in *Wright v Court and Others* the following passage was cited with approval:

> *It is the duty of a person arresting anyone on suspicion of felony to take him before a justice as soon as he reasonably can, and the law gives no authority even to a justice to detain a person suspected but for a reasonable time until he may be examined.*

Despite the change in the nature of the role of the justice to that of a judicial one, the rule that a suspect be taken before a justice as soon as reasonable became embedded in criminal law.

Thus, the police assumed the role of arresting and questioning persons suspected of committing crimes, gathering evidence and initiating prosecutions. However, there was little statutory support for their powers. In fact, police officers had exactly the same right of a citizen to arrest someone suspected of committing a crime. A number of inconsistent decisions arose as a result of limits on

questioning and exclusion of incriminating statements made to persons in authority.

2.5.2 The Judges Rules

This lack of certainty as to the power of police was finally addressed by the judges of the King's Bench Division in 1912. As a result four original Judges' Rules were formulated as a guide to the police when questioning suspects and arrested persons. In 1918 a further five rules were added.

Unfortunately, the precise intention of the original rules caused some confusion and so, in an attempt to clear up ambiguity as to the meaning of the Rules, the Home Office issued an explanatory circular in 1930. It is arguable whether the circular achieved its objective.

These Rules and the relevant portions of the explanatory circular as reproduced in Carters (loose leaf service:1245.20) are:

> ***Rule 1***
>
> *When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.*
>
> *Explanation in 1930 Circular:*
>
> *For the purposes of these Rules the words "crime" and "offence" are synonymous and include any offence for which a person may be apprehended or detained in custody.*
>
> ***Rule 2***
>
> *Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.*
>
> ***Rule 3***
>
> *Persons in custody should not be questioned without the usual caution first being administered.*
>
> *Explanation in 1930 Circular:*
>
> *Rule 3 was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and, long before this rule was formulated, and since, it has been the practice for the judge not to allow any answer to a question so improperly put to be given in evidence; but in some cases it may be proper and necessary to put questions to a person in custody after the caution has been administered, for instance, a person arrested for burglary may, before he is formally charged, say, "I have hidden or thrown the property away" and after caution he would properly be asked "Where have you hidden or thrown it?"; or a person, before he is formally charged as an habitual criminal, is properly asked to give an account of what he has done since he last came out of prison. Rule (3) is intended to apply to such cases and, so understood, is not in conflict with and does not qualify Rule (7), which prohibits any question upon a voluntary statement except such as is necessary to clear up ambiguity.*
>
> *Prime facie the expression "persons in custody" in Rule 3 applies to persons arrested before they are confined in a police-station or prison, but the Rule equally applies to*

prisoners in the custody of a gaoler. The terms "persons in custody" and "prisoners" are therefore synonymous for the purpose of this Rule.

Rule 4

If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words ("against you") of such caution be omitted, and that the caution should end with the words "be given in evidence".

Rule 5

The caution to be administered to a prisoner when he is formally charged should therefore be: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence." Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

Explanation in 1930 Circular:

With regard to the form of the caution it is obvious that the words in Rule (5) are only applicable when the formal charge is being made and can have no application when a violent or resisting prisoner is being taken to the police station. In any case, before the formal charge is made, the usual caution is, or should be; "You are not obliged to say anything, but anything you say may be given in evidence".

Rule 6

A statement made by a prisoner before there is time to caution him is not rendered inadmissible by reason of no caution having been given, but in such case he should be cautioned as soon as possible.

Rule 7

A prisoner making a voluntary statement must not be cross-examined and no questions should be put to him except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

Rule 8

When two or more persons are charged with the same offence, and statements are taken separately from them, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

Rule 9

Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read over to him and he has been invited to make any correction he may wish.

1964 Judges' Rules

In 1964 the Home Office promulgated new Judges' Rules which were approved by all Judges of the Queen's Bench. These Rules are reproduced in Appendix 1.

The effect of the old and new Judges' Rules were considered by the Chief Justices of the Commonwealth, the Australian States and New Zealand at a conference in February 1965 and the following statement issued:

> 1. *Neither the old nor the new English Judges' Rules have the force of law in Australia or in New Zealand. In considering whether confessional statements made by persons charged with crimes ought to be admitted in evidence the Australian and New Zealand courts have taken into account whether police officers have complied with the spirit of these Rules. But our courts have never regarded compliance or non-compliance as a decisive factor and have always emphasised that it is for the court to take into account all the circumstances of an individual case in determining whether a confessional statement should be admitted.*
>
> 2. *The Australian Chief Justices emphasised that they had no authority to make any such rules. It is for the authorities in charge of the various Police Forces to make their own rules for the good conduct and guidance of their officers. The judges are always on their guard to ensure that fair conduct is observed by the police in the examination of suspects. The law requires a judge to determine whether in the light of all the circumstances of a case there are such elements of unfairness in the use made by the police of their position in relation to the accused that a confession alleged to have been made by him ought to be rejected. There is a right of appeal against the decision of a judge admitting an incriminatory statement.*
>
> 3. *The conference considered that it would be inappropriate to purport to approve or disapprove the new detailed rules formulated by the English Judges but it may be that the Police Commissioners or other proper authorities will give consideration to them in the formulation of administrative instructions. Should amendments be made to the existing instructions no doubt judges will in the course of trials take them into account as an administrative attempt to prescribe standards of proprietary for the conduct of police interviews but no code of rules can guarantee fairness and justice in advance of every case. A police officer's sense of fair play in a given case is likely to be of much greater importance than mere compliance with a set of written rules.*

The status of the Judges' Rules in Queensland

It is well recognised that the Judges' Rules do not have the force of law. (see *R v Nichols, Johnson and Aitcheson* [1958] Qd R 200 at 240-241, *R v Lee* (1950) 82 CLR at 154 and *Smith v The Queen* (1957) 97 CLR 100 at 130) They are best described as:

> *... administrative directions, the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice.* (see *R v Voisin* [1918] IKB 531 at 539)

As to the version that should be observed in Queensland, the 1912/1918 version have been held to be applicable in Queensland. (*R v Nichols*) When the 1964 Rules were promulgated, the judges of the Supreme Court of Queensland decided to adopt them. However, later in a letter to the President of the Bar Association from the Chief Justice their operation was deferred "until further

notice". That letter was subsequently reproduced in a Practice Note [1964] Q.W.N. 42:

> *Re New Judges' Rules*
>
> *With further reference to my letter to you of the 20th March, 1964, in which I informed you that the Judges of the Supreme Court had decided to adopt the new Judges' Rules in Queensland as from the 1st July, 1964, I now desire to inform you that the date of their coming into operation in this State has been deferred until further notice.*
>
> *The Rules have been under consideration by the Judges in other States and have been discussed at recent conferences of Attorneys General and at this date they have not been adopted in all States. In the interests of uniformity it is considered that the introduction of the Rules here should be deferred until further consideration in other States is complete.*

The notice was never forthcoming. However, in Queensland express reference has been made to the 1964 Rules. (*R v Hart* [1979] Qd R 8 and *R v Borsellino* [1978] Qd R 507)

Teh's research (1972:489) indicates that the Rules as adopted in the Australian States are in line with the pre-1964 Rules, and, this version has been incorporated verbatim in the *Queensland Police Operational Procedures Manual*.

Suffice to say there has been much debate as to the exact intent and scope of the Rules.

2.5.3 Statutory Restrictions

In addition to the Judges' Rules, in Queensland a police officer must bear in mind provisions of the *Criminal Code* and the *Justices Act 1886* which impose a duty on him to take an arrested person before a Magistrate as soon as practicable. These provisions do not apply if the person has been granted bail in accordance with the *Bail Act 1980*.

Section 552 of the Criminal Code provides:

> *It is the duty of a person who has arrested another upon a charge of an offence to take him forthwith before a justice to be dealt with according to law.*

Section 69 of the Justices Act 1886 provides:

> *A person taken into custody for an offence without a warrant shall be brought before a justice to be dealt with according to law as soon as practicable after he is taken into custody.*

The term *as soon as practicable* indicates that the common law and statutes do not condone delay merely for the purpose of further questioning. In *Williams v The Queen* (1986) 161 CLR 278 the High Court considered this term which appears in the Tasmanian equivalent to s.69 of the Justices Act. Wilson and Dawson JJ at page 313 said:

> *Those words must be given a construction which, so far as is possible, is in accordance with the common law and it cannot be suggested that there is any difficulty in doing so. The common law requires an arrested person to be taken before a justice as soon as is reasonably possible and the words "as soon as is practicable" should be taken to mean the same thing. Neither the common law nor the statute permits delay merely for the purpose of further investigation either of the offence for which the person was arrested or of any other offence or offences. What is reasonable will depend upon all the circumstances, including the availability of a justice, but it does not encompass delay of that kind.*

Therefore, it is clear that after arrest detention solely for questioning and/or making further investigations is unlawful.

The Committee notes that the *Draft Criminal Code Bill 1994* contains similar provisions. Clause 286 of the Bill provides:

> *If a person arrests someone else on a charge of an offence, the person must, as soon as reasonably practicable, take the other person before a Magistrates Court to be dealt with under the law.*

Clause 125 provides that it is an offence to wilfully delay taking a person before a Magistrates Court:

> *If a person arrests someone else for an offence, the person must not wilfully delay taking the other person before a Magistrates Court to be dealt with under the law.*
>
> *Maximum penalty - 3 years imprisonment.*
>
> *Crime - wilfully delaying to take an arrested person before a Magistrates Court.*

2.6 Arrest

It is often necessary to consider what constitutes an arrest in order to determine:

- whether the police detention is lawful; and
- the time at which the appropriate caution should be given in accordance with the Judges' Rules

2.5.1 What constitutes an arrest

In short, an arrest in the technical sense is a lawful detention made for the purpose (or at least the provisional purpose) of bringing a prosecution against the person arrested. (Williams,1991:409)

It is generally accepted that at common law there are three elements to an arrest. They are:

- The person must be somehow deprived of their liberty. This deprivation can be physically or symbolically, for example touching the suspect. However, if the suspect submits to the arrest then this formality need not be fulfilled. (*Dellit v Small ex parte Dellit* [1978] Qd R 303)
- The imprisonment must be intended as a step in a criminal process and this present intention must be conveyed to the person arrested. The police officer may later release the person if a satisfactory explanation is given. However, a distinction must be drawn between this situation and the position where the police officer has no intention to charge the person unless he can extract confessions from him.
- The reason for the arrest must be communicated to the person arrested. This requirement was clearly laid down in *Christie v Leachinsky* [1947] AC 573. Failure to comply with the rule makes the arrest unlawful. However, there is an exception to the rule in the case where the accused must realise why he is being arrested.

There is often a difficult factual question as to whether a person has been:

- formally arrested, that is, in accordance with the common law rule that the police officer must have reasonable grounds for suspecting (or believing) that the person has committed the offence and the above criteria have been satisfied; or
- placed in de facto custody, sometimes described as voluntary attendance. This situation arises when a police officer, lacking the grounds necessary for an arrest, and without

actually purporting to make an arrest, requests a person to accompany him to a police station or elsewhere. Such a case involves the person believing that he is obliged to accompany the police, and that he would not in fact be free to go if he expressed a wish to do so.

This issue is further canvassed in para 2.8.3.

2.6.1 The Distinction Between Arrest and Charge

It is important to note the distinction between "arrest", that is, the time at which the police deprive the person of his liberty, and charge, which refers to the formal process of laying of a charge which occurs at the watchhouse.

2.7 Exclusionary Rules

2.7.1 The Role of the Judges' Discretion

Even though a confession may be found to be voluntary according to the principles already discussed, a judge may nevertheless exercise his discretion to exclude it as evidence, that is, render it inadmissible, if, having regard *to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused.* (*R v. Lee* (1950) 82 CLR 133 at p 154)

This "fairness" discretion may be invoked by improper conduct such as arrest on a holding charge (for further discussion see para 2.8.2.), failure to give a caution in breach of the Judges' Rules, and refusal to allow the accused access to legal representation.

In addition, it was decided by the High Court in *Cleland v R* (1982) 151 CLR 1 that a judge may exclude a confession that has been obtained illegally or unfairly, based on the discretion stated in *Bunning v Cross* (1978) 141 CLR 54. This discretion operates to exclude unlawfully obtained evidence on public policy grounds and is directed at *deliberate or reckless disregard of the law by those whose duty it is to enforce it.* (*Bunning v. Cross* at p.78 and *Pollard v R* (1992) 67 ALJR 193 at 208)

2.7.2 The Bunning v Cross Discretion

Unlawful custody may arise where an accused:

- has been held in custody where there are insufficient grounds for the police officer to suspect/believe that the person has committed an offence;
- is arrested only for the purpose of questioning; or
- after arrest, has not been taken before a justice as soon as practicable.

In *Bunning v Cross* Stephen and Aickin JJ (at 78-80) listed a number of matters that will be relevant when considering the exercise of the discretion. Cross (1990:763) lists them as follows:

- *Was the unlawful act the result of mistaken belief that the act was lawful, or a deliberate disregard of the law?*
- *Does the nature of the illegality affect the cogency of the evidence so obtained?*
- *Was the illegal act the result of a process of deliberate cutting of corners to make the task of the police easier?*

- *How serious is the offence charged?*

- *Does an examination of the legislation indicate a deliberate intent on the part of the legislature to circumscribe the powers of the police in the interests of the public?*

In *Cleland v R* the accused was in police custody but not taken as soon as practicable before a justice or Magistrates Court as provided by Victorian legislation. An oral confession made while he was unlawfully detained was admitted into evidence by the trial judge. However, on appeal the High Court set aside the conviction and ordered a new trial on the ground that the trial judge failed to exercise the *Bunning v Cross* discretion.

Gibbs CJ said at page 18:

> *There seems no reason in principle why the rule in Bunning v Cross should be confined to real evidence, although that is its "principal area of operation". It should however be made clear that there is no general rule that the court will reject evidence illegally obtained. On the contrary, the rejection of confessional evidence for this reason alone is most exceptional.*

His Honour went on to agree with the statement of Brennan J in *Collins v. The Queen* (1980) 31 ALR 257 at page 317 that:

> *When the admission of confessional evidence is in question, the material facts are evaluated primarily to determine whether it is unfair to the accused to use his confession against him, and it would be only in a very exceptional case that the residual question would arise as to whether the public interest requires the rejection of the confession.*

In *Pollard v R* Brennan, Dawson and Gaudron JJ in a joint judgement reiterated that the discretion to exclude illegally or improperly obtained evidence does extend to confessional evidence, although in practice its application is likely to be infrequent.

More recently the question of confessions made whilst in unlawful custody was considered in *Foster v. R* (1993) 113 ALR 1. There the High Court found that the appellant had been unlawfully arrested because at the time of the arrest the police had neither the intention to charge nor the evidence to justify a charge.

Ultimately the High Court agreed with the trial judges' decision to exclude the evidence of the confessional statement by virtue of the exercise of the "fairness" discretion.

Although it was therefore not necessary to consider the "public policy" discretion, the Court considered it appropriate:

> *... that we indicate that we consider that the circumstances of the present case are such that the evidence should also have been excluded on the ground that the seriousness of the unlawful conduct on the part of the police was such that considerations of public policy precluded its reception.* (at p.10)

2.7.3 The Subsequent Scope of the "Fairness" Discretion and Interaction of the Two Discretions

Following the decision of *Cleland*, the scope of the "fairness" discretion has been reconsidered.

In *Cleland*, Dawson J concluded (at p.36) that:

> *Considerations of fairness in the exercise of the older discretion relating to the exclusion of evidence of confessional statements must now be limited to fairness in*

the sense of fairness to the accused: whether it would be unfair to the accused to admit the evidence because of unreliability arising from the means by which, or the circumstances in which, it was procured.

Odgers (1990:230) proposes that this means matters of police misconduct previously dealt with under the "fairness" discretion will now be more suitably dealt with under the "public policy" discretion. The rationale being that police misconduct raises issues of public policy as opposed to reliability.

The majority of the High Court in *Van Der Meer and Others v R* (1988) 82 ALR 10 at p.26 said that:

Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement.

In *Duke v R* (1988) 83 ALR 650 the concept that reliability equated to "fairness" was only accepted by two of the five members of the High Court. Unfortunately, there was no agreement on what otherwise would constitute "fairness".

Reference was not made to the concept of reliability in *Foster*. There the High Court at p.10 agreed with the trial judge's decision to exclude the evidence of the confessional statement because having regard to *"the conduct of the police and all the circumstances of the case"* reception into evidence of the confessional statement would have been unfair to the accused (the quote being from *R v Lee* (1950) 82 CLR at 154).

As to the interaction of the two discretions Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in a joint judgement said at p.6:

It is now settled that, in a case where a voluntary confessional statement has been procured by unlawful police conduct, a trial judge should, if appropriate objection is taken on behalf of the accused, consider whether evidence of the statement should be excluded in the exercise of either of two independent discretions.

The first of those discretions exists as part of a cohesive body of principles and rules on the special subject of evidence of confessional statements. It is the discretion to exclude evidence on the ground that its reception would be unfair to the accused, a discretion which is not confined to unlawfully obtained evidence.

The second of those discretions is a particular instance of a discretion which exists in relation to unlawfully obtained evidence generally, whether confessional or "real". It is the discretion to exclude evidence of such a confessional statement on public policy grounds.

The considerations relevant to the exercise of each discretion ... to no small extent overlap. The focus of the two discretions is, however, different. In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on "large matters of public policy" and the relevance and importance of fairness and unfairness to the particular accused will depend upon the circumstances of the particular case.

In a case where both discretions are relied upon to support an application for the exclusion of a voluntary incriminating statement obtained by unlawful police conduct, it will commonly be convenient for the court to address first the question

> *whether the evidence should be excluded on the ground that its reception and use in evidence would be unfair to the accused.* (Brennan, Dawson and Gaudron JJ agreed with this approach in *Pollard v The Queen* at p.204)

The Court also noted that ordinarily where there is a dispute about voluntariness of an alleged confessional statement and about whether it should be rendered inadmissible on discretionary grounds, it was proper to deal with the issues in that order.

However, the Court recognised that circumstances may *arise in which the preferable course is to consider first the question whether evidence of the alleged confessional statement should be excluded on discretionary grounds.* (at p.11)

2.7.4 Compliance with the Judges' Rules in Exercising Judicial Discretion

As previously discussed, the Judges' Rules do not have the force of law. However, compliance with the Judges Rules is often a factor taken into account when exercising the discretion to exclude admissible evidence.

In *R v Hawkins* [1949] Q.W.N. 34 the trial judge admitted evidence that was obtained after arrest but without a caution being administered, in breach of the Judges' Rules. The Court of Criminal Appeal declined to review this exercise of discretion. Webb CJ at page 48 noted:

> *The Judges' Rules should be observed, of course, but their non-observance is always a matter for the trial judge to take into consideration, and he, in his discretion, may well exclude evidence obtained contrary to those rules, but if he exercises his discretion against the prisoner, that does not furnish a ground of appeal.*

In *R v Nichols* the Court of Criminal Appeal also refused to exclude evidence obtained in breach of the Judges Rules.

The matter was discussed by Mason CJ (dissenting) in *Van Der Meer and Others v R.* There His Honour repeated the statement made by the Chief Justices of the Commonwealth, the Australian States and New Zealand on 1 Feb 1965 that:

> *Neither the old nor the new English Judges Rules have the force of law in Australia or in New Zealand. In considering whether confessional statements made by persons charges with crimes ought to be admitted in evidence the Australian and New Zealand courts have taken into account whether police officers have complied with the spirit of these Rules. But our courts have never regarded compliance or non-compliance as a decisive factor and have always emphasised that it is for the court to take into account all the circumstances of an individual case in determining whether a confessional statement should be admitted.*

Mason CJ went on at p.16 to observe that:

> *The first question which the trial judge had to decide was whether the confessional statements were voluntary. If they were voluntary, he had then to decide whether they should be excluded on the ground that they were improperly obtained. The Judges' Rules have more relevance to the first than to the second of these questions.*

2.7.5 Compliance with the Police Commissioner's Directions

The effect of non-compliance with the Police Commissioners administrative directions was considered in *R v W and Others* [1988] 2 Qd R 308. In that case it was held that police officers were legally bound by the Commissioner's administrative directions pursuant to s 11(1) of the *Police Act 1937-1985* and r.10(2)(1) of the *Police Rules,* and failure to comply with them was an unlawful act. Unfairness to the accused could result from a failure to comply with the directions, thereby possibly invoking the court's discretion to exclude a confession so obtained.

Section 11 (1) of the *Police Act 1937-1985* empowered the Governor in Council to make rules for the general government and discipline of members of the Police Force, such Rules to have the same effect as if they were enacted in the *Police Act.* However, that section has been replaced by section 4.9(1) of the *Police Service Administration Act 1990* which gives the Commissioner the discretion to issue such directions as he considers necessary or convenient for the efficient and proper functioning of the Police Service. Undoubtedly the latter section does not give the Commissioner's directions the same force of law, but there seems no reason why non-compliance with them, could not also compel the court to consider exercising its discretion to exclude the evidence obtained as a result of a breach.

2.7.6 Judicial Discretion in the Cases of Uncorroborated Confessions, Unsigned Records of Interview and Disputed Verbal Confessions

In cases where the accused disputes either his written or oral confession, judicial discretion can be exercised to exclude such confessions from evidence.

In *Driscoll v R* (1977) 15 ALR 47 Gibbs J. (with whom the majority agreed) made some timely comments regarding the general rule that an unsigned record adds nothing to the weight of the oral evidence and is itself of little evidential value. At page 68 he stated:

> *The mere existence of a record is no safeguard against perjury. If the police officers are prepared to give false testimony as to what the accused said, it may be expected that they will not shrink from compiling a false document as well. The danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight.*

He thus concluded:

> *For these reasons, it would appear to me that in all cases in which an unsigned record of interview is tendered the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded.*

And later:

> *In any case the paramount requirement is that the trial should be conducted fairly and for the reasons I have given I consider that the admission of an unsigned record would in some cases tip the scales unfairly against the accused.*

His Honour also suggested that if police wanted supporting evidence of an interrogation, which would be more effective than unsigned records of interview and would not be as objectionable, they should revert to other methods such as tape and video recording.

The High Court in *Carr v R* (1988) 165 CLR 314 held that juries should generally be warned against basing a guilty verdict upon an uncorroborated and disputed verbal confession.

Electronic recording of interviews in relation to indictable offences is now required pursuant to the *Electronic Recording of Interviews and Evidence Manual 1989* issued by the Queensland Police Commissioner dated July 1989. (Refer to para 2.7.1)

In *Duke v R* (1989) 63 ALJR 139 a confession was contained in an unsigned record of interview made whilst the applicant was unlawfully detained. The question arose as to whether there is a rule of law or practice that requires a trial judge, when directing a jury in a case where the only evidence against an accused person is a disputed uncorroborated police evidence of a confession to

specifically warn the jury of the danger of acting on the police evidence. The court held that it was decided in *Carr v R* that there was no principle of law or practice, but rather the giving of a direction was a matter to be determined in the light of the circumstances of the case.

In *Mc Kinney v R* (1991) 171 CLR 486 the High Court reconsidered the whole question on the grounds that the decisions in *Carr* and *Duke* could not be reconciled and, given the *existence and increasing availability of reliable and accurate means of audiovisual recording.* The Court (at p.242) referred to the *significant progress in relation to the audiovisual recording of interviews since Carr was decided.*

Therefore, it was held that a rule of practice should be adopted by the trial judge to warn the jury that it may be dangerous to convict the accused where the only, or substantially the only, evidence against the accused is a disputed, uncorroborated confessional statement allegedly made while the accused was under interrogation in police custody, and where the confessional statement is unsupported by any audiovisual recording or written verification by the accused or by the evidence of non-police witnesses.

The majority (at 242) reasoned that:

> *A rule of practice will operate to counter the relative disadvantage accruing to an accused person who is interviewed while in police custody at a place lacking recording facilities.*

2.7.7 Judicial Discretion where the Right to a Lawyer has been Refused

In *Driscoll v. R* (1977) 15 ALR 47 the High Court said that a failure to allow a solicitor to be present:

> *... might be a ground for the judge to reject the confession in the exercise of his discretion if he regarded it as unfair to allow it to be used.* (at p.66 per Gibbs J)

The question arose in Queensland in *R v Borsellino* [1978] Qd R 507. In that case the accused, whilst at a police station, made numerous requests that he be allowed to contact his solicitor. Each request was refused, and, despite his objections, an investigation was subsequently carried out in which the accused was alleged to have made confessional statements.

Dunn J opined that, in Queensland, the Court should recognise a right to communicate with a solicitor subject to a qualification such as principle "C" of the 1964 Judges' Rules. That principle states:

> *Every person at any stage of the investigation should be able to communicate and consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so.*

His Honour said ultimately the question was:

> *Is this a case in which evidence has been obtained by conduct of which the Crown ought not to take advantage? If it is, then the evidence should be excluded even though the evidence is tendered for the suppression of crime.* (at p.513)

On the facts, he held that the evidence was inadmissible because it was oppressive and there were no circumstances rendering it *desirable or essential in the interests of justice* that the accused be interviewed without first having legal assistance.

Subsequently in *R v Hart* [1977] Qd R 8 Connolly J agreed with Dunn J's application of principle C of the 1964 Judges' Rules in similar circumstances. His Honour further stated:

> *The circumstance that an accused person has been refused access to his solicitor will not render evidence of his subsequent interrogation legally inadmissible but it may well be a ground for the exercise of the discretion to reject the confession if the judge regards it as unfair to allow it to be used in all the circumstances.*

2.8 Recent Developments - Electronic Recording

Widespread support has been found by numerous law reform bodies to introduce recording of interrogation of arrested persons.

Allegations of police "verballing" were investigated in the *Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland*. (The Lucas Inquiry 1977) The Committee recommended *inter alia* electronic recording of police interviews.

The Gibbs Committee (1989:50) reasoned that:

> *... the most important safeguard to ensure that questioning is properly conducted and that the results of the questioning are honestly reported would be a requirement that evidence of a confession or admission should be recorded by tape (preferably by video-taping). Where the law requires a caution or any other information to be given to a person in custody, the giving of the caution or information should also be recorded ...*

The Committee went on to recognise the importance of confessional evidence at criminal trials and asserted that a video or audio recording would protect the accused from a false claim that a confession was made and protect the police from a false assertion that a confession was fabricated.

This view has also been expressed by the courts. Brennan J. in *Carr v R* (1988) 62 ALJR 568 at 572 recognised that the installation of recording equipment:

> *would diminish at once the risk of miscarriage of justice and the inordinate expense of trials in which the principle dispute of fact relates to what happened during the police investigation.*

2.8.1 Queensland Police Department - Electronic Recording of Interviews and Evidence Manual

The Queensland Police Commissioner in July 1989 issued instructions dealing with electronic recording of interviews and the preservation of evidence.

In brief, Section 1 contains the Instructions which provide:

- Members will record all interviews with suspects for indictable offences by means of combined video and audio recording equipment.

- Exceptions to video and audio recording cover situations where recording equipment is not available, is broken or is being used for another interview.

- The recording is to be done by equipment which provides:

  - one video recording; and

  - three audio recordings.

  These recordings are to be distributed as follows:

  - an audio recording is to be given to the suspect or his legal representative.

- an audio and the video recording will be retained by the interviewing officer. (These are to be used as evidence in Court and as the investigating officer's working audio tape.)

- an audio recording is treated as the master tape.

· Interview procedures generally (including the asking of questions and announcement of persons entering the room, production of exhibits etc.) are contained in para 1.8.1. The responsibility is placed on the interviewing officer to identify when a person becomes a suspect for an indictable offence.

Section 2 contains guidelines as to suggested procedures, but recognise that District Officers may create alternative procedures to suit local requirements. These include:

· If a suspect persists in refusing to be interviewed on tape, the interview is to be recorded by way of typed Record of Interview. (2.8.1)

· The Judges' Rules are to be complied with and, where appropriate, the normal warning with regard to the answering of questions must be included in the interview. (2.8.16)

The effect of non compliance with these instructions was considered by Morley DCJ in *The Queen v Mc Laughlin* (unreported decision of the District Court on 27 April 1993).

In that case the accused allegedly made a confession during an interview which was not recorded in any way whatsoever, despite the fact that the room was fully equipped for taking electronically recorded interviews. Objection to admission of the accused's confession was made on the basis of the *Bunning v Cross* discretion.

Morley DCJ noted that there were plain breaches of the Commissioner's instructions. He rejected the argument that the evidence should be allowed because it was obtained in ignorance of the instructions rather than improper motive. Accordingly, he concluded that the case fell within *Mc Kinney* and the evidence should not be admitted.

In this regard the decision of *R v W and Others* has already been mentioned.

2.8 ALLEGED POLICE PRACTICE

Outlined above are the restrictions imposed on police questioning and the possible consequences of non-compliance.

In practice various methods have supposedly been adopted to circumvent those constraints. Those identified in the CJC Report and the other Reports referred to are discussed below.

2.8.2 Arrest "Out of Hours"

In an attempt to overcome the requirement to take an accused before a Magistrate as soon as practicable, police have been alleged to arrest a person at a time when no Magistrates are available. For example late at night or very early in the morning.

This is undesirable as:

· treatment of suspects should not depend on the time of day that they are arrested.

· although unavoidable in most cases, it may give police the option to decide on the actual time of arrest of a person and therefore give them the opportunity to question him further.

· arrests at such hours are expensive in terms of overtime. (*Police Powers of Interrogation and Detention - Law Reform Commissioner of Tasmania Report No. 64*, 1990:8)

· whilst not unlawful it is not a sound or ethical basis on which to operate a system of criminal investigation. (NSWLRC,1990:15)

However, the NSWLRC did also recognise that if a suspect is arrested when magistrates are available, complying with the law may hamper proper and necessary police investigation.

In its submission the QPS strongly refuted assertions that these practices take place as ill-founded and incapable of being substantiated. Further it stated that:

> *Should there be sufficient evidence available at the conclusion of the questioning, the suspect is arrested for the offence. Neither the questioning process nor the making of an arrest rely on the availability of a Magistrate.*
>
> *Simply under the Queensland legal system there is nothing to be gained in making an arrest on the basis that a Magistrate may or may not be available.*
>
> *When an arrest is made after court hours, a person charged with an offence is either released on bail or is held at a watchhouse until the Magistrates Court next sits.* (1994:6)

2.8.3 Arrest on a Holding Charge

The 1930 Explanatory Circular to the Judges' Rules refers to the non authorisation of questioning *on the subject of the crime for which he is in custody*.

Therefore, a lawful holding charge may be used to question a suspect about another offence on which there are insufficient grounds to arrest. If the original arrest was not in good faith or was otherwise an abuse of police power, evidence gained may be rendered inadmissible by the judges discretion (see *R v Hallam* (1985) 18 A Crim R 221).

The QPS in its submission makes reference to Rule 3 of the Judges' Rules and the fact that it refers only to the offence in question:

> *Simply, once a person is arrested the questioning process ends in relation to that offence.* (1994:6)

The fact that a suspect may be questioned in relation to other offences seems to be refuted by the next sentence:

> *Over many years police have been taught that wholesale questioning is not permitted.* (1994:6)

The NSWLRC Report (1990:30) concurred that *the use of an artificial holding charge as a device to outflank the law of arrest should be strongly discouraged*.

The ALRC Report (1975:para 42) also condemned this practice.

2.8.4 Voluntary Attendance

The CJC in its report at page 667 stated that:

> *One of the frequently employed methods of avoiding the restrictions imposed upon questioning of suspects after arrest is to refrain from formally arresting the person and instead treat the person as a "volunteer" to whom the restrictions do not apply.*

The Australian Law Reform Commission noted that the ambiguous terms of the Judges' Rules led to an illusory safeguard in practice. In particular, Rule 3 provides that persons in custody should

not be questioned without the usual caution first being administered.

However, as the ALRC noted the police can circumvent this by claiming that the person was not in "custody" but was co-operating voluntarily. (1975:140)

Much confusion seems to lie in the definition of "custody" which is not defined in the Judges' Rules. Teh (1972:496) reasoned that the term was not to be confined to formal arrests. He disagreed with the interpretation given in *R v Lee* where the High Court equated a person in custody with a person who had been arrested or charged. Teh believed that "custody" should be extended to cover where a suspect is detained. (1972:497)

Williams J in *Smith v. R* (1956-1957) 97 CLR at 129 agreed on a wider interpretation. He said:

> *The term "in custody" in the Judges' Rules is not a term of art. It is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody.*

In *Van Der Meer v R* the majority of the High Court agreed with the trial judges finding that the police were not satisfied that they had grounds to charge until the interrogation was almost complete. Therefore, as no formal arrest had taken place until then, no caution was required at an earlier stage. Further, they accepted the finding that the appellants were free to leave until that point.

At page 28 the majority stated that from the nature of the investigation and circumstances:

> *... it would inevitably have taken some time before any police officer could reasonably suspect that one of the applicants had committed an offence. Certainly, none of the applicants was encouraged to leave the police station but that is a far cry from saying that they were in custody from the outset.*

The dissenters Mason CJ and Deane J, thought that the police had in fact decided to charge the appellants much earlier in the process. They were in "custody" as it was apparent to them that they were not free to leave and therefore a caution should have been given at that time.

Mason CJ at page 19 said:

> *And there is much to be said for the view that, when interrogation takes place at a police station in the circumstances described by Williams J in Smith (at 129), the police come under an obligation to administer a caution. That is not only because the interrogation takes place under compelling circumstances but also because the fact that the police create the impression that they are detaining the suspect is in itself some indication that they are contemplating the taking of further steps in relation to him.*
>
> *I do not doubt that in some situations the police, though believing a suspect to be guilty of the crime, wish to ascertain whether he has an answer to the suggested case against him, before making a definitive decision to charge him. But, recognition of the right to silence and considerations of fairness to the suspect demand that, in these situations, the police should issue a caution and that they should not whittle down the effect of the caution by pressuring or cajoling the suspect into speaking once he has clearly indicated his wish to remain silent. Whether the suspect wishes to take advantage of the opportunity given to him is a matter for him to decide. And it is vital that the law should ensure that his freedom of choice is respected.*

The Chief Justice went on to say (at p.20) that the applicants remained at the police station in circumstances which to them must have seemed compelling. This led to the "inescapable inference" that the police were detaining them and such detention was unlawful because it was for the purposes of interrogation.

The question has also arisen in cases where the accused has argued that his presence at the police station for questioning in fact amounted to an arrest.

In *The Queen v Conley* (1982) 30 SASR 226 at 239 King CJ used a two scenario approach. At p.239 he said:

> *Frequently a police officer invites or requests a suspect to accompany him to a police station or to some other place for the purpose of pursuing police enquiries and the suspect voluntarily complies. Such an invitation or request does not amount to deprivation of liberty (The Queen v King, per King J at pp.128-129), even though the police officer would have made an arrest if the suspect had not complied and even though the suspect believed that that would be the result of non-compliance.*
>
> *If, however, the circumstances are such that the words uttered, although in form an invitation or request, would in the circumstances convey to a reasonable person that he had no genuine choice as to whether to accompany the police officer, it becomes incumbent upon the police officer to make it clear that the suspect is not under arrest and is free to refuse to accompany him, and, in the absence of such an intimation, the apparent invitation or request may constitute an apprehension.*

In *The Queen v. S and J* (1983) 32 SASR 174 two aboriginal youths were asked by police if they would accompany them to premises in question and later the police station. Admissions were made by the appellants at the station. The appellants had been informed by the police that they were not under arrest. It was argued that the confessions were not voluntary that the suspects had been interrogated separately without the presence of a guardian or friend and that the investigating police officers failed to observe the police orders regarding the questioning of juvenile aboriginals.

The trial judge found that the appellants were not under arrest at the time of questioning and that the admissions were admissible. The majority of the Court of Appeal concurred with this conclusion. Mitchell J, at p.185 quoting the above passage from *Conley*, considered that it was *reasonable to assume that the police officers wished to avoid arresting the appellants until they had conducted formal interrogations* and that the police had made it sufficiently clear that they were not arresting the appellants. (see p 185 and 186) Her Honour said she might have had some doubt that they were free to refuse to accompany the police, particularly as they were being watched by uniformed officers, but she was unwilling to overturn the trial judges decision as he had the advantage of seeing and hearing the witnesses.

White J, the dissenter (at 188), applied the second part of the quoted passage from *Conley* and said that the de facto control over the freedom of movement of the appellants led to either:

> *an inference of de facto arrest or at least a substantial ambiguity about arrest which gives rise to an onus on the police officers to disabuse the minds of the suspects about their position.*

The Supreme Court of NSW in *O'Donoghue* (1988) 34 A Crim R 397 again considered the issue whether a person requested by the police to accompany them to the station was under arrest. Hunt J at p.402 thought the issue was *whether the police officer had conveyed to the suspect by what he said or did the impression that the suspect was not free to leave or to refuse to accompany the officer. If that impression was formed solely from the suspect's own belief that a request from a police officer constituted a command then as the High Court has recognised, it was not conveyed by anything said or done by the police officer*. Accordingly, in that case there was no arrest.

More recently the question arose in *Sammak v The Queen* in the Tasmania Court of Appeal. There

the Court drew a distinction between "in custody" for the purposes of the Judges' Rules and "arrest" which was the criteria for the statutory duty in question. Zeeman J. held that the evidence was sufficient to establish the former, but insufficient to satisfy the higher threshold required by the statute.

However, he added:

> *The mere state of mind of a police officer that he would have detained the applicant had he attempted to leave was insufficient to constitute detention. The applicant went to the police station voluntarily. There was no evidence that thereafter he formed any belief at any relevant time that he would not have been permitted to leave should he have attempted to do so.*

Rule 2 of the Judges' Rules provides that a caution has to be administered before asking any questions, or asking any further questions, *when any member of the Force has made up his mind to charge a person with a crime.*

The ALRC noted that this gives rise to two difficulties. Firstly, it is impossible to determine a police officer's state of mind at a particular point in time. Secondly, even if the accused understands that the police officer has decided to charge him, the caution may be given too late in the interview.

The Commission continued:

> *This problem is accentuated when it is appreciated that it is usual and perfectly understandable police practice, so far as possible, to delay characterising the situation as custodial until such time as sufficient evidence is obtained to both make an "arrest" and to lay a charge simultaneously.* (see para 140)

Conclusion

Suffice to say there is confusion regarding the concept of "custody" and when the caution should be given in accordance with the Judges Rules. This uncertainty has led to undesirable police practices. By way of concession, any confession made as a result of such a breach, may be rendered inadmissible by virtue of the judge exercising his discretion.

2.8.5 Taking a Chance

It has also been suggested that the police may ignore the requirement to bring a person before a justice if they consider that it will interfere with their investigations.

The NSWLRC (1990:15) claims that in its course of research, which included interviews with senior police officers, many said they would take the risk rather than lose potentially valuable evidence.

2.9 The Question of Balance - Should the Police have the Right to Interrogate?

The central issue in Volume IV of the Commission's report derives from the common law rule espoused in *Williams v R* that an arresting officer is not entitled to hold a person merely for questioning and a person arrested can only be questioned until such time as it is reasonably practicable to bring him before a justice. The complex and diverse legal implications flowing from this have been canvassed above.

What remains to be discussed are the social implications surrounding this rule. Should the police have the power to detain for questioning?

The Gibbs Report (1989:29) noted that many law reform bodies had proceeded on the view that the police should have the power for questioning, and that the divergence of opinion was more on whether arrest should be a pre-requisite to the detention.

Williams recognises that the common law allows scope for a police officer to question suspects about offences. Mason and Brennan JJ at 300 said:

> *There is nothing to prevent a police officer from asking a suspect questions designed to elicit information about the commission of an offence and the suspect's involvement in it, whether or not the suspect is in custody. But if the suspect has been arrested and the inquiries are not complete at the time when it is practicable to bring him before a justice, then it is the completion of the inquiries and not the bringing of the arrested person before a justice which must be delayed.*

Many jurisdictions have now enacted legislation to provide a statutory time frame in which that questioning can take place. The CJC's proposed scheme allows a minimum of four hours. A set detention period for questioning raises the following issues:

- Does the common law need to be so extended?
- Is this type of scheme in conflict with the established right of the accused to remain silent?
- How does the position of power between police officers and members of the public affect the "quality" of evidence obtained during this extended period?

In respect of this last issue Woods (1990:15) highlights the oft ignored fact that some interrogation techniques may cause a suspect to confess to something he did not do. The following can also be gleaned from his research:

- the environment alone in which interrogations are conducted contain pressures that may make an innocent person falsely confess.
- in the interrogation room these pressures are compounded by the stresses created by the room itself, particularly isolation from the outside world and the absence of distractions.
- police control over all of the suspect's actions while he is in custody which can reduce the accused to a state of shock.
- recent empirical studies revealed that the initial shock of arrest and imprisonment may mean the suspect is in a badly debilitated state when he enters the interrogation room.

In *Williams* four of the five judges referred to the need to strike a balance between the requirements of effective law enforcement and the long standing common law protection of personal liberty.

Mason and Brennan JJ adopted the statement that the right to personal liberty is *the most elementary and important of all common law rights*. Further at 292:

> *the right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.*

And at page 299:

> *The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished.*

There have been at least two different approaches as to the correct balance that law enforcement seeks to achieve in this area. The approaches can be described as:

1. A balance between the rights of the individual against the rights of the community.

   The terms of reference of the Philips Commission (1981:4) required it to have regard:

   to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime.

   The British Prime Minister in his statement in the House of Commons said there was:

   a balance to be struck here between the interest of the whole community and the rights and liberties of the individual citizen. (1981:4)

   But as the Commission noted (1981:5) this raised:

   a number of difficult and insoluble questions. Can there be in any strict sense an equation drawn between the individual on one side and society on the other?

2. A balance between two separate (public interest) requirements.

As Odgers (1990:220) noted:

> *There is a public interest that criminal investigation and prosecution be effective. Equally there is a public interest that it be carried out in a civilised manner. These interests sometimes come into conflict and the problem is in finding the right balance.*

In considering these two approaches the NSWLRC (1990:57) opined that the former was inappropriate as it sought to put an individual interest against a social interest whereby the individual interest will prevail. It preferred the latter because they reasoned that both needs were separate requirements of the public interest in proper law enforcement.

As to the current state of balance the Crown Prosecutors Association of Queensland in its submission said:

> *It is of course, essential to our society's concept of justice that suspects in police custody are treated fairly and properly, and that accused persons are accorded the benefits of rights given to them by the law. But have we not reached the stage where the pre-occupation with accused persons' rights has totally overwhelmed the legitimate right of the community to have offenders brought to justice?*

"Rights" in general were discussed by Odgers (1985:90). He made a valid point that there is a difference between ensuring individuals know about a right they possess and actually encouraging them to use it. In the case of the right to silence the suspect is under no legal obligation to speak to the police, and thus he has the right to say nothing. However, Odgers points out that a right is hollow if an individual does not know of its existence. If a system of law confers rights on people then they should know them. If people are not informed of their rights, those who are better educated or have previous experience of police questioning will have an advantage over those who have less education or no previous experience.

The ALRC noted *no criminal justice system deserves respect if its wheels are turned by ignorance.*

However, Odgers also noted that it is not necessarily in the public interest that everyone who possesses a right should exercise it. As an extension to that proposition, it is not necessarily in the public interest to encourage individuals to exercise their rights. It follows that it is not necessarily in the public interest to develop a procedure which will both encourage and lead to the exercise of a particular right. For example the presence of lawyers during interrogation which will increase the probability that suspects will exercise their right to say nothing or at least say nothing to damage their interests. While the public interest is subjective, it would be difficult to justify a system whereby persons who know something about an offence are encouraged to say nothing at all to the

police.

2.10 Summary

The above discussion reveals that the current situation in Queensland can be summarised as follows:

- Police questioning plays an important role in the criminal investigation process. While its primary function is to obtain confessions it also has significant ancillary purposes.

- At common law a confession is admissible as an exception to the hearsay rule if made voluntarily. The rationale for the admission of confessional evidence, which is otherwise hearsay, is that such statements against interest, if made voluntarily, are likely to be true.

- At common law no person can be detained simply for the purposes of questioning, and an arrested person can only be questioned until such time as it is reasonably practicable to bring him before a justice.

- In Queensland, s.552 of the *Criminal Code* and s.69 of the *Justices Act* impose a duty upon a police officer to take an arrested person before a Magistrate as soon as practicable. These sections prevent delay in order to question the suspect.

- Despite a confession being prima facie admissible, that is, it was given voluntarily, a Court may exclude the evidence in the exercise of its discretion, if:

    - in all the circumstances it would be unfair to admit the evidence against the accused. For example:

        - police investigating the matter fail to obtain independent verification of a confession, such as a video taped record of interview, in circumstances where the means to obtain verification was readily available.

        - access to a lawyer has been refused, despite numerous requests by the accused.

        - ignorance of the special needs of a person.

        - the confession has followed prolonged or inappropriate questioning.

        - the confession has been obtained in breach of the Judges' Rules, such as the omission of a caution after arrest.

    - there is some illegality attaching to the procurement of the confession and therefore it would be against public policy to admit the evidence. For example:

        - the accused has been unlawfully arrested and detained for questioning.

        - the accused has been lawfully arrested but detained for questioning in contravention of the *Criminal Code* and the *Justices Act*.

- The Judges' Rules have historical significance and were developed to guide police in their questioning of suspects, including the giving of the caution as to the right to silence.

  The Rules do not have the force of law and are only administrative directions. However, breaches of the Rules may invoke a judge to exercise his discretion and rule the evidence inadmissible.

  The 1912/1918 Rules have been held to apply in Queensland, although, some Queensland authorities have also referred to the 1964 Rules.

The 1912/1918 rules have been incorporated in the Queensland Police Operations Manual.

- In order to detain a person for questioning some claim that undesirable police practices have developed such as:
  - arrest out of hours.
  - arrest on a holding charge.
  - declining to, or delaying the, arrest of a suspect so that the caution is not given or is given at a late stage in proceedings. (often referred to as voluntary attendance).
- The right to silence means that no person is required to answer questions put to him by a person in authority and, as a corollary, at trial no adverse inference can be drawn from a persons election to remain silent.
- There is no common law or constitutional right to a lawyer. However, the *Police Operational Procedures Manual* orders members to allow suspects to contact a legal representative upon request, and, there is case law to support the proposition that denial of such access may lead the judge to exercise his discretion and refuse to admit any confessional evidence.
- The advent of electronic recording has the potential to reduce involuntary or fabricated confessions. The *Police Commissioners Administrative Directions 1989 Electronic Recording of Interviews and Evidence Manual* require that all interviews with suspects in relation to indictable offences are to be both audio and video taped. Provision is made for alternative procedures where equipment is unavailable. A breach of this requirement may lead to evidence being excluded in the exercise of the Court's discretion.

3. THE TREND TOWARDS REGULATED SCHEMES

3.1 Other Regulated Schemes

The common law situation with regard to police powers for detention and questioning of suspects has been the subject of review by many law reform bodies. Legislative schemes governing the area have been implemented, or are proposed, by numerous jurisdictions.

The concept of these schemes is very similar and can be broadly described as providing a statutory framework for conferring on police the power to detain and question suspects for either a fixed period or a "reasonable" time.

By way of "balance" a number of safeguards are offered to the suspect, such as:

- a caution in relation to the right to silence;
- access to a lawyer;
- an opportunity to communicate with a friend or relative;
- for non-citizens an opportunity to obtain consular assistance and, if required, an interpreter; and
- special rules regarding persons with special needs.

Their implementation is also supported by recording requirements, supervision such as custody officers, and disciplinary measures.

Finally, many schemes address the exclusion of evidence which has been either unlawfully or improperly obtained.

Much has been written on the topic, and now there is an opportunity to observe the systems in those jurisdictions that have already, or are proposing, the implementation of such schemes.

A summary of the features of both the current and proposed legislation is contained in Appendix 10 of the Commission's report. However, it is necessary to understand the background to the introduction of those schemes in the various jurisdictions.

The following is a summary of the responses to the issue in other jurisdictions:

- **United Kingdom.** As a result of the Royal Commission on Criminal Procedure (the Philips Commission) which released its report in 1981, the *Police and Criminal Evidence Act 1984* (PACE) was enacted. It provided a comprehensive code on police interrogation. The operation of PACE was subsequently reviewed by the Royal Commission on Criminal Justice, chaired by Viscount Runciman. The Commission's report was released in 1993.

- **The Commonwealth.** In 1975 the Australian Law Reform Commission in its *Criminal Investigation Report*, recommended detention for questioning. Despite attempts to pass legislation giving effect to these recommendations, it was not enacted. The matter was reconsidered by the Gibbs Committee in 1989 which resulted in its subsequent report titled *Detention Before Charge*. As a result, the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* was passed to amend the *Crimes Act 1914* thereby enabling federal and state police to question a suspect after arrest. The provisions apply to a person suspected of committing a Commonwealth offence irrespective of the State or Territory in which they were arrested.

- **Victoria.** The Victorian scheme allowing post arrest detention for questioning, was adopted in 1984 as a result of a report by a Committee chaired by the Director of Public Prosecutions, Mr John Phillips Q.C., requested by the then Attorney-General. Victoria was the first jurisdiction to alter the common law position. Pursuant to amendments to the *Crimes Act 1958*, an arrested person could be held for an initial period of six hours. The operation of the Victorian scheme was reviewed by the Coldrey Committee in 1986, and, as a result the fixed period of detention was substituted for a "reasonable time".

- **South Australia.** In 1985 South Australia followed suit and pursuant to amendments to the *Summary Offences Act 1953*, a scheme was introduced allowing pre-charge detention for up to four hours.

- **Northern Territory.** In 1988, following the decision of *Williams v R*, amendments to the *Police Administration Act 1978* were enacted. As a result, a person can be detained by police for a "reasonable period" after arrest.

Similar schemes are also proposed in:

- **New South Wales.** Section 352 of the Crimes Act 1900 (NSW) provides for the power to arrest without warrant and take the arrested person (and any confiscated property) before a Justice to be dealt with according to law.

  In 1990 the New South Wales Law Reform Commission released a Report titled *Police Powers of Detention and Investigation After Arrest.* The Report recommended the introduction of a regulated scheme to replace the common law. This has resulted in the recent *Crimes (Detention After Arrest) Amendment Bill 1994* which gives the police the power to detain suspects between arrest and charge for a "reasonable time".

- **New Zealand.** In New Zealand anyone who is arrested and charged with an offence, and not released upon bail or summons, must be brought before a court as soon as possible. This is in accordance with section 316(5) of the *Crimes Act (New Zealand)*. In addition section 23(3) of the *Bill of Rights Act 1990 (New Zealand)* provides:

  > *Everyone who is arrested for an offence has the right to be charged promptly or to be released.*

  The New Zealand Law Reform Commission proposed a regulated scheme providing for post arrest, pre-charge detention for questioning in a discussion paper released in 1992. In October 1994 the Commission released its report on the matter titled *Police Questioning*. That report advocates a regulated scheme permitting pre-charge questioning for a period "reasonable in the circumstances" not exceeding six hours. The Report contains a draft Police (Questioning of Suspects) Act.

- **Tasmania.** In Tasmania a police officer who arrests a person must bring him/her before a justice as soon as practicable. This is in accordance with section 34A(1) of the *Justices Act 1959 (Tas)* and section 303 of the *Criminal Code 1924 (Tas)*.

  Pursuant to the Standing Reference on Criminal Law and Procedure given to the Law Reform Commissioner of Tasmania in September 1988 by the Attorney General, the Commissioner was to review criminal law and procedure and seek proposals for reform.

  The Commissioner appointed a Committee to assist him in preparation of a *Report on Police Powers of Interrogation and Detention* which was published in 1990. The Committee did not recommend a regulated scheme as such. Instead it recommended that a police officer who has arrested, or who has custody of an arrested person, must within a reasonable time after the arrest, either release that person or present him before a Court. In determining what is a reasonable time a police officer may consider, inter alia, the need to detain the person for the purposes of questioning. If that person is freely and voluntarily answering questions properly put, his detention is deemed to

be reasonably necessary.

The common law still applies in Western Australia. The Bail Act 1982 (WA) provides that a police officer, or other person, who arrests a person for an offence has a duty to either:

- if empowered by the Act, grant bail; or
- as soon as is practicable, bring or cause the person to be brought, before a court to consider that person's case for bail;

whether or not the person, or any person on his behalf, has applied for bail.

3.2 The Regulated Scheme Proposed by the Criminal Justice Commission

Volume IV of the Criminal Justice Commission's *Report on a Review of Police Powers* focuses upon the police use of questioning and whether there is a need for change to the current law and practice in Queensland.

The Report examines the rules which govern police questioning of suspects and the ways in which police react to these rules. The Commission argues that the current state of the law and practice concerning the questioning of suspects by police is confusing to both suspects and police. The Commission emphasises that questioning of suspects is an important part of the work of modern police services. Further, the Commission argues that:

> *the rules governing the treatment of suspects give little recognition to the central role which questioning plays. Moreover, these rules are ambiguous and, for this reason, relatively easy for police to circumvent. The police have been assisted in this regard by the willingness of courts to accept legal fictions and loopholes such as voluntary attendance and out-of-hours arrests, and to admit evidence obtained in contravention of the rules. As a result, police have been encouraged to detain suspects unlawfully in order to question them, and to take the chance that the court will not exclude any evidence which emerges (NSWLRC 1990, p.15).* (1994:669)

The Commission identified three broad options in determining how to respond to the problems:

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

The Commission's report rejects the first and second options. In respect of the first option, the Commission argues that:

> *there are manifest inadequacies with the current law. These problems are a direct consequence of the fact that the law has failed to adapt to changing conditions within the criminal justice system.(see Appendix 11) Unless the problems are addressed, the gap between law and practice will continue to grow. Police are being asked to work with law which is at least 100 years out of date. Moreover, the law's deficiencies have long been publicly acknowledged: it is almost 20 years since the ALRC's seminal 1975 report on Criminal Investigation made clear the need for reform, and eight years since the High Court decided Williams v The Queen (1986) 161 CLR 278.* (1994:671)

The Commission's report concludes that it should adopt a comprehensive regulated scheme which recognises the rights of suspects as well as the importance of interrogation to the criminal investigation process.

The key features of the scheme proposed by the Commission are:

- That police be obliged by law to:
  - inform suspects at the outset whether they are under arrest. (1994:680)
  - inform suspects who are not under arrest that they are free to leave. (1994:680)
  - caution suspects as to their right to remain silent, prior to the commencement of any questioning. (1994:682)
- To empower police, if they have reasonable grounds, to detain an arrested person for questioning or other investigative purposes for a reasonable period up to a maximum of four hours taking into account time-out periods. (1994:693,695)

  Further, that provision should be made for an extension by a magistrate to extend that detention period up to a further eight hours and, in very unusual cases, a further extension may be authorised by a Supreme Court judge for such period as he/she specifies. (1994:698)
- For the purpose of determining the scope of the scheme the Commission's report recommends that the term `suspect' should include a person who has been arrested or is in a police station, police vehicle or police establishment in the company of a police officer, or is otherwise under police control and is the subject of a criminal investigation to determine his or her involvement (if any) in the commission of an offence. (1994:677)
- That the scheme apply to volunteers. In particular, that volunteers and police should appear before a magistrate after the first four hours of questioning and again after a further eight hours (not counting time-outs). (1994:702) The Commission argues that applying the time limits to volunteers should prevent police from circumventing the restrictions by classifying people as volunteers rather than arresting them.
- A scheme of free legal advice for suspects should be introduced.

  The Commission's report emphasises that the pre-charge detention provisions recommended should only be adopted if the proposed free legal advice scheme for suspects who police wish to question is also introduced. The Commission estimates that the annual cost of operating a free legal advice scheme would be in the range of $1.55 million to $2.59 million. (1994:713)
- The Commission's report considers it essential that a designated `Custody Officer' should be responsible for the care of the person and the protection of his or her rights during the detention period. The Commission recommends that the responsibilities of the Custody Officer should include:
  - informing the suspect of his or her rights;
  - determining whether pre-charge detention is warranted;
  - authorising investigative procedures involving the suspect;
  - identifying and attending to any `special needs' of the suspect;
  - ensuring that the suspect has medical assistance, rest and refreshment; and
  - ensuring proper custody records are maintained. (1994:728)
- After considering the effectiveness of existing sanctions where an officer fails to comply with rules relating to the conduct of investigations, the Commission's report proposes that:

- there be a formal procedure for ensuring that, where it becomes apparent during court proceedings that police have acted in a way that may warrant criminal disciplinary or remedial action, the breach is referred to the Commissioner of Police. (1994:733)

- legislation be developed which defines the circumstances in which unlawfully or improperly obtained evidence is to be admitted in court proceedings. (1994:737)

- all interviews of suspects by the police be electronically recorded and that unrecorded confessions and admissions be inadmissible in court proceedings unless there are exceptional circumstances. (1994:740)

4. GENERAL OVERVIEW OF THE PARLIAMENTARY COMMITTEE'S RECOMMENDATIONS

4.1 General Overview of the Parliamentary Committee's Recommendations

The Committee in its review of the Commission's report has at all times been cognisant of the following matters:

- that police powers not be increased without a demonstrated need for such increase;
- that fundamental rights, such as the right to silence and the right to personal liberty, only be trespassed upon where there is a demonstrated need;
- that any proposed regulated scheme is consistent with prior recommendations of the Committee;
- that any proposal be economically and operationally practicable; and
- that all alternatives be considered.

The Parliamentary Committee does not support the Commission's recommendations for a regulated scheme as outlined in Volume IV.

The Committee appreciates that its rejection of the Commission's report does not necessarily mean that the Commission's report will not be ultimately accepted by the Parliament. Therefore, the Committee, despite its rejection of the Commission's proposed scheme, will address each recommendation separately.

There are a number of reasons why the Committee rejects the Commission's proposed regulated scheme. This chapter will discuss in some detail each major reason.

4.2 Viability of a Free Legal Advice Scheme

The Commission's recommendations regarding pre-charge detention are contingent upon the introduction of a free legal advice scheme. The Committee does not believe that such a scheme is economically or practicably viable.

The Commission has estimated the costs of such a scheme to be in the range of $1.55 to $2.59 million per year. However, the Commission further notes that this costing is dependent upon the utilisation rate. The Committee, and a number of other organisations represented during the review process, have serious doubts as to the reliability of the Commission's costing.

The legal advice scheme may in reality cost the community many millions more per year than has been estimated.

In addition, the Committee has reservations as to the efficacy of any free legal advice scheme. Experience in other jurisdictions which have operated free legal advice schemes indicates that the quality and value of legal advice provided under such schemes is often deficient. Therefore, often the real safeguard value of these schemes is illusory.

The Commission emphasises the necessity for free legal advice if a post arrest, pre-charge detention scheme is adopted. The Commission views the free legal advice scheme as a counter balance or major safeguard to the power to detain for questioning. However, in costing the scheme the Commission has estimated an initial utilisation rate of approximately 24%. If only 24% of suspects take up the proposed free legal advice, what is the real safeguard value of the scheme?

The Commission and proponents of the Commission's recommendations have emphasised that support for pre-charge detention is dependent upon a free legal advice scheme. The Committee cannot support a free legal advice scheme.

4.3 Increase in the Incidence of Arrest

The Committee is of the opinion that the Commission's proposed scheme will increase the incidence of arrest.

In its report No.23B (1994:202), the Committee recognised that the act of *arrest is a serious interference with personal liberty, and as such should be exercised sparingly and judiciously*.

The Committee notes with interest the Commission's prior concern with the problems associated with arrest and the Commission's attempts to reduce the incidence of arrest:

> *The Commission considers that the police use of arrest rather than the complaint and summons procedure should be reduced. To make it clear that the discretion to arrest is to be used as a last resort, the Commission believes that the statutory power to arrest without warrant should also state that its use ought to be restricted to cases where proceedings by an alternative manner would not be effective. In making this recommendation the Commission recognises, as the Queensland Police Service has observed, that the police often find it more administratively convenient to arrest a person than to employ the summons procedure.* (1993:601)

Recommendation 13.5 of Volume III of the Commission's report (1993:604) proposed a set of criteria which restricted the power of a police officer to arrest a person:

> *The Commission recommends that consistent with Recommendation 13.4 an arrest should only be made where a police officer has reasonable grounds to suspect that it is necessary to:*
>
> *(i) establish the identity of the person;*
> *(ii) ensure the appearance of the person before the court;*
> *(iii) prevent the continuation or repetition of the offence or the commission of another offence;*
> *(iv) obtain or preserve evidence relating to the offence;*
> *(v) prevent the harassment of, or interference with, a person who may be required to give evidence in respect to the offence;*
> *(vi) prevent the fabrication of evidence in respect of the offence; or*
> *(vii) preserve the safety or welfare of any person.*

The Committee, in report 23B, concurred with the Commission that the power to arrest was overused. However, the Committee's proposed regime went further than the CJC's recommendation in order to discourage the use of the arrest power. In particular, the Committee recommended:

- that the threshold for arrest be *reasonable grounds to believe*; and
- that arrest not used to *obtain* evidence.

In respect of the last matter, the Committee noted:

> *The CJC recommends that criteria (iv) be worded "obtain or preserve evidence relating to the offence".*
>
> *As noted by the Queensland Law Society:*

The conditions proposed by the Commission included:-

"(IV) to obtain or preserve evidence relating to the offence"

whereas the CCRC proposed:-

"preventing the concealment, loss or destruction of evidence relating to the offence".

There is not real justification in the report for this change, apart from a general reference to other jurisdictions (p.602) where there appears to be a combination of both purposes. The Law Society is concerned that arrest should not be used to obtain evidence - that purpose can be achieved by use of the search, entry and seize power if necessary.

The Committee concurs with the Law Society's submission. (1994:215)

Therefore, the Committee recommended:

The Committee amends CJC Recommendation 13.5.

The Committee recommends that, in relation to indictable offences, the offender should be proceeded with by way of summons or citation notice, unless a police office has reasonable grounds to believe that an arrest is necessary to:

(i) establish the identity of the person;

(ii) ensure the appearance of the person before a court in respect of the offence;

(iii) prevent the continuation or repetition of the offence or the commission of another indictable offence;

(iv) prevent the concealment, loss or destruction of evidence relating to the offence;

(v) prevent the harassment of, or interference with, a person who may be required to give evidence in respect of the offence;

(vi) prevent the fabrication of evidence in respect of the offence; and/or

(vii) preserve the safety or welfare of any person - including the arrestee.

The Committee recommends that, in relation to simple or regulatory offences, the offender should be proceeded against by summons or citation notice unless the police officer has reasonable grounds to believe that an arrest is necessary to:

(i) to establish the identity of the person;

(ii) prevent the continuation or repetition of the offence or the commission of another offence;

(iii) preserve the safety or welfare of any person - including the arrestee; and/or

(iv) ensure the appearance of the person before the court in respect of the offence.

In relation to both the above provisions, a positive obligation must be placed upon

> *police, if they arrest persons on the basis of criteria (i) in each case, to take positive steps as soon as possible to establish the identity of the person so as he/she can then be released.* (1994:216-217)

The ALRC Report (1975:para 10) noted that one dissenter (now the Hon Sir F G Brennan Chief Justice of the High Court) thought that giving the police power to interrogate after arrest would lead to more arrests at an earlier stage in the investigation. The report stated that the dissenter further thought that:

> *... when a person is arrested, he is thereby affected by physical and psychological constraints. He is neither legally nor actually free and he is conscious of the power which authorities then have over him. In such a situation he ought not to be subject involuntarily to the exercise of the interrogator's powers.*

Dr Rodney Harrison QC (1994:10) has also suggested that a police power of detention for questioning will be easily abused in a number of ways, including:

> *First, under the present law, arrest is viewed as a step taken generally with a view to the laying of a charge. While they do occur, arrests which do not result in a charge being laid are a relative rarity, and have at least in theory the potential to leave the Police open to a claim for false arrest. If the Police have a power of arrest for questioning, then detention for questioning becomes in itself the potential justification for the arrest. The temptation will exist to arrest mere suspects and pull them in for questioning, irrespective of the existence of "reasonable cause to suspect". The temptation will also be there, I suggest, to arrest for that ostensible purpose individuals who are making a nuisance of themselves, with a view to ensuring they cool their heels in custody for a few hours, at which time they can be asked a few questions for the sake of appearances, and then sent on their way, summary justice exacted. The nature of the power to arrest makes substantive review of its exercise very difficult in practice. A claim for damages for false imprisonment or arbitrary detention will seldom be a practical avenue of redress, and a complaint to the Police Complaints Authority, even if successful, is not much comfort for an unjustified loss of liberty.*

The same concern was expressed by Mr Jerrard, the Bar association representative, at the public hearing:

> *The Bar had also suggested that the power of arrest itself be limited to the same position as it is under section 8A of the Crimes Act—that is, that an arrest is only lawful where the arresting police officer has reasonable grounds for the view that proceeding by way of summons would not be effective. If you have a system of authorised precharge detention,* ***there is a risk that police will want to arrest people rather than to summons them, simply so that they can take advantage of this free gaol period****, so to speak, that the police get. One must not encourage arrests because of this wonderful procedure of locking people up when they have not even been charged, which will be available after they are arrested. So this package should include the strict requirement that one can only make an arrest if one has reasonable grounds for the view that proceeding by summons would not be effective to secure attendance at court.* (1994:23) [Emphasis added]

The Committee believes that the proposed scheme advocated by the Commission in respect of post arrest, pre-charge detention is inconsistent with the objectives of both the Commission's and Committee's prior reports to discourage arrest. Rather, the Committee believes that the proposed scheme will encourage police to arrest suspects in order to *obtain* evidence, namely, confessions.

The increased likelihood of the use of the arrest power is not in the interests of the public, both in terms of the social cost to civil liberties and the economic cost associated with arrest.

4.4 Inherent Inconsistency with the Right to Silence

The Committee is convinced that any scheme which revolves around detention for questioning is inherently at odds with the right to silence. Such a scheme is also at odds with the concept of voluntariness which is the basis for admission of confessional evidence.

The Commission has recommended that a person be given a caution regarding his right to remain silent before questioning. However, if a detained person refuses to answer questions, he may nonetheless remain in detention. The continued detention of a suspect who has indicated that he/she does not wish to answer questions is inconsistent with an election to remain silent. The fear is that the act of detention may itself *induce* a detained person to not exercise the right to silence, and perhaps, *induce* a confession that is false.

Dr Rodney Harrison QC (1994:11) states:

> *Detention in Police custody for questioning may well include significant periods of solitary incarceration; periods of questioning, quite possibly prolonged; deprivation of sleep; possible visits to the alleged scene of the crime, requests for and possible undergoing of testing or medical examination, and so on. The longer all this goes on, the more likely it is that some suspects, at least, will feel under pressure - whatever cautioning and legal advice they may originally have received - to make some kind of admission, if only to bring their detention at the hands of the Police to an end. The proposals would enable the Police to wage a subtle "war of nerves" during the period a suspect is detained. Even if the actual interviews are videotaped, much is likely to occur out of the frame of the camera. The decided cases recognise the overbearing effect that prolonged Police questioning, even in the face of an exercise of the right to silence, can have: see eg. R v Wilson, supra; R v Beazley, supra; R v Finlay (1987) 3 CRNZ 483.*

Later, Dr Harrison QC notes that under a scheme of pre-charge detention the right to silence is subordinated.

The Committee notes Recommendation 19.2 of the Commission's report which states:

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

The Committee finds it difficult to comprehend how legislation could cure the inherent inconsistency between the Commission's proposed scheme and the right to remain silent.

Some advance the argument that detention for questioning under "regulated schemes" will herald the end of the right to silence. More is said about this in chapter 6.

4.5 A Regulated or Legislative Scheme will not cure all Deficiencies

The Committee recognises that there are uncertainties and deficiencies in the current law. The Committee also appreciates that from time to time abuses occur within the current system. However, the Committee does not believe that the Commission's regulated scheme will prevent abuses by police, nor will it cater for every eventuality.

The Committee is sceptical of the attempt to curb abuse by a detailed legislative scheme. Legislation cannot cure all evils. A legislative scheme will be equally open to abuse.

Importantly, the Committee recognises that it is impossible to cater in legislation for all possible scenarios.

As Whiddett (1991:10) states:

> *The plain fact is that no matter how painstakingly and microscopically prescriptive the legislation, or even (as someone once observed) if police presented their evidence in mint condition with sterilised gloves and tweezers, there will always be angles left for defence counsel to worry and probe juries, sufficient to conjure up new and creative red herrings which legislation could never hope to eliminate. Probity itself will forever remain open to exploration no matter how elegant or long winded the legislative prescription or meticulously careful the investigation.*

Few would disagree that certainty in the law is for the good of all. But some (Harrison, 1994:8) have criticised the leap from the common law position to a regulated scheme which aims to make the law "neat and tidy". As it is rightly pointed out, even under a regulated scheme what remains uncertain is the application of the law to specific fact situations. Therefore, some argue that regulated schemes do not result in any greater certainty than at present.

Legislation cannot provide for every situation. An example is *Pollard's* case which concerned the Victorian legislation. There the High Court had to interpret "questioning" as it appeared in s.464H(1) of the *Crimes Act* which states that evidence of a confession or admission is inadmissible against an accused unless:

> *(d) if the confession or admission was made during questioning at a place where facilities were available to conduct an interview, the questioning and anything said by the person questioned was tape-recorded ... and the tape-recording is available to be tendered in evidence.*

But, Pollard was interviewed twice. Only the later interview was tape-recorded and it was during this one that he made some admissions. Did "questioning" mean questioning at both places of interview or just at the place where the admissions were made?

Judicial interpretation of s.464C(1) was also required. It provides that before any questioning, a suspect must be informed of his/her right to communicate with a friend or lawyer. The Court held that for the purposes of this section "questioning" meant all the questioning which has taken place. But the judges refused to imply into the section an automatic exclusion of evidence obtained subsequent to a breach of s.464C. Rather, the common law discretions to exclude evidence were to be applied.

The Commission's report in attempting to find curial support for a legislative scheme relied upon views expressed by members of the High Court. At p.675 the Commission's report stated:

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

However, the Committee notes that the Commission failed to make reference to the warning of Wilson and Dawson JJ. at 313:

> *If the law requires modification then it is better done, as Mason and Brennan JJ. have pointed out, by legislation. For there must be safeguards, if necessary in the form of time limits, and they must be set with a particularity which cannot be achieved by judicial decision.* ***Moreover, it is better that legislative change should take place against the background of the common law as it has been understood in this country, which has consistently viewed detention for the purpose of***

> ***investigation as an unwarranted encroachment upon the liberty of the person.*** *The experience of the common law is something which, in our opinion, should be borne steadily in mind if and when the changing needs of society appear to require statutory adaptation of the existing rules.* [Emphasis added]

As the Bar Association's submission to the Commission pointed out, the High Court in *Williams* did not advocate a modification of the common law.

> *The Issues Paper quotes extensively from the High Court judgments in Williams v. The Queen (1986) 161 CLR 278.* ***It is therefore important to keep in mind that the High Court did not advocate a modification of the common law but did emphasise that, if the legislature considered a change to be necessary, the provision of safeguards was essential.*** *The Bar approaches the matter in the same way.* (1994: ?) [Emphasis added]

The Committee does not believe that the Commission's report has heeded this advice.

Some of the public submissions received also stressed the limits of legislation. In the words of the Crown Prosecutors' Association:

> *The main thrust of the Fourth Volume is the creation of a legislative scheme to regulate the detention and questioning of persons suspected of committing criminal offences. While the clear definition of legal rights and responsibilities is a most desirable aim,* ***there is an unfortunate belief on the part of many in government and the community that all social problems can be cured by legislative action.***
>
> *It is paramount that a legislative or regulatory scheme be so designed as to properly achieve its aims. In the present case, it is essential that any legislation regulating detention and questioning of suspects by police ensure that justice is done to both the suspect and the community alike.* ***There is a very real danger that subsequent litigation will concentrate on the intricacies and mechanics of the regulations rather than upon the justice of the individual case.***
>
> *... Generally the Association agrees with most of the Criminal Justice Commission's recommendations in this volume.* ***However, it is a grave misconception that justice can only be done by the prescription of rules and regulations.*** (1994:93 and 105) [Emphasis added]

4.6 Recognising and Legalising Unlawful Police Practices

The Commission only really acknowledged one objection to a regulated scheme, namely, that police should not be rewarded for ignoring the law through the legalisation of their practices.

However, the Commission appears to have oversimplified the rationale for this objection.

The Committee believes that the basis for this argument is that police practices in detaining persons for questioning is inherently undesirable, not that police should be rewarded for participating in these practices.

The argument is best expressed that the attempt *"to recognise reality and bring the law in the books closer to the practice on the ground"* is in fact legalising undesirable police practices. (Philips Commission 1981:110) (CJC 1994:673)

Dr Harrison QC (1994:9), in criticising similar recommendations made by the New Zealand Law Reform Commission, has described the logic of this approach as follows:

Although instances of illegal detention for questioning by the Police have regularly come before the courts in recent years, it is difficult to know just how widespread the practice is. While the judges have been rightly critical of such actions on the part of the Police, there is nothing to suggest that the present law as to exclusion of evidence is inadequate to deal with the problem. However, in the law reform context, surely it is fallacious and indeed a travesty of reasoning to argue as the Commission does that, because the Police are regularly breaching the law and usurping powers of detention for questioning that they currently lack, the obvious solution is to provide them with such powers. This is merely to reward the Police collectively for having acted in an unlawful manner and in disregard of numerous judicial pronouncements critical of their conduct. That is not the way law reform should operate in this country.

Mr Michael Shanahan at the public hearings criticised a power to detain for questioning and queried whether any confession made a result would be voluntary:

... detention for questioning is simply an opportunity for the legalisation of continued pressure to be placed on suspects. The dangers of that are that it could well result in confessions that are not true. ***One must really question, in the entire context of this sort of proposal, whether any confessions or admissions that result after detention are truly voluntary****. I think the illogic, perhaps, in some of the proposals can best be gained by looking at one of the extension proposals in which a Supreme Court judge must give the third extension and that a person can simply decline to be further interviewed. One must wonder who is going to agree to be further interviewed. If after four hours or eight hours, or whatever the period is the police are applying for as a further period of time to continue their investigations—and I would think that most of their investigations would be continued questioning of a suspect—what suspect is going to agree to a further period of time?*
There are other quick points that I would like to make. The rationale that the present system results in trickery or law breaking by the police and because of that it is a reason to actually change the law to allow what they presently do to be legal, I do not think is particularly logical. The current system provides rights and obligations for both parties: citizens and police. To argue that because the police are abusing that system because it does not give them proper powers is an argument that could be mounted for any excess. I do not think it is a particularly weighty one. The end logic of that is to reduce crime by making everything legal. I do not think it is an acceptable sort of argument. (1994:10) [Emphasis added]

4.7 No Demonstrated Need for Change

The common law has jealously guarded the right to personal liberty and the right to silence. It has also jealously guarded against the individual being subjected to arbitrary arrest and detention for the purposes of questioning. The regulated scheme proposed by the Commission, if accepted, would substantially alter the balance that has been struck during the course of this State's legal history.

The Commission has previously stated that any change to police powers should only be in response to a demonstrated need.

The Queensland Law Society did not believe such extension of police powers was justified. Its submission stated:

You will see from the earlier submissions that the Society does not support the Commission's recommendations for post arrest (pre-charge) detention and does not accept that there is any persuasive objective evidence in the form of statistics or case studies which justifies this proposed extension of police powers.

Your Committee will be aware from earlier submissions by the Society in respect

> *of Volumes II and III of the Report, that the Society does not accept that the conferring fo more and more powers on law enforcement agencies (and the creation of heavier and heavier penalties) leads to a reduction in the crime rate, and examination of the enforcement models for drug offences in Queensland and Federally discloses that increased police powers do not impact on the rate of the commission of offences.*
>
> *...The Society would take this opportunity to commend the Commission upon its Report on this most difficult issue but remains of the view that* ***there is insufficient justification for such an expansion of police powers and that the safeguards and the sanctions may well prove to be illusory****.* (1994:61) [Emphasis added]

At the public hearing, Mr Potts representing the Law Society emphasised that a case for increasing police powers in this respect had not been made out:

> ***Mr Potts:*** *... increasing powers given to quite often very junior officers of the Queensland Police Service in respect to people's freedom—freedom to move at a time when people who are the subject of these restrictions are almost inevitably at a major disadvantage. I say that because, although this is a society with rights—for example the right to remain silent—many people, although those rights may be told to them, do, for many reasons, quite often bad reasons, give up that right to remain silent. They do so because of perhaps poor education, in some cases fear, in some circumstances because they are trying to protect other members of their families from further investigation or bother or indeed even a shame of knowing that their friend or their relative, their husband, father, mother, brother, sister is in fact at a police station.*
> *The inevitable response that most criminal lawyers have is that quite often we find people who are at police stations who make admissions for very bad reasons and quite often admissions which it turns out do not meet with the facts. In some cases they are admissions which are simply—I am not suggesting violence but I am suggesting are obtained in circumstances where there is certainly some implied threat, force or inducement upon them to make such admissions.*
> *The reality that the Law Society addresses is simply that the Law Society resists as strongly as it can the increasing powers that are being placed in the hands of police officers.* ***We say that it is incumbent upon those persons who wish to expand the law and expand these powers to show that there is a genuine need. It seems, and I would imagine that much of the submissions and evidence that you will hear and have heard—and I heard a few minutes of Mr O'Gorman's addresses to you—is anecdotal. We say that there is little evidence of any substance which demonstrates a need for pre-sentence detention****.* (1994:37) [Emphasis Added]

Similarly, the Legal Aid Office's submission believed that no case had been made out for pre-charge detention:

> *The central question to be answered is whether the present system needs to be changed to include pre-charge detention or left as it is with measures taken to clarify what police can do and what the rights of the suspect are plus measures to ensure compliance. The view of the Legal Aid Office is that the latter should be the approach taken, and that* ***no case can be made out for a scheme which allows detention for questioning of arrestees or voluntary attendees before they are charged****. The principal objection to any scheme that allows for detention before being taken before a justice is that the suspect is being denied his liberty by being denied the opportunity to go before the person who can give him back his freedom by granting bail, and secondly that he is in police custody with greater opportunity for police to put pressure on him to make admissions or a confession, if only to get away from police pressure. A scheme allowing for pre-charge detention will*

abrogate the guarantees given by s.69 Justices Act 1886 (as amended) and s.552 Criminal Code, and the common law guarantees as set out in Williams -v- The Queen (1986) 161 CLR 278. (1994:52) [Emphasis added]

The Committee appreciates that there are some deficiencies with the present law and practice concerning police interrogation of suspects. However, the Committee also appreciates that the law and practice in relation to police of suspects has been in development for well over a hundred years.

The Committee is not convinced that the present deficiencies substantiate a fundamental change such as detention for questioning within a highly regulated regime. The Committee is not satisfied that there is sufficient evidence of the desirability of such a regulated scheme.

The Commission stated that it reviewed three broad options:

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

The Committee does not believe that the Commission's report adequately addresses other alternatives. For example, the Commission does not explore whether minor adjustments could be made to the current law which would curtail alleged undesirable practices.

Before proceeding to recommend substantive change to the law which infringe longstanding common law liberties and rights, other alternatives must be considered.

It is unwise to follow the precedents of others before considering the fundamental effect of those changes.

4.8 A Regulated Scheme Allows Scope for Unfair Questioning Techniques and False Confessions May Follow

If detention for questioning is allowed then it is difficult to define how far police can go in the interrogation of suspects. The Runciman Commission report has been criticised because it does not set ground rules for police interviews. Ed Cape (1994:120) refers to evidence to showing the propensity of some people to confess falsely, and the part that the style of questioning has in producing such confessions:

> *It may be that a specific question is unfair because it has been put in a confusing or ambiguous way. Secondly, the form of a question may be unfair because it is a leading question. Thirdly, the style of questioning may be unfair because, for example, it is bombastic and bullying.*

Woods (1990:15) also noted this problem:

> *One danger often glossed over or ignored in the discussions of interrogation techniques in most interrogation manuals is that the use of some of the techniques might cause a suspect to confess to something he did not do. There is, in fact, a significant body of social science literature that raises the possibility that police interrogation may induce false confessions.*

His reasoning included the following observations:

- *The very environment in which most interrogation is conducted contains pressures that might cause an innocent man to make a false confession. (1990:15)*

- *Once in the interrogation room, the pressures of the unfamiliar setting are joined by the stresses created by the special nature of the interrogation room*

itself, with its isolation from the outside world and lack of distractions, not to mention the probably bare furnishings. (1990:16)

- *Human beings generally find loss of control over their environment unpleasant, and this loss of control creates even more stress. Police control over all aspects of a suspect's actions while in police custody - eating, drinking and waste elimination - may reduce some persons to a state of shock. (1990:16)*

- *certain interrogation techniques may also result in false or inaccurate confessions (for example, the technique of simply telling the suspect that he is guilty, whether or not he is in fact guilty). (1990:16)*

- *the interpersonal dynamics in police interrogation might also lead to false confessions. Research has shown that an individual who finds himself disagreeing with the unanimous judgement of others may yield to the majority even when this means misrepresenting what he sees or believes.* (1990:17)

4.9 The Regulated Scheme is Still Open to Abuse

The Committee believes that the proposed regulated scheme will still be open to abuse by police who are so inclined.

In particular, as will be addressed later in this report, the Committee is convinced that elements of the Commission's recommendation, such as "time-out" provisions, are readily open to abuse.

In addition, as will also be addressed later in this report, the Committee is convinced that a number of safeguards, such as custody officers and the free legal advice scheme, will in reality be inefficient and ineffective.

Mr Carberry noted at the public hearing that abuse by police would still be open under the Commission's proposal:

> ***Mr Carberry:*** *The other thing that I would say is that* ***a regulated system as the one propounded by the CJC report will not eradicate the use of artifice by police****. It seems to me quite extraordinary that, really, what has happened in this report is that researchers have made a genuine attempt to find out how the system is presently working, and I do agree that the Judges Rules as presently set out are confusing. What they have discovered is that the present population of police are resorting to some ruses or some artifices which are set out at pages 666 to 669 in the report—arresting people when a magistrate is not available, the use of holding charges, the myth of voluntariness and just plain taking a chance.* ***People who are capable of doing that are capable of circumventing even a regulated system****. The submission of the legal service is that the chances of Aboriginal people being overborne during the period of detention are so much greater than anyone else, so that is why we basically only agreed with the recommendation that the police should be under legislative obligation to inform suspects at the outset of their rights.* (1994:46) [Emphasis Added]

This likelihood was also predicted in the Queensland Law Society's submission:

> *The Commissions's attention has also been directed in the past to evidence that suggests that increase in police powers is accompanied by real risk of abuse of those powers and that essential safeguards may prove to be illusory. The English experience post 1984 provides examples of this problem as does the situation in Scotland following the creation of detention power in 1980 (see annexed*

submission Page 5). (1994:62)

4.10 The Commission's Proposed Regulated Scheme will Reduce the Number of Confessions Obtained or Admitted into Evidence

If it is accepted that confessions are important in the solving of crime, then it flows that it is in the public interest that persons not be deterred from voluntarily making confessions as to their involvement in criminal activities.

Therefore, the following questions must be addressed. Will the adoption of the Commission's proposed regulated scheme reduce:

- the number of voluntary confessions obtained? and/or

- the number of voluntary confessions admitted into evidence?

The Committee is not convinced that the adoption of the Commission's proposals will result in a negative answer to the above questions.

If the utilisation rate of the proposed free legal advice scheme is high, the Committee fears that the number of confessions obtained will decrease accordingly. The Committee is of the opinion that most lawyers will advise their clients not to answer questions posed and to exercise their right to silence. This is not in the interest of the community. However, ironically the community will be paying for this advice. This advice may also not always be in the interest of the client.

The Commission has cited research which suggests that legal advice does not significantly reduce the number of confessions made. However, those studies have been conducted in jurisdictions where the quality of legal advice was found to be seriously deficient.

During the public hearings the Committee was informed of the results of a free legal advice scheme and "know your rights" cards instigated by the Aboriginal Legal Service. According to Mr Carberry, who represented the Aboriginal Legal Aid Service, those two measures:

> *vastly increased the percentage of our clients who decline to give interviews. Speaking to solicitors who are doing current casework, I am told that at present more than half decline to give interviews to the police. Three or four years ago I think it would have been a much lower figure.* (1994:46)

In addition, as will be discussed in more detail later in this report, the Committee is concerned that an over regulated regime may result in an increase in the exclusion of confessional evidence as a result of "technical" breaches of the regulations.

5. THE PROPOSED REGULATED SCHEME

5.1 CJC Recommendation 18.1

> *The Commission recommends the introduction of a regulated scheme governing police dealings with suspects who have been arrested and those who are voluntary attendees, where relevant. The scheme should contain legislative obligations on police officers to inform suspects of their rights and status; the provision of free legal advice to suspects; and legislative provision for limited pre-charge detention for questioning and other investigative purposes.*
>
> *A suspect should be defined as a person who is in the company of a police officer in a police station, police vehicle or police establishment, or is otherwise under police control and is either being questioned, or is to be questioned, to determine his or her involvement (if any) in the commission of an offence.*

5.2 Background, Rationale and Scope of Proposed Scheme

The legal background to the Commission's recommendations has been discussed in Chapter 2. A general overview of the Commission's proposed scheme and the rationale for that scheme has been canvassed in Chapter 3.

5.3 Arguments Raised in Public Submissions

The Commission's recommendation 18.1 for the introduction of a regulated scheme was supported by the following groups and individuals:

- The Bar Association of Queensland.
- The Council for Civil Liberties.
- Mr Robert Sibley, Senior Lecturer in Law, Faculty of Law, QUT.
- The Crown Prosecutors Association of Queensland.

However, the Bar Association and the Council for Civil Liberties emphasised that support for the scheme was contingent upon the adoption of the scheme as a "package". In particular, both groups were anxious to ensure that the scheme was not adopted without the proposed free legal advice component.

The support from the Civil Liberties Council for the Commission's proposed scheme could hardly be classified as enthusiastic. At the public hearing, Mr O'Gorman representing the Council stated:

> *We come here in the somewhat unusual position, and with some degree of considerable hesitation, to support the considerable increase in police powers that are outlined in this proposal, which we would support only if it goes through and is locked in somehow as a complete package.* (1994:51)

Later, Mr O'Gorman reiterated the Council's position:

> *It is quite unusual and with regret that we support the concept of post (sic) charge detention, but only if it is for fixed periods.* (1994:52)

Later still, Mr O'Gorman stated:

> *Could I express the gravest of reservations that this package cannot be introduced without that absolute of police station free legal advice availability.* (1994:53)

The Committee notes that the Council for Civil Liberties has altered its position from that taken when it submitted a submission to the Commission following the release of the Issues Paper. As has already been noted in Chapter 4, the Council in that submission opposed any form of detention for questioning, contending that if such a scheme was instituted then it would inevitably lead to the abolition of the right to silence.

Opposition to the Commission's proposed scheme was voiced by the following groups and individuals:

- The Queensland Police Service. Acting Commissioner Aldrich representing the Service at the public hearing stated the Service's position as follows:

  > *... the police support the general concept of a regulated scheme for questioning suspects. However, it does not support the form of the scheme recommended by the Commission. The service considers that the net result will amount to an overly restrictive system favouring the suspect and not the public. (1994:2)*

- The Queensland Police Union of Employees. The Union's position, as enunciated by Mr J O'Gorman, was similar to the position taken by the Queensland Police Service, that is, detention for questioning was supported, however, not in the form proposed by the Commission.

- The Legal Aid Office (Queensland). The Legal Aid Office was implacably opposed to the Commission's recommendations concerning pre-charge detention for questioning although the Office supported the concept of a regulated scheme.

  The Submission from the Legal Aid Office stated:

  > *This recommendation is supported, subject to the regulated scheme <u>not</u> involving any pre-charge detention and suspects being informed of their rights by an independent person from the first contact with police.* (1994:55)

- The Queensland Law Society. The Law Society's submission stated:

  > *... the Society does not support the Commission's recommendations for post arrest (pre-charge) detention and does not accept that there is any persuasive objective evidence in the form of statistics or case studies which justifies this proposed extension of police powers.* (1994:61)

  The Law Society's submission continued by providing specific criticisms of some of the safeguard measures recommended by the Commission.

- The Aboriginals and Torres Strait Islanders Corporation (Q.E.A.) for Legal Services. The unequivocal position taken by the Legal Service was that pre-charge detention for questioning should not be implemented. (1994:45)

- Director of Prosecutions. The Director of Prosecutions stated:

  > *It is all very well to require police to act lawfully, but is it necessary to introduce what the Commission calls a "regulated scheme" imposing unnecessary fetters on honest cops, who, after all, are the only means the community has of investigating serious crime and bringing malefactors to justice?* (1994:84)

Central to the Commission's recommendation 18.1 is the definition of a suspect. The definition

contained within recommendation 18.1 is capacious.

Mr J O'Gorman on behalf of the Queensland Police Union of Employees did not approve of the definition. He stated:

> *The scope of when someone is defined as being in custody or under arrest is the first thing that causes us very, very serious concern. As an example, if this Friday night I get involved in attending to a matter outside a hotel in Brisbane and someone is being seriously injured, if I have a dozen police there, we try to contain the scene, which includes trying to identify who may or may not be witnesses. By the definition—or the spirit—of the CJC recommendations, everyone of those people at that scene in the company of a police officer is, in loose terms, under arrest. Now, that is possibly an extreme example, but it is a very common example that we have to deal with. Their definition of a suspect is a person who is in the company of a police officer, in a police station, police vehicle, police establishment or is otherwise under police control. If you take that definition to its illogical conclusion—if any of the people in this room come upon a road accident this afternoon on their way home from work and are directed by a police officer to do something, they fit within that definition and are then a suspect. It does not make sense. We have to get realistic, objective, workable definitions of things so that we can perform our duty on behalf of the community.* (1994:31)

Conversely, support for the definition was expressed by Mr T. O'Gorman from the Civil Liberties Council:

> *... So in addressing you in relation to the Executive Summary, we would see the necessity for a regulated scheme. We accept the definition of "suspect" as outlined in (x) as being a workable definition. We certainly see the necessity of the obligation to inform the suspect of his or her status, but we would see that as having to be taken one step further in the context of a requirement to tape-record from the point of first contact.* (1994:51)

In his submission Mr Robert Sibley said:

> *I agree generally that a regulated scheme is desirable for the reasons argued for in the report. In my view reform of the system is overdue. The proposals represent a reasonable balance between the rights of suspects and the community interest in the effective investigation of crime. I agree that the scheme should extend to the so called "voluntary attendee" because in practice many of these persons are either ignorant of or unsure about their true position when faced with the subtle application of pressure by police "to assist". The definition of "suspect" appears to include such persons in that they would be "in the company of a police officer ... being questioned ... to determine involvement in an offence". This is wider than the Victorian Crimes Act provision which requires that there also be sufficient information to be in the possession of the investigating police to justify the arrest of that person in respect of the offence.* (1994:107)

5.4 Analysis and Comment

In the previous chapter the Committee signalled that it could not support the Commission's proposed regulated scheme. The following reasons were given to support the Committee's position:

- a free legal advice scheme is not economically or practically viable. Therefore, as the Commission has stipulated that the scheme is contingent upon this component, the Committee is unable to support the package.

- the scheme is likely to increase the incidence of arrest. As the Committee has noted, the

power to arrest has allegedly been overused by police in the past. This issue has been acknowledged by the Committee, and the Commission in past reports and measures have been recommended to curb the use of the power to arrest. The Commission's proposed regulated scheme will encourage the use of arrest in order to obtain confessional evidence.

- a power to detain a person simply for the purposes of questioning is inherently inconsistent with the right to silence.

- the proposed regulated scheme will not cure all deficiencies that may arise in individual cases.

- the proposed regulated scheme is merely legalising unlawful and undesirable police practices.

- the Commission has not adequately demonstrated a need for change which would justify the introduction of a regulated scheme.

- a regulated scheme allows scope for unfair questioning techniques which may result in false confessions.

- despite the introduction of a regulated scheme police will be able to abuse the system.

- there is a risk that the Commission's proposed regulated scheme will reduce the number of confessions obtained or admitted into evidence.

In the event that the Parliament does not accept the Committee's recommendations and legislates to introduce the Commission's regulated scheme, it is necessary for the Committee to here state opposition to the Commission's definition of "suspect".

The Committee considers that the definition of suspect is so wide as to itself be uncertain. The definition includes any *person who is under police control*. What does this mean? As it was pointed out to the Committee in one of its many meetings detailed in Chapter 1, it could conceivably include a person who is questioned by police at the scene of a crime or accident, at a time when the police officer foresees concerned believed that the person was a potential witness.

The Committee foresees numerous arguments in the court room as to the meaning of "suspect" and, in particular, "police control".

5.5 PCJC Recommendation

The Committee rejects CJC Recommendation 18.1

The Committee rejects the CJC's definition of suspect as contained in CJC Recommendation 18.1.

6. THE STATUS AND RIGHTS OF THE SUSPECT

6.1 The Obligation to Inform the Suspect of Status

6.1.1 CJC Recommendation 19.1

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

6.1.2 Background, Rationale and Scope of Obligation

As discussed in para 2.8.3 an alleged police practice employed in order to avoid the restrictions placed on the questioning of suspects, is to rely on the voluntary attendance of the person. The "voluntary" nature of such attendance has been questioned where the person feels obliged to accompany the police officer and, in fact, does not feel they are at liberty to leave.

The alleged practice not only achieves a situation where a suspect can be questioned without the need to bring him before a justice as soon as practicable, but also can mean that the caution regarding the right to silence is not given until a later stage in questioning. In this regard the uncertainty concerning Rules 2 and 3 of the Judges' Rules should be recalled.

The CJC Recommendation 19.1 attempts to cure this situation by placing an obligation on a police officer to inform a suspect whether or not he/she is under arrest.

In its Introduction to Volume IV (1994:655) the Commission noted that even if the Parliament does not accept all of its proposals, the recommendations in Chapter 19 concerning the notification of suspects' status and rights should be implemented.

6.1.3 Arguments Raised in Public Submissions

Support for the obligation to inform suspects' as to their status, on the condition that it was done by an independent person, was expressed by the Legal Aid Office:

> *This recommendation is supported, provided that the information is given by an independent person, not a police officer as outlined above.* (1994:55)

Mr Robert Sibley's submission to the Committee also agreed with the concept, but also had reservations as to who should inform the suspect. Mr Sibley's submission stated:

> *I also agree that it is imperative that such a scheme require that each individual be made aware of their status. Whether it is appropriate for the investigating police to do it is a more difficult question. It is conceded that as they are the first point of contact with the suspect and the ones who have to direct their minds to that question they logically should inform.* (1994:107)

The Crown Prosecutors Association also thought it appropriate to advise a suspect of his status:

> *There are, it is respectfully agreed, good reasons to formalise the presently existing state of affairs with respect to the detention, lawful or otherwise, of suspects.*
>
> *Given the recommendation that police be empowered to detain persons for questioning it is appropriate that police inform persons attending at a police*

establishment of their position. (1994:97)

The submission put forward by Mr R N Miller QC, the Director of Prosecutions, did not object to the recommendation, but contained a reminder that the threshold for arrest was on "reasonable suspicion". In his words:

> *I have no quarrel with the proposal that when a police officer requests a person to go to or remain at a place designated by the police officer that officer should inform that person that he or she is under arrest, or is not under arrest and is free to leave at any time that person wishes. I also agree that if a police officer makes up his mind that he will not let that person leave then he must arrest that person and inform him or her that he or she is under arrest. It is, however, to be remembered that a police officer may arrest on "reasonable suspicion".* (1994:84)

The Queensland Police Service had no objection to the recommendation but did comment on the Commission's research which was the basis for the recommendation.

> *Whilst the Police Service has no objection to this recommendation on the basis of fairness to a suspect, it does comment on the research which supports the recommendation.*
>
> *At pages 654 and 679 of Volume IV reference is made to the interview of 36 persons facing a Magistrates Court for a first appearance. The Service is of the view that little weight can be placed on the conclusions extrapolated from the interviews. The sample is unrepresentative of the number of persons who appeared before Magistrates Courts during 1993. Additionally, no indication is given as to whether the researchers provided police with the opportunity to refute the allegations made by each of the seven persons whose versions are summarised on pages 679 and 680 of the report. One would assume that in the majority of instances an examination of the electronically recorded Record of Interview would have dispelled many of the allegations made.*
>
> *While the Commission does not claim that the sample is representative, it does assert that the interviews provided a valuable insight into individual's experiences with the police investigation process. The Service cannot agree.* (1994:9)

The Bar Association was of the opinion that the act of informing a suspect of their status should be tape-recorded. The Association's argument was expressed by Mr Jerrard at the public hearing as follows:

> *With respect to recommendation 19.1—that is, the obligation to inform suspects of their status—which appears both in the summary and at page 680 of the report, I would suggest that it should be obligatory for that informing to be tape-recorded, if not videotape-recorded. It would be productive of more litigation if there were not an obligation to tape-record that and to tape-record the acknowledgment by the person being addressed. Otherwise you will just have Officer Plod saying, "I told him this, that and the other", and the person who is later charged will say, "No, that didn't happen." Then a week's court time would be taken up deciding whether this did or did not happen.* (1994:23)

On the other hand, Mr J O'Gorman from the Queensland Police Union of Employees, seemed to express concern about the practicality of this recommendation in the following terms:

> *The 19.1 recommendation is the obligation to inform the suspect of his or her status. That means that, once you start to talk to a person, you have to inform them whether they are a suspect or whether they are not; whether they are under arrest, or whether they are not; whether they are free to leave the police company, or whether they are not. If we return to the example that I was using, there are a number of reasons why*

> *we would like to at least keep those people available to us outside the hotel. One is to identify who may be potential witnesses and to what degree, what value, etc. While we are identifying witnesses, if the person has been stabbed a number of times and while we are talking to a person in the capacity of a witness, somehow or other we ascertain that he has a bloodstained knife, or she has a bloodstained knife in their possession, are we going to say immediately, "You are now a suspect", when they may not be? The knife could have been passed to them. There are all of these sorts of considerations. We have to get a very high level of practicality, particularly in the recommendations from this volume, because this decides whether the court hears the evidence or not, decides whether a jury hears the evidence or not and decides whether material is evidence or not. With all respect to individual people who practise in the legal profession, we must recognise that the object of the criminal justice system is to get the highest level of quality evidence before the court so the courts can make the decision. We should not be obstructed in our legitimate role of placing evidence before the courts.* (1994:31)

6.1.4 Analysis and Comment

As a general rule the Committee does not object to the principle that a person who is requested by a police officer to go to, and/or remain, at any place be informed by that officer as to whether the person is, or is not, under arrest. However, the Committee equally recognises that in some cases to do so may be impractical. The Committee recommends that the obligation upon police to inform a suspect of his/her status not be contained in legislation, but rather that the obligation be contained in guidelines issued by the police Commissioner pursuant to the Committee's proposed *Police Powers and Procedures Act*. Importantly, the obligation should be made conditional upon the practicality of the occasion. A more detailed discussion of these guidelines is contained in Chapter 12 of this report.

6.1.5 PCJC Recommendation

The Committee amends CJC Recommendation 19.1 by qualifying that the obligation to inform the suspect as to his/her status not be embodied in legislation, but rather contained in guidelines issued by the Commissioner of Police pursuant to the Committee's proposed *Police Powers and Procedures Act.*

6.2 The Right to Remain Silent

6.2.1 CJC Recommendation 19.2

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

6.2.2 Background, Rationale and Scope of Obligation

A detailed discussion of the right to remain silent was contained in Chapter 2 of this report. That discussion emphasised that the right to silence involves two aspects:

- a person is not obliged to answer any question put to them; and
- at trial no adverse inference can be drawn from a persons election to exercise their right to silence.

On the whole, retention of the right in all aspects has been supported. (see 2.3.2.)

However, there have been suggestions that an adverse inference should be able to be drawn from a

suspects' silence. The Lucas Inquiry (1977:261) advocated this position. More recently the English Criminal Justice Act (1994) has provided that, in certain circumstances, adverse inferences may be drawn from an election to remain silent.

6.2.3 Arguments Raised in Public Submissions

Strong support for retention of the right to remain silent was voiced by the Queensland Law Society.

> *The Society is opposed to any change to the law in relation to the right to silence. The abolition or attenuation of the right carries obvious consequences for the investigative and trial phases of the criminal process. Sensibly, the Discussion Paper notes that any change in the law in the area of police powers must be assessed for its consequential effect on other aspects of the investigative and trial process.* (1994:11)

And later:

> *The right to silence is premised on the important foundation that it is up to the prosecution to prove a case against an accused and to do so beyond reasonable doubt. The enormous resources of the state are pitted against an individual who all to frequently is poorly educated, disadvantaged and unable to properly acquit himself in the psychologically oppressive situation of police station questioning.*
>
> ***In the Committee's submission no reason has been shown to support any watering down of the right to silence and arguments which are heard from time that at the very least a negative inference should be able to be drawn by a jury where an accused remains silent in the face of police questioning are fundamentally flawed.*** *As pointed out by Odgers "there are a number of reasons for silence consistent with innocence. The suspect may wish not to disclose conduct on his or another's part which, though non-criminal, is highly embarrassing. He may wish to remain silent to protect other people. He may believe that the police will distort whatever he says, so that the best policy is to say nothing and to stick rigidly to that policy. Even more significant are communication factors. People accused of crime tend to be inarticulate, poorly educated, suspicious, frightened and suggestible, arguably not able to face up to and deal with police questioning, even if that questioning is scrupulously fair. Relying on the right to silence, such persons may think it's safer to say nothing at all".*
>
> *The retention of the right to silence is the very basis of the current criminal trial process from the point of the start of the investigation through to jury verdict. The Committee would propose making a much more detailed submission on this topic at a later date if the inconceivable should occur, namely that there is a real possibility that Government would intend to abolish or significantly weaken this right. It is our view at this stage that this is simply inconceivable and, accordingly, we consider that our above comments are sufficient for the purpose of this Discussion Paper.* (1994:12) [Emphasis added]

The Bar Association in its submission took a similar stance:

> *The right to silence should remain. Although the Gibbs Review Committee is the latest in a long line of similar bodies to question the retention of this historical right once the other statutory safeguards are in place, the onus should be on those in favour of abolition to justify the change. The Bar considers that the case for abolition has not yet been established. If a change is to be considered, this should not occur until there has been time to assess the effects of increased police powers operating in conjunction with statutory safeguards.* (1994: ?)

Mr T O'Gorman from the Civil Liberties Council also advocated support for retention of the right, and made comment as to the recent change in the English position:

> *We unhesitatingly see as an absolute linchpin the right to remain silent. You might be aware of the recommendations of the Runciman Royal Commission in England last year. The commission was set up to look at the abomination called the UK injustice system—I am sorry, justice system—which recommended the retention of the right to silence in its current form and in the same form that the CJC recommends. The Government there just simply ignored that and implemented all the increased powers aspect of the Runciman Commission, including the total opposite of what Runciman recommended. They have, in effect, abolished the right to silence in the UK in a cutely named Criminal Justice Bill, which is before Parliament, I think—probably passed recently.* (1994:51)

Mr Sibley, in his submission, reviewed authorities supporting both aspects of the right to silence, and concluded that it would appear to be unnecessary to contain a provision in the legislation stating that it did not intend to derogate from the right. His review was as follows:

> *It is too late to deny the place of the "right to silence" in contemporary Australian society particularly in view of Australia's ratification of Protocols such as article 14.3 (g) of the International Covenant on Civil and Political Rights which provides as a minimum guarantee in the determination of any criminal charge against a person that they:*
>
> *"Not be compelled to testify against [themself] or to confess guilt".*
>
> *Although this Covenant does not form part of the domestic law of Australia it may, as Kirby JA observed recently, "inform the approach taken to the exposition of the common law of this country".*
>
> *The "right to silence" encompasses a number of distinct immunities only two of which are relevant in the context of police interrogation viz:*
>
> *"3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers ... from being compelled on pain of punishment to answer questions of any kind*
>
> *5. A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority".*
>
> ***It is clear that the right to silence in the face of interrogation is a fundamental right also recognised by the common law of Australia and "which is applied in the administration of the criminal law in this country"*** *(Petty and Maiden v R per Chief Justice Mason and Justices Deane Toohey and McHugh.*
>
> ***Equally where the right to silence is recognised and is acted upon then to draw any adverse inference from such reliance would be to give the immunity with one hand and take it away with the other as the majority of the High Court forcefully recognised in Petty's case:***
>
> ***"An incidence of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless".***
>
> *The preservation of this right in no way interferes with the power of the courts in an*

appropriate case to comment on the cause adopted by an accused where he or she has exercised a right to speak (as was accepted in Petty's case itself) or indeed to comment in the case when an accused has failed to give evidence where the facts are peculiarly within his or her knowledge.

However recommendation 19.2 is probably superfluous in that the fundamental common law right not to answer questions or incriminate oneself can only be taken away by the expression of a clear legislative intention. *In Coco v R Chief Justice Mason and Justices Brennan McHugh and Gaudron of the High Court said this:*

"The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedom or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

Similar expressions are to be found in the judgement of the other members of the court.

Thus it would appear to be unnecessary to make it clear that the scheme proposed by the legislation did not derogate from the common law right because it could only do so if an intention on the part of the legislature clearly emerged from the Act itself. *In that event the presence of such a statement would only be part of the material to be looked at by the court in determining such legislative intent.* (1994:107) [Emphasis added]

The argument that an adverse inference should be able to be drawn from a persons' exercise of the right to silence, was addressed by some submissions received by the Committee.

The Crown Prosecutors Association submission stated:

Another example is the right to silence. As it was indicated by the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (The Lucas Inquiry), and indeed as it has been indicated by many leading lawyers, the direction of a trial judge must give to a jury that they cannot draw any adverse inference from an accused's failure to answer questions or give evidence defies common sense.

While the Association does not advocate the abolition of the right to silence, serious consideration should be given to the proposed amendments of that right currently before the British Parliament. As Lord Taylor states in his lecture, the proposed measures there, subject to some safeguards, "introduce an element of common sense and realism which has been sadly lacking hitherto." (1994:105)

The matter was also considered, in conjunction with the provision of a free legal advice scheme, by Mr Shanahan from the Legal Aid Office at the public hearing. When discussing the ramifications of the free legal advice scheme he said:

It is hard to say what the ramifications of this system would be. I can see a lot of legal advice to the suspects being not to answer questions, if this system introduces a duty lawyer scheme and gets lawyers involved very early in the process. That would result in pressure on the right to silence. The next step would be to say, "Look, we have all of these suspects who are not answering questions. We can't use their

silence. We should take away their right to silence." I think that is what is happening in the UK at the moment. It is hard to work out what the ultimate ramifications of tinkering with one part of the equation would be. (1994:13)

The above view expressed by Mr Shanahan was also repeated to the Committee by groups and individuals during the Committee's visits to other jurisdictions.

The Queensland Law Society's submission to the Commission, following the release of the Issues Paper, espoused concerns as to the future of the right to silence if a scheme of detention for questioning is introduced in Queensland. That submission stated:

For instance, if the power of detention, whether pre or post arrest, is granted across the board in relation to indictable offences, there may well be an argument further down the track that there should be a consequential abolition of the right to silence on the basis that the further powers of pre or post arrest detention are not working as well as the police hoped because citizens are declining to answer questions and, therefore the full potential of the detention powers has not been realised.

Lest it be thought this is a fanciful suggestion, the current course of the Runciman Royal Commission in the United Kingdom needs to be examined. That Royal Commission arose out of the findings of the Court of Appeal relating to the Birmingham six and other Irish cases. The Royal Commission was set up in 1991 amidst considerable disquiet as to the miscarriages of justice which were perceived to be occurring in the United Kingdom. The Royal Commission has been sitting now for over six months and there is every indication that the police will be pushing for an abolition or significant truncation of the right to silence on the basis that the detention power given to English police by virtue of the 1984 Police and Criminal Evidence Act can only realise its full potential if persons are compelled to answer under interrogation and therefore forego their right to silence.

The Discussion Paper quite properly points out that both the A.L.R.C. and the N.S.W. L.R.C acknowledge in the respective reports on this topic that if a statutory regime was proposed which provided for a fixed period of time during which the police could lawfully detain a person for questioning, such a regime could be totally undermined by police strategy based upon avoiding arrest wherever possible and relying instead on the consent of suspects. The Discussion Paper goes on to note that this very situation developed in Scotland after a change in the law there in 1980 which empowered police to detain a person for up to six hours. The discussion paper at page 25 quotes from the 1990 Dison, Coleman and Bottomley article which appeared in the Journal of Law and Society:

> *"A Scottish Office study found that many officers were continuing to rely on voluntary attendance rather than using statutory powers of detention. One third (and in one area, over half) of suspects attending stations were volunteers in 1981-84".*

If other jurisdictions are to be looked at for the purpose of deciding any law changes in Queensland, it is incumbent upon those who would want a change in the current law in this area to address the Scottish experience. We have heard Queensland police spokesman (whether Departmental or Police Union) assert since as far back as the Lucas Enquiry in 1977 that police are tired of the ruses which they have to engage in order to get suspects to a police station for the purpose of being interviewed. There is the explicit assertion in police statements that if the law were changed to enable detention (whether pre- or post-arrest) that would be a total solution to the matter.

The Scottish experience clearly shows the danger of police manipulating such a law change in the direction of detention for their own purposes. If police found that the

system of greater regulation consequent upon a detention concept was not to their liking, if the Scottish experience can be used as a guide it might be expected that there would still be a high number of volunteers going to a police station, thereby avoiding the protective regulatory practices that police will have to engage in if detention were introduced. "Protective" in this sense refers to mechanisms designed to minimise suspects being "verballed", assaulted or otherwise ill-treated.

The Discussion Paper makes the observation that the current Queensland law means that the volunteer is not accorded the same rights and protection as a person in custody (page 25). It may well be argued by some that the purpose of providing for a regime of detention will be to remove the anomaly whereby volunteers are not required to be extended the same "rights" as persons under detention or arrest. The Committee rejects this type of argument as being specious at best.

Rather, the Committee proposes that uniform procedures should apply to all persons from the point of first contact with police through to their first Court appearance. These procedures include mandatory tape-recording from the point of first contact, an obligation to inform a citizen of this right (on tape) from the point of first contact, mandatory tape-recording at the police station accompanied by a set of procedures designed to ensure that citizens are able to exercise their current legal rights whilst in custody.

Before elaborating on this proposal, it will be clear that the Committee totally opposes detention, pre- or post-arrest, for the purpose of investigation. Whichever model is examined, whether detention before arrest or detention after arrest, the logical next stage unfortunately would likely be the continuing push for greater police powers with demands for curtailment or abolition of the right to silence and refusal of legal access to persons under restraint. (1994:4)

Support for an adverse inference being drawn from the fact that a suspect exercised his right and chose to remain silent, was expressed by the two police groups.

At the public hearing Mr J O'Gorman representing the Queensland Police Union of Employees advocated reform in this area on the following basis:

Recommendation 19.2, the right to remain silent—I realise that very few people in a position of influence in the community share this view, but our view is that the right to remain silent should remain but, if someone chooses to remain silent in the light of having evidence presented to them or an opportunity presented to them to explain circumstances or evidence, then the Justice at the trial should have the option of advising the jury that they are at liberty to draw whatever inference they like from that person choosing to remain silent at the time they have the opportunity to explain the circumstances. (1994:32)

The Queensland Police Service framed its position by offering this alternative recommendation:

The Police Service does not recommend that a person be required to answer questions. However, the Service does recommend:

- *in the case of a trial there be no impediment to a jury being invited to draw an adverse inference from the fact that an accused refused to answer questions put to him/her by police during the course of an electronically recorded interview;*

- *in the case of a magistrate, the court be allowed to draw an adverse inference from the fact that a defendant refused to answer questions put to him/her by police during the course of an electronically recorded interview.*

or alternatively

- *once the prosecution has established a case to answer a court may draw an adverse inference from any decision by an accused/defendant not to give evidence.* (1994:19)

6.2.4 Analysis and Comment

The Committee reiterates its prior position stated in Report No. 23B (1994:229) that the right to silence is a fundamental right entrenched in our legal system, and as such it should not be altered.

The Committee also refers to its prior discussion in Chapter 4 where it noted that the Commission's stand to retain the right to silence is inherently at odds with the concept of a regulated scheme providing for detention for questioning.

There was an argument raised in a minority of submissions that the provision of free legal advice meant that a jury should be entitled to draw an adverse inference from the suspects silence. As will be further discussed in Chapter 8, the Committee does not consider that the proposed free legal advice scheme is viable and therefore the argument to remove the right in these circumstances also fails.

The Committee does not consider that the well established right to silence should be embodied in legislation. Mr R Sibley's submission reviewed the authorities supporting this conclusion.

The debate as to whether Queensland should adopt a Bill of Rights embodying the right to silence is yet to be finalised.

6.2.5 PCJC Recommendation

The Committee rejects CJC Recommendation 19.2.

The Committee recommends that the right to silence should remain in its present form. However, the Committee does not believe that to achieve this aim it is necessary to embody the right in legislation.

The Committee believes that the Commission's proposed regulated scheme, involving detention for questioning, is itself inherently inconsistent with the right to silence. CJC Recommendation 19.2 will not cure this inherent inconsistency.

6.3 The Caution

6.3.1 CJC Recommendation 19.3

> *The Commission recommends that, prior to any questioning, a police officer must caution a suspect in the following terms:*
>
> *You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer any questions, anything you say will be recorded and may be introduced as evidence in court.*

6.3.2 Background, Rationale and Scope of Obligation

The current position with respect to the giving of a caution is in accordance with the 1912/1918 Judges' Rules, as this version has been adopted verbatim in the Queensland Police Operational Procedures Manual.

The Rules provide that the caution is to be given at three stages:

- when a decision to charge has been made. (see Rule 2)
- prior to questioning a person who is in police custody. (see Rule 3)
- after a person has been shown a statement made by a co-accused. (see Rule 8)

Rule 5 together with the 1930 Explanatory Circular provides that the wording of the caution should be as follows:

- before the formal charge is made - "You are not obliged to say anything, but anything you say may be given in evidence."
- when a prisoner is formally charged - "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

As was discussed in para 2.8.3. the Judges' Rules have been criticised as being uncertain and therefore allowing abuses to occur. In summary:

- Rule 3 provides that *persons in custody should not be questioned without the usual caution first being administered.* This can be circumvented by the police claiming that the person was not in custody but was "voluntarily" attending.
- Rule 2 provides that a caution has to be administered before asking any questions, or asking any further questions, *when any member of the Force has made up his mind to charge a person with a crime.* However, it is often difficult to determine the actual point in time when a police officer made up his mind to charge a person. Further, by the time the police officer has made up his mind and the accused understands this to be the case, the caution may be given at a late stage in the interview.

Therefore, under the current law it is possible that a person is not cautioned prior to the commencement of questioning. The CJC's Recommendation 19.3 seeks to ensure that a suspect (the definition of which has already been discussed in Chapter 5) will be cautioned prior to any questioning taking place.

6.3.3 Arguments Raised in Public Submissions

At the public hearing, Mr T. O'Gorman on behalf of the Council for Civil Liberties expressed the obligation to caution suspects as mandatory. Mr O'Gorman stressed that this obligation would not lead to a reduction in the number of confessions obtained. In his words:

> *The obligation to caution suspects prior to any questioning is, in our view, absolutely mandatory. While I have not been here for the police and their friends today, for it to be suggested that that will somehow or other lead to a diminution of suspects talking is, in fact, to ignore the reality of what has happened since, in effect, mandatory tape-recording from a police station has been brought in. Any of you who have followed this debate with any interest over the years would have seen the Armageddon cries of the police lobby when Lucas said in 1977 that police should be obliged to tape-record all interviews. The police union and the Police Commissioner then said that the police would never get confessions. The experience since 1989 has shown that to be the lie that it was. Police are getting more confessions now under mandatory tape-recording than they ever got. No material exists in the Queensland Police Service to show that tape-recording, which is now required, has led to any diminution in confessions. And, indeed, it has had a hugely salutary effect of a great saving in court time in relation to voir dire—that is, the almost inevitable challenge to police confessions that occurred under the old regime.*
>
> *So I urge you not to be taken in by the expected argument of the police lobby that the*

> *obligation to caution suspects prior to any questioning will lead to a drying up of confessions. They brought that Armageddon spectre before us all in relation to tape-recording in 1977 and succeeded. And so, for another 12 years, the verbals flourished. But since 1989, if you talk to most police officers—except the irredeemable ones—they will express complete surprise about how many confessions they are still obtaining with video and tape-recording.* (1994:51)

Mr R Sibley, in his submission, also agreed with the recommendation. However, he did raise concerns as to who was the best person to give the caution. He stated:

> *I agree with the intent of this recommendation. This fundamental common law right ought to be spelled out to all suspects. Logically this must be done before the suspect person begins to answer questions. However it should be steadfastly borne in mind that investigating police officers are not acting in the best interests of the suspect. Their function involves in large part the obtaining of evidence with a view to conviction. Confessions or damaging admissions are often a valuable source of such evidence.* ***I question whether the person who in reality is the beneficiary of the waiver of the right to silence is the best person to bring home to the suspect such a fundamental matter.*** *The danger is that left in their hands the process may become simply the payment of a parroted lip service to the spirit of the requirement. Requiring the Custody Officer (Recommendation 22.2 and Report p 722) to provide both written and oral advice of the suspects rights upon arrival at the police station goes someway to guard against this. Persons who have special needs such a juveniles, Aboriginal and Torres Strait Islanders, persons with English as a Second Language etc will usually be identified and their rights protected. However the average person is also generally unaware of his or her rights in the circumstances of involvement with police officers. It is a daunting prospect even for the stout hearted and well educated. The optimum system would be one whereby a legal practitioner is required to assist <u>all</u> persons under the proposed Legal Aid Scheme at least to reinforce this fundamental right in the mind of the suspect. It is noted however that the service as proposed is to be offered only to voluntary attendees or those who are to be arrested and then detained for further investigation. As it is predicted that only 30-50% of these suspects will accept the offer of free legal advice in any event the functions of the Custody Officer in this regard would seem to be absolutely crucial.* (1994:110) [Emphasis added]

The Legal Aid Office in its submission also believed that the caution should be given by an independent person. Further, the Office advocated that this should be recorded on tape.

> *This recommendation is supported, particularly the aspect of the caution being given before <u>any</u> questioning concerning an offence.* ***However, the caution should be given by an independent person, and should be recorded on tape.*** *If a person, after making a fully informed consent to waive his right to silence, speaks to police and this conversation is taped by police, this should be made clear to him. In fact, recording of initial conversations should be encouraged, provided disclosure by police to the suspect is made.*
>
> ***In addition, at this stage, the suspect should be informed of his rights to obtain legal advice from either his own or a free Legal Aid solicitor.*** *This approach is recommended by the Criminal Code Review Committee (see ss.262, 263, Final Report, June 1992).*
>
> *Police may object to the above as being unworkable restrictions on them and their ability to collect evidence. However, it is in their interests, as well as the suspect's, as any admissions obtained after an informed choice to speak to police is more likely to be admissible in court and if made on legal advice, may lead to a plea of guilty at any early stage, or, at the very least, a plea of guilty to lesser charges or a reduced*

number of charges.

At the public hearing Mr Carberry on behalf of the Aboriginal and Torres Strait Islanders Corporation for Legal Services stated:

> *The legal service agrees with the recommendation that police should be under a legislative obligation to inform suspects at the outset of their rights and whether or not they are under arrest. It probably would not be known widely that the current legislative position is that they are not under an obligation to do so. There are just rare cases where sometimes evidence is excluded in court cases later on. However, the view of the legal service in Brisbane is that, in the case of warnings given to Aboriginal and Torres Strait Islander people, police officers should be under an obligation to conduct inquiries as to their bicultural competence.* (1994:44)

The Crown Prosecutors Association submission stressed that the recommendation with respect to the caution, should only apply after the police officer has decided that the person is a suspect. The relevant extract states:

> *Again with respect to the administration of the caution, it is important that what is meant by the word "suspect" be defined clearly.*
>
> *The notion that any person who is subsequently charged with a criminal offence ought to have been warned prior to <u>any</u> questioning is plainly silly and it is assumed that the words "prior to any questioning" contained in recommendation 19.3 refer to questioning <u>after</u> the police officer has decided that the person is a suspect.*
>
> *Subject to the foregoing and to the provisos set out below under the heading of <u>General Matters</u> the Association does not cavil with the recommendation set out at 19.3* (1994:98)

The Director of Prosecutions in his submission also had a concern with the giving of a caution, in light of the definition of "suspect". He noted that a "suspect" could encompass a wide range of people, and if they were all cautioned, it may operate against the public interest. The Director's argument is as follows:

> *A question which, I submit, should give the Parliamentary Committee grave concern is whether the caution should be required to be given at the early stage proposed in the Commission's Report. According to the Report a "suspect", as defined in recommendation 18.1, must be cautioned. A suspect includes a person who is in the company of a police officer in a police station, police vehicle or police establishment, or is otherwise under police control and is to be questioned to determine his or her involvement (if any) in the commission of an offence. Any sensible guilty person at that point in time would exercise the right to remain silent with the result that no incriminating evidence would ever be obtained from such a person. If all such cautioned persons were to exercise that right then the criminal justice system would fail to operate in the interests of the public, and in the interests of innocent members of the community whose own rights have been terribly ignored and violated.*
>
> *The battle against crime is an uneven battle. The victim begins with his or her hands tied, with the victim being in a vulnerable position. The villain is the empowered party. Are we to make the contest even more uneven by granting further and strengthened rights to the criminal wrongdoers? For that is what the Commission's recommendation favour. At page 677 it is said that an essential feature of the definition of "suspect" is that a person becomes a suspect once the police have formed a suspicion, no matter how ill-founded, that the person may have been involved in the commission of an offence. This is a far cry from the rules as they presently exist, no matter how they are interpreted.*

If the Parliamentary Committee feels that this proposal will assist in bringing to justice and conviction those who deserve to be convicted, then so be it. But I can not myself accept that the innocents in our society, the unwary victims, will ever be able to accept that this proposal would enhance the respect that the populace should have for the administration of our criminal justice system.

The need for the caution should be delayed beyond the point of mere suspicion, if the police are not to have their hands tied, and tied unnecessarily. (1994:83) [Emphasis added]

Support for this recommendation can also be gleaned from the police groups. At the public hearing Mr J O'Gorman on behalf of the Queensland Police Union of Employees, stated the Union's position as follows:

The next one, the obligation to caution suspects—we do not have a real problem with the recommendation. We have an obligation to caution suspects now. It is a matter of debate in trials but it is never a matter of difficulty. When we form the opinion that somebody is likely to be charged with a particular offence, or when we make up our mind to charge someone with a particular offence, then the caution is administered. If the Parliament chooses to modify that either way, then we do not have a difficulty in cautioning people in relation to their rights to remain silent. I think that in contemporary society, there are very, very, few people who need to be told they do not have to talk to the police, but we do not have a difficulty in reminding them. (1994:32)

However, the Queensland Police Service felt that the recommendation need only apply to indictable offences. In its written submission the Service argued:

The Criminal Justice Commission recommends that prior to any questioning a police officer must caution the suspect. A form of caution was provided. While it is not precisely similar to the current caution used by police, the difference will matter little to the Service except insofar as its recommendations pertaining to the Right to Silence rule are concerned.

Currently, a caution need not be administered to a suspect until such time as a police officer has decided to charge the suspect. ***This is in accordance with the Judges Rules****. However, the Commission's recommendation will mean that prior to any questioning whatsoever, a suspect must be cautioned.*

If this is to be the case, the Service would not object to the alteration insofar as indictable offences are concerned, provided that the caution applies only after a person becomes a suspect, and on being lawfully detained for questioning.

It is noted, however, that the obligation to caution suspects applies to all offences and not just indictable offences. ***The Police Service does not see the need to alter the existing situation and caution a person with respect to simple offences such as disorderly conduct or traffic related matters.*** *It is not tenable to suggest that every speeding motorist or person using obscene language in a public place be advised of their right to remain silent prior to a traffic ticket being issued or the person arrested for the obscene language.*

Indeed, the Service envisages that a conflict may arise in the case of some simple offences, e.g. traffic matters, where, in some instances, the relevant legislation requires a person to answer questions put to them by a police officer. It is an offence not to provide the information. (1994:20) [Emphasis added]

6.3.4 Analysis and Comment

The public submissions, whilst overall agreeing with this recommendation, raise the following issues:

- If the caution is to be given to a suspect prior to the commencement of questioning, it becomes vital to determine the definition of suspect. The Committee has already noted in Chapter 4 that the definition provided by the Commission is so wide as to be uncertain. Foreseeably the situation could arise where at the scene of a crime numerous victims and witnesses are "suspects" within the Commissions definition. Therefore, police may, depending on the circumstances, be required to caution each and every one of the so identified "suspects" prior to asking them a question. The practicality of the combined effect of these two recommendations is doubted. The requirement of a caution should not operate so as to give potential witnesses the impression that they are suspects or to disencourage them from talking to the police.

- The recommendation is expressed so as to apply to all offences including summary offences. The Police Service submits that this recommendation may not be tenable in the case of simple offences such as disorderly conduct or traffic related matters. Further, the Service submits that it may create confusion in situations where the relevant legislation obliges a person to give certain information.

- Should the caution be given by a police officer? The Committee believes that in all practicalities, police officers will be the appropriate persons to administer the caution.

The Committee recognises that the giving of the caution may require additional consideration in the case of suspects with "special needs" such as Aborigines and Torres Strait Islanders. This is discussed further at para *.

There was little objection to the actual wording of the caution as contained in the recommendation.

Currently the provisions regarding the giving of a caution are contained in the Police Operational Procedures Manual. These directions in effect echo the Judges' Rules. In Chapter 4 the possible effect of non-compliance with the Police Commissioner's Administrative Directions were discussed. It was held in *R v. W and Others* that a failure to comply with such directions was an unlawful act and, may result in a trial judge exercising his/her discretion to exclude confessional evidence thereafter obtained.

It is recognised that the legislation pursuant to which the Police Commissioner issues directions has been amended so that such directions no longer have the force of law. However, the Committee believes that it is more appropriate for guidelines regarding the questioning of suspects to be contained in administrative directions. The judicial discretion to rule voluntary confessional material inadmissible is well established, and permits each case to be considered on its own facts.

`Suspect' should be defined to mean a person who a police officer suspects was involved in the commission of an offence. This definition accords with common sense and should not pose problems for police.

6.3.5 PCJC Recommendation

The Committee amends CJC Recommendation 19.3.

The Committee recommends that, prior to questioning, a police officer should caution a suspect in the terms suggested by CJC Recommendation 19.3.

However, the Committee does not support the Commission's definition of suspect.

The Committee recommends that suspect should be defined as "any person who a police officer suspects on reasonable grounds was involved in the commission of an offence".

Further, the Committee recommends that the requirement contained in this

recommendation to warn suspects not be embodied in legislation but instead be contained in Directions made by the Police Commissioner pursuant to the Committee's proposed *Police Powers and Procedures Act.*

7. THE LENGTH AND PURPOSE OF PRE-CHARGE DETENTION

7.1 Commencement of Detention

7.1.1 CJC Recommendation 20.1

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

7.1.2 Background, Rationale and Scope of Obligation

As discussed in Chapters 4 and 5 the Committee rejects the concept of a regulated scheme permitting detention for questioning.

However, the Committee recognises that the Parliament may adopt, or substantially adopt, the Commission's proposed scheme. Therefore, notwithstanding the Committee's previous recommendations, this report will address each of the Commission's recommendations in respect of the length and purpose of pre-charge detention.

The issue to which CJC Recommendation 20.1 relates, is whether the power to detain for questioning should be available pre-arrest or post arrest but pre-charge.

7.1.3 Arguments Raised in Public Submissions

It must be noted that the concept of pre-charge detention was rejected outright by most groups.

The Legal Aid Office clearly stated its position as thus:

> *This recommendation is not supported, as the Legal Aid Office does not see the need for pre-charge detention and sees such detention as an impediment to appearing before a justice to have bail considered. If the person wishes to help police further, he can do so after he has obtained bail.* (1994:56)

Similarly, Mr Carberry from the Aboriginal and Torres Strait Islanders Legal Service, announced at the public hearing:

> *In general, we do not agree with precharge detention at all.* (1994:45)

It appears that support for the concept of post-arrest detention was very reluctantly given by the Council for Civil Liberties. In the words of Mr T O'Gorman at the public hearing:

> *We are implacably opposed to the concept of precharge (sic) detention. ... It is quite unusual and with regret that we support the concept of post charge (sic) detention, but only if it is for fixed periods.* (1994:52)

A proponent of pre-charge detention, Mr R. Sibley, stressed that the threshold for arrest should be met, before detention could commence. Mr Sibley's submission stated:

> *I agree that the detention should only commence upon arrest. However that power, as has already been accepted by the committee, should only arise when there are reasonable grounds to believe that a person has committed an offence.* (1994:110)

Representatives from the police groups made submissions on the basis that questioning was necessary in order to decide whether to arrest a person. At the public hearing Mr J O'Gorman from

the Queensland Police Union of Employees said:

> *Recommendation 20.1, the commencement of detention—this recommendation sort of hinges on the definition in 18.1 of when a person becomes a suspect, or when the detention time commences. The Commission recommends that the precharge detention scheme should commence at the point of arrest. The definition in this document, or the spirit of this document regarding arrest, is nowhere near the definition of arrest that I have learned and was trained in, which was based on the Criminal Code, and that is, arrest is when you take somebody into custody with a view to bringing them before a court charged with an offence.*
>
> *... **Our submission would be that the precharge detention time should commence at the time that you have made the decision that the people are not free to leave** whether as suspects or extremely relevant witnesses, and that impacts on the recommendations in Volumes I to III about witnesses, etc.*(1994:32) [Emphasis added]

Similarly, at the public hearing, Acting Commissioner Aldrich representing the Queensland Police Service argued:

> *The Commission recommended that a precharge detention for questioning scheme should commence at the point of arrest. Conversely, the service prefers a scheme where detention for questioning commences prior to arrest.*
>
> *In its report, the Commission advises that it is not satisfied that there is justification for a prearrest detention power. In the Commission's view, the removal of the restrictions on questioning after arrest is a better approach because it deals directly with the perceived problem. It adds that to encourage the creation of a new type of arrest would complicate the criminal justice process. The Police Service does not agree with the reasoning provided by the Commission. What the Commission perceives to be the remedy to the problem merely overcomes a decision of the High Court of Australia in relation to questioning. It does not offer a solution to the actual problem.*
>
> ***Questioning is an essential prerequisite to arrest.** Under the service's proposal, the investigative authority would amount to a detention and not be associated with an arrest. An arrest may cause a public perception of guilt to attach to it. Should it be believed that after questioning a person is not responsible for an offence, the person would be released without the stigma of being arrested attaching to that person.*
>
> ***Additionally, the Commission argues that the police should not be authorised to deprive a person of his or her liberty unless they have reasonable grounds for suspecting that the person has committed an offence.** In many cases, prior to questioning a person, a police officer might suspect that a person has committed an offence but it may not be the case that a legal reasonableness can properly attach to that suspicion.* (1994:2) [Emphasis added]

The submission from the Queensland Police Service contained the same argument. In order to fully understand the Service's argument, it is necessary to repeat its lengthy submission on the issue:

> *The Criminal Justice Commission recommended that a pre-charge detention for questioning scheme should commence at the point of arrest. Conversely, the Police Service recommends a scheme where detention for questioning commences prior to arrest.*
>
> *At page 685 of its report the Commission advised that it had considered the arguments put forward by the Police Service but was not satisfied that there is a justification for a pre-arrest detention power. Its reasons are, in part:*

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

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

The Police Service objects to the reasoning relied on by the Criminal Justice Commission.

What the Commission perceives to be the remedy to the problem merely overcomes the decision of the High Court of Australia in Williams v R. It does not offer a solution to the actual problem.

Questioning has traditionally been an essential prerequisite to arrest. *Under the Commission's proposal a person could be deprived of his or her liberty, by arrest, prior to all available evidence, including the consideration of defences, being examined. The Service notes, however, that such a system still involves detention.*

*If it becomes apparent that a person is not responsible for an offence **after** they have been arrested and questioned, the law will require they be released. However, the stigma of the arrest remains.*

Under the Service's proposal the investigative authority would only amount to a detention and not be associated with an `arrest'. Arrest may cause a public perception of guilt to attach to it.

Should it be believed after questioning that a person is not responsible for the offence, the person would be released without the stigma of having being arrested attaching to that person.

Additionally, in its reasoning to Recommendation 20.1, the Commission at paragraph 4, page 685 argues that:

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

It must be noted that in order to make an arrest a police officer must have a `reasonable' suspicion that a person has committed an offence. In many cases, prior to questioning a person, a police officer might **suspect** that a person has committed an offence but it may not be the case that a legal `reasonableness' can properly attach to that suspicion.

For instance, one case of anecdotal evidence obtained from detectives for the purpose of this submission relates to the murder of woman on the south side of Brisbane. Detectives suspected that one of four persons committed the murder as each may have had a motive for the offence. However, it is interesting to note that none of the suspects were considered to have committed the offence in concert with any of the other suspects.

Therefore, it was necessary to eliminate three of the suspects from suspicion in order to identify the murderer. Simultaneously, the residences of each of the suspects were visited by police, and each was interviewed. Three were eliminated from suspicion.

Having reduced the suspect list to one, and on receiving scientific evidence the remaining suspect was charged with murder. The matter is still before the courts.

In terms of the CJC recommendation, police would be placed in a position where they could not make four arrests of unassociated persons for the purpose of questioning each for the offence of murder. Logically, this premise is based on the fact that it would not be feasible for police to have `reasonable grounds for suspecting' that four totally unassociated suspects had independently committed the murder. Therefore, bearing in mind the Commission's recommendations, the Parliamentary Committee is asked to consider the practicalities of the following:

- *How police could possibly justify simultaneous arrests of the four suspects on the basis of `reasonable suspicion' when it was suspected that only one of the four persons had actually committed the offence and the others were not involved;*

- *Should police have approached and interviewed each suspect, `one after the other', to allow for the elimination and release of the current suspect in order that the next might be arrested to be interviewed (and so forth)?;*

- *If the above question is answered in the affirmative, and the person subsequently charged with the offence had been the last to be interviewed, sufficient time would have been available to allow the murderer to destroy evidence or to evade apprehension by escape.*

If, however, police were permitted by legislation to detain for questioning on suspicion (not `reasonable' suspicion) then each of the four persons mentioned in the anecdote could be lawfully detained and questioned. At the conclusion of questioning in the circumstances mentioned, three would still have been released and the fourth charged with the murder, but the task of the police would have been greatly simplified.

... Under the Police Service proposal, after a suspect is questioned, particularly in instances where admissions are made, the police officer will properly be able to form a `reasonable' suspicion that the suspect committed the offence and thus justify an arrest being made. Conversely of course, where matters of exculpation or defence are raised the person may be released without the need for an arrest to have first been made.

Therefore, it is considered that arrest should be the final link in the investigatory chain prior to a person being taken before a court.

A further consideration is that police may wish to proceed against a suspect by `Notice to Appear' or summons rather than arrest. In this case it would seem anomalous that in order to question a person an arrest first must be made, the questioning carried out, the person `unarrested', and a Notice to Appear or summons issued against the person for the offence. (1994:21) [Emphasis added]

7.1.4 Analysis and Comment

The Committee cannot accept the argument advocated by the police groups that pre-arrest questioning should be permitted, particularly as the Committee does not accept a regulated post arrest, pre-charge detention scheme.

However, the Committee does concur with the Commission's reasoning that to detain a person for questioning is no different than arrest. The liberty of the person is still being denied. If anything, the Committee believes that pre-arrest detention is much more of a deprivation of liberty, because such deprivation will be made on a lower threshold.

Importantly, as the Committee noted in its report No. 23B, arrest (or deprivation of liberty) should only be used when necessary. Further, the threshold of arrest should be reasonable grounds to believe and should, at all times, be for the purposes outlined in Report No. 23B. Those criteria *did not* include arrest for the purpose of questioning.

Post arrest, pre-charge detention and pre-arrest detention (which is still a deprivation of liberty) will, in the Committee's opinion, only lead to an increase in the use of the arrest power by police.

In the Committee's opinion arrest should not be encouraged.

The Committee also believes that any form of detention for questioning is inconsistent with the basis for the admission of confessional evidence - that it is a *voluntary* statement against interest.

However, the Committee makes the point that it does not oppose the questioning of persons after arrest who have voluntarily agreed to be questioned, have been properly cautioned and the consent, caution and subsequent acknowledgment is video recorded. In such cases, the Committee considers it irrelevant whether the questioning is pre or post arrest. In this regard the Committee notes the comments of Mr Shanahan from the Legal Aid Office at the public hearing:

> *If people are prepared to talk and they make an informed decision to talk, then whether it is prior to arrest or not is not really relevant; it is whether they are voluntarily giving the answers.*
>
> *The opposition to this system is that it puts pressure on someone to say something that is not voluntary.* ***However, if a person is prepared to talk, cooperate and answer questions voluntarily and in an informed way, whether it is prior to or post-arrest is not relevant. It is a voluntary decision that they have made to cooperate.*** *People do confess to crimes. In many cases, it is an indication of remorse. It would be improper for a system to try to stop that. If a person makes an informed decision to confess, the system should accommodate that.* ***Whether it is prior to arrest or after is not relevant. The fact that it should be voluntary is important.*** (1994:13) [Emphasis added]

This issue will be discussed in more detail in Chapter 12.

7.1.5 PCJC Recommendation

The Committee rejects CJC Recommendation 20.1.

7.2 Grounds for Detention

7.2.1 CJC Recommendation 20.2

> *The Commission recommends that the following procedure apply in all cases where a person has been arrested:*
>
> *Upon being arrested, the person is to be taken directly to the watchhouse or other appropriate facility to be charged and considered for bail, unless the police officer who makes the arrest believes there are grounds for detaining the person for one or more designated investigative and/or administrative purposes. If the officer considers that such grounds exist, the person is to be taken to the Custody Officer at*

the nearest police establishment with the equipment and facilities needed to perform the required functions.

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

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

7.2.2 Background, Rationale and Scope of Obligation

The Commission in this recommendation has defined the circumstances under which questioning of an arrested person may be warranted.

In an attempt to limit abuse of this power it has provided for:

- a Custody Officer whose responsibility it is to decide whether there are ground s for detaining the person at the pre-charge stage; and
- specified grounds on which an arrested person may be detained.

7.2.3 Arguments Raised in Public Submissions

Of course, this recommendation was rejected outright by groups opposed to the concept of detention for questioning. In the words of the Legal Aid Submission:

> *This recommendation is not supported as the Legal Aid Office does not believe there is a need for such detention, and because the purposes said to justify such detention are not valid.*

As to the specified grounds warranting detention, the Legal Aid Office submission stated:

> *Regarding further investigations and the nature of the charges to be laid, this does not seem necessary as the person has already been arrested; such a decision must have been made already. If other charges are to be preferred or amendments made to existing charges, this can be done at a later stage.*
>
> *Regarding establishing the identity of the person, this should already have been done, and if not done, can be done before a Magistrate, if any doubts linger.*
>
> *Regarding completing any necessary documentation requiring his presence, none springs to mind.*
>
> *Regarding conducting other authorised investigative procedures, only those involving the accused would be relevant. If ordered by a court, these could be done after being brought before a justice, as require by s.69 Justices Act 1886 and s.552 Criminal Code.*

The Legal Aid Office also queried why questioning with the arrestee's consent could not be

undertaken after the granting of bail:

> *The real reason, it is submitted, why pre-charge detention is wanted is to question the accused. If this requires the informed consent of the arrestee, why detain him before taking before a justice so he can apply for bail? If he is wiling to talk to police, his being on bail should not stop him. Could it be that police are worried that, by appearing forthwith before a justice, and being given bail, they possibly lose a powerful incentive to induce an arrestee to give a statement eg. "if you make a statement, we won't oppose bail." The longer an arrestee is detained before being considered for bail, the greater the possibility he will make statement to be seen to be "co-operating with police".* (1994:56)

Other groups supported the concept but commented that it should not apply to both simple and serious offences.

The Submission by the Queensland Police Service was particularly adamant in this regard. It stated:

> *The Police Service was amazed the Commission recommended that pre-charge detention apply to simple offences as well as indictable offences, following the arrest of a person. The recommendation will only add to the work load already placed on police without achieving a useful goal.*
>
> *The Commission recommended, in part:*
>
> *... if the officer considers that such grounds exist, the person is to be taken to the Custody Officer at the nearest police establishment with the equipment and facilities needed to perform the required functions.*
>
> *The Custody Officer, upon being satisfied that the person was lawfully arrested, may authorise the detention of the person for a specified period on the grounds that it is necessary to:*
>
> *...*
>
> *· conduct other authorised investigative procedures.*
>
> ***The Service strongly objects to the proposition that this should be an established procedure in the case of simple offences, particularly traffic related matters.*** *Currently, a police officer can arrest a person for an offence of drink driving prior to obtaining a specimen of breath or blood. Acceptance of the Commission's recommendation will mean that the arresting officer will need to seek a Custody Officer's approval prior to obtaining the specimen of breath or blood.*
>
> *The recommended procedure is unacceptable in that it not only conflicts with the law as contained in the Traffic Act, but it will impinge on the two hour legislative period in which the breath or blood must be obtained for the result of any subsequent analysis to be conclusive as evidence.*
>
> ***Consequently, while the Service supports investigative detention for indictable offences, it does not support the concept being extended to all simple offences.*** (1994:27) [Emphasis Added]

In a similar vein Mr Jerrard representing the Bar Association said at the public hearing:

> *The Bar had also recommended that the power of precharge detention after arrest be limited to serious offences. Our original submission suggested that those should be defined as ones punishable by at least 10 years' imprisonment. There may be some matters that could be regarded as serious offences that would carry less than 10*

years. There are some varieties of serious assaults that might carry less than that, but there does not seem to be any restriction in the report restricting precharge detention to serious offences. It is a matter worthy of consideration. (1994:22)

Mr Jerrard also expressed concern that the availability of detention could be used as a means of denying a person bail.

... There would have to be care taken to ensure that the availability of precharge detention is not used just as a means of denying people bail. For example, the police might arrest somebody, and there is nothing really that they particularly want to get out of that person's mouth because, say, they have a good case and/or he or she has already made a confession before he or she was actually arrested, but they do not want that person to get out on bail—and they know that person will get bail, because it is not serious, but they do not want that person to tip off his or her mates or friends that the police know about this offence and are making inquiries. (1994:28)

Mr R Sibley in his submission aired another concern regarding the criteria upon which the Custody Officer can make a decision to authorise a further deprivation of liberty. He argued:

I agree generally with this recommendation. However I believe that a couple of matters bear further consideration. It is for the arresting officer to <u>believe that there are grounds</u> for detaining further. The custody officer need satisfy themself only that the suspect was <u>lawfully arrested</u> whereupon a discretion arises to authorise the further detention <u>on the grounds that it is necessary</u> to:
<u>enable</u> further investigation and enquires <u>as are reasonably necessary</u> to determine whether a prosecution will be launched and the nature of the charge
<u>complete</u> documentation
<u>establish</u> identity
<u>conduct</u> other "authorised investigative procedures".

Although the exercise of a discretion arising upon the formation of an opinion is examinable by the courts on the grounds that the officer:

"does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination on any of these grounds his conclusion is liable to review" (<u>Avon Downs Pty Ltd v FCI</u> (1949) 78 CLR 353 per Dixon J at 360)

or that:

"if the decision ... was so unreasonable that no reasonable decision-maker could arrive at it, or involved a use of power conferred ... disproportionate to the purposes of the power" (<u>Ganin and others</u> (1993) 32 NSWLR 423 per Kirby JA at p. 444)

where there is no criteria spelled out in the legislation itself the courts may take the view that it is a matter committed to the judgement of the individual officer. (See Ryan J in <u>In the Matter of Bryant, D'Allesandro and Ready</u> OS No 770 of 1992, 6th January 1992 (Supreme Court of Queensland unreported); <u>Ganin and others</u> op cit.)

However the immediate review of such a decision in this context is improbable. The importance of this issue is the later determination of whether the further detention is or is not authorised by the Act. If it is not this may lead to the exclusion of any resultant evidence in the exercise of the trial judges discretion.

The question arises therefore whether it is sufficient to simply refer to <u>necessity or reasonable necessary</u> as the criteria upon which the Custody Officer is to authorise what is, as the Criminal Justice Commission recognises, a further deprivation of

liberty (report Vol IV at p.687). ***Some similar criteria to that applying to the arresting officer should also apply to the decision making process of the Custody Officer. Why should the arresting officer not have to convince the Custody Officer that there are reasonable grounds for suspecting or believing the further detention is necessary?*** *The United Kingdom scheme appears to establish the principles on which a Custody Officer must determine whether to keep someone in custody after being charged. (Report Vol 4 Appendix A p A 41)*

There is also no reference in the recommendation to the grounds that may be used to convince a Judge to extend a detention beyond 8 hours (Recommendation 20.5 at Report p 698) or the basis upon which communication with others may be denied viz: the preservation of evidence, the tipping off of accomplices or the intimidation of witnesses (Report p 721). The latter omission can only be exercised by the Custody Officer where there is a belief on reasonable grounds held by "the police officer" that that will be the result of communication. If it is intended that such matters may be regarded by the Custody Officer as a necessary basis for the initial period of detention they should be more specifically identified.

The other schemes detailed in Appendix 10 appear to relate the grounds to the ascertainment of what is a reasonable time as distinct from empowering the police to detain at all. (1994:110) [Emphasis added]

7.2.4 Analysis and Comment

The Committee makes the following points in relation to the Commission's Recommendation 20.2 that the Custody Officer may authorise the detention of an arrested person on the grounds of pursuing further investigative/administrative purposes:

- The police should not need to carry out further investigations to determine whether a prosecution be launched. The recommendation only applies to arrested persons. In order to have arrested the person, the police should be in possession of all sufficient evidence to satisfy the arrest threshold.

- The recommendation applies to all offences, regardless of whether they are simple or indictable. The Committee believes that this will in practice involve a significant extension of police powers.

- The Recommendation provides that if the officer who makes the arrest believes that there are grounds for detaining the person then the arrested person is to be taken to the Custody Officer. It is the Custody Officer who then decides if it is "necessary" to detain the arrested person. Mr Sibley's submission raises a valid question regarding the standard of the Custody Officer's belief in this regard. The Committee feels that again the situation has reverted to the exercise of discretions based on subjective tests which could be open to abuse. The Committee is concerned that the Custody Officer will effectively "rubber stamp" the investigative officer's decision to detain.

- The Recommendation indicates a responsibility on the Custody Officer to review the lawfulness of the arrest. The Committee believes that this should be a primary role of a Custody Officer. In this regard it should be noted that **PACE 1984 (England and Wales)** contains a specific provision obligating a Custody Officer to, as soon as practicable after the arrival of the arrested person at the station, consider whether there is sufficient evidence supporting the offence for which the person has been arrested.

The Committee considers that the system proposed by this recommendation would inevitably be abused and persons would be arbitrarily detained for questioning. Incentives to abuse this power include:

- Questioning suspects on any other matters.

- Preventing arrested persons from obtaining bail.

- Obtaining an effective cooling off period in the case of a person who is creating a nuisance of themselves. (Harrison,1994:10)

7.2.5 PCJC Recommendation

The Committee rejects CJC Recommendation 20.2.

7.3 Length of the Detention Period (Fixed v. Reasonable)

7.3.1 CJC Recommendation 20.3

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

7.3.2 Background, Rationale and Scope of Obligation

Regulated schemes in other jurisdictions take two different approaches regarding the specification of the period of detention. The approaches are:

- Detention for a reasonable time up to a fixed maximum time limit with provision for "time-out" and extensions in certain circumstances; and

- Detention for a reasonable period, such period to be determined in accordance with defined criteria.

The approach adopted in other jurisdictions, which have either passed legislation permitting detention for questioning, or are proposing such legislation, are as follows:

A. Fixed maximum time

Commonwealth. The ALRC's report (1975:para 89) recommended that questioning be allowed for a period of four hours which did not include "dead time". This period could be extended for a further eight hours by a magistrate. The *Crimes Act 1914 (Cth)* was amended by the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991*, based on the Gibbs Committee Report (1989). It permits detention for questioning for a period up to two or four hours (depending on the status of the person) with allowance for time-out. If the person has been arrested in relation to a serious offence, the period of detention can be extended by a magistrate, or, in some cases a justice of the peace, for a further period not exceeding eight hours.

South Australia. Pursuant to the *Summary Offences Act 1953 (SA)*, detention for questioning is permissible for four hours with limited time out. This can be extended by a magistrate for a further period of up to eight hours.

United Kingdom. The time limits on detention under *PACE 1984* are considerably longer than those permitted under other jurisdictions, although there are no equivalent time-out provisions. Basically a person may not be detained at a police station without charge for a period exceeding 24 hours. However, detention is to be reviewed by a Custody Officer after the first six hours and again at no longer than nine hour intervals thereafter. In the case of certain serious offences, an officer holding the rank of superintendent or above may authorise further detention beyond 24 hours and up to 36 hours. Detention beyond 36 hours must be approved by a magistrate.

New Zealand. The NZLRC (1994:46) has recommended a scheme permitting pre-charge

questioning for a period "reasonable in the circumstances" not exceeding six hours, with provision for time-out.

A District Court judge can extend the initial period of detention for a further period of six hours, and, in exceptional circumstances, may grant yet another extension of six hours. (1994:48)

Despite their recommendation, the NZLRC (1992:178) did recognise the following arguments against a fixed maximum time:

- *To fix a specific period is to achieve certainty at the expense of flexibility and practical efficiency.*

- *A fixed period, even with provision for extension, ignores the likelihood that the fixed time will prove inadequate in complex offences or offences with multiple suspects.*

- *The cases where a fixed time period may be ineffective are likely to be those of the most concern to the public. To circumscribe the investigative powers of the police in these situations may result in dissatisfaction with the questioning regime.*

- *If a fixed time limit is set the tendency may be for the maximum to become the norm.*

- *If there is a fixed time period, there may be a tendency to rush pre-interrogation investigations so as not to use up too much of the investigation period, particularly where a suspect is arrested at the time or shortly after the commission of the offence. It can be contended that in order to question the arrested person properly the police ought to have as much evidence as possible at their disposal.*

However, the Commission was persuaded by the following arguments in support of a fixed maximum time with power to extend:

- *A fixed time indicates to all participants in the process (arrested persons, the police, the courts) what length of detention is acceptable.*

- *A fixed time protects the liberty of the individual. Under the reasonable time approach a detained person would not know when he or she is likely to be released, or whether the detention is even lawful.*

- *A fixed time provides guidance to police officers and promotes accountability. The later determination of reasonableness by the court could prove to be an unsatisfactory method of regulating police conduct and would provide little guidance to the police.*

- *Because of the greater certainty if there is a fixed period, it is likely that there would be less need to hold a voir dire to determine the admissibility of evidence obtained while a suspect was detained. The consequent saving of court time should result in reduced transaction costs, speedier trials, and more expeditious handling of caseloads by the courts.*

- *According to most studies the vast majority of investigations can be completed within a short time after arrest.*

- *The experience of other jurisdictions indicates that the fixed time option can work well.* NZLRC (1992:176-178)

B. "Reasonable time"

Victoria. The Victorian legislation originally permitted questioning for a fixed maximum time of 6 hours, with no allowance for time-out. However, following the 1988 report by the Consultative Committee on Police Powers of Investigation (Coldrey Committee), the period was amended to that of a reasonable time.

Despite finding that 99.5% of investigations had been completed within six hours of a suspect being arrested, the Coldrey Committee concluded that:

- *Six hours might be inadequate in complex cases.*
- *The fixed period caused some police to rush investigations.*
- *The need to bring the arrested person physically before a judicial officer to apply for an extension tended to interrupt the continuity of an investigation.*
- *It may be impracticable to bring some persons before a magistrate - for example when medical treatment was required.*
- *The six hour period could be eroded by travel time and other factors such as awaiting the arrival of a legal representative, or by meal breaks.*
- *There was a concern that the upper time limit would come to be regarded as the norm.* (Woltring,1991:13) (Coldrey Committee,1988:93 and 101)

Northern Territory. Legislative amendments in 1988 gave the police the power to detain a person for questioning after arrest for a reasonable period. Matters to be taken into account in determining what is a reasonable period are outlined.

New South Wales. The NSWLRC recommended a scheme allowing post arrest, pre-charge detention for questioning for a reasonable period up to four hours with time-out. Application can be made to a judicial officer for a detention warrant authorising an extension to the detention period. The judicial officer may only order further detention for the period which he/she is satisfied is "the minimum period reasonably necessary for the police to complete their investigations, but in any event for no longer than eight hours".

Numerous arguments for a fixed maximum time limit were proposed by the NSWLRC in its Report (1990:88 and 89) including:

- *The "reasonable time" formula without any fixed limits or presumptions is much too uncertain to regulate an area which touches on the fundamental liberty of the individual.*
- *As well as providing the least measure of guidance and accountability, the indeterminate "reasonable time" system violates the spirit of the common law. Although the judgements in* ***Williams*** *seem to invite legislative reform, the joint judgement of Wilson and Dawson JJ sounds a cautionary note against replacement of the common law with too open-ended a system of detention:*

  To countenance a period of detention in police custody after arrest, without specific limits, for such time as might be reasonably necessary to enable the police to obtain the evidence upon which to charge the suspect, is unacceptably open-ended and quite contrary to what was (and in Australia, in our view, still is) the law.
- *It provides a high degree of certainty, and brings the area of criminal*

investigation under effective legal regulation for the first time.

- *It operates on the basis that police will be given clear standards and rules of procedure to operate under, which will afford them a realistic opportunity to perform their duties.*

- *Persons in custody will be kept fully informed at all stages about their position and their rights.*

- *There will be proper record keeping to enable contemporaneous and subsequent review.*

Despite these recommendations, the *Crimes (Detention After Arrest) Amendment Bill 1994 (NSW)* provides that the period of detention for questioning is to be for a reasonable time.
The change from a fixed time as recommended by the NSWLRC to a reasonable time contained in the NSW Bill has been criticised. D. Dixon (1994:144) noted:

> *The fundamental objection to "reasonable time" is the lack of certainty for police and suspects alike. Both should know how long detention can last. Instead, the Bill relies on the courts to determine what is reasonable. All the usual problems of courts are relevant: their determination is retrospective; in a system constructed around the guilty plea, challenges to evidence are an ineffective device; and the courts' record in protecting defendants and regulating police by evidentiary controls is weak. The alternative is to specify detention limits: no case has been made (in NSW or elsewhere) against this except that the police consider it inconvenient.*

Tasmania. The Tasmanian LRC (1990:12) was also opposed to arbitrary time limits because *the duty to end the detention is suspended, and accordingly the police have no incentive to release.* Thus, the likelihood that detention would continue for most of the period was seen as high.

Accordingly, the legislation proposed by the Commission provided that a police officer who has arrested, or who has custody of, an arrested person, must within a reasonable time after the arrest, either release that person or present him before a court on a charge. In determining what is a reasonable time, a police officer must consider a number of factors including the need to detain the person for the purposes of questioning. So long as that person is freely and voluntarily answering questions properly put, his detention is deemed to be reasonably necessary.

The Commission's Conclusion

The Commission concluded that the maximum fixed time approach was preferable because it:

- *Provides police with clearer guidance as to what is appropriate.*

- *Facilitates accountability.*

- *Has been shown to be workable in other jurisdictions.* (1994:690)

If a fixed maximum time is adopted, what length should the specified maximum period be?

The following reports indicate the length of time necessary to question a person:

- The Coldrey Committee referred to research which found the average time a suspect spent at the police station was 2 hours and 15 minutes and fewer than 1 in 10 investigations ran to six hours. (1988:69)

- The ALRC (1975:para 92) referred to American studies which indicated that as many as 97 per cent of cases are cleared in 4 hours. It recommended this period.

- The NSWLRC (1990:90-91) selected 4 hours for the initial period of detention based on the best empirical evidence available, which the Commission conceded left a little to be desired. The report also referred to a NSW police pilot study which was carried out for 3 months in 1987. It revealed that in 91 per cent of cases surveyed it took less than four hours to process suspects between arrest and charge, not including time-out.

- In South Australia where the initial detention period is four hours, the Commissioner of Police in 1990 observed that "the legislation has proven to be effective". (NSWLRC:90)

The Commission concluded that four hours was an appropriate maximum time period for which a person can be detained pre-charge.

If detention for a period up to a fixed maximum time is adopted what factors should be taken into account in determining the period?

Under the Commission's proposal the Custody Officer is to determine "a reasonable period" of detention, up to four hours, by reference to the relevant circumstances.

At page 692 of the Commission's report is an inclusive list of relevant circumstances which should be considered in determining the length of pre-charge detention. The Commission states that these have been compiled with reference to similar provisions in other jurisdictions.

These are:

- *whether the presence of the arrested person is necessary for the conduct of the investigation which is intended to be conducted after arrest*

- *the number and complexity of matters under investigation*

- *whether the person has indicated a willingness to make a statement or answer questions*

- *whether a police officer reasonably requires the time to prepare for any interview of the person in custody*

- *whether appropriate facilities are available to conduct an interview or other investigations*

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

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

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

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

- *the time taken to complete any forensic examinations necessary.*

The Commission's report at page 693 also states that in making his determination, the Custody Officer:

- Must balance the period necessary for the custodial investigation against the circumstances and seriousness of the alleged offence and the requirement that the investigation be conducted diligently and expeditiously.

- Should not nominate at the outset a specific period in terms of hours and/or minutes.

- No matter how the period is described, monitor the detention to ensure that the period of detention is reasonable.

7.3.3 Arguments Raised in Public Submissions

This issue was not canvassed by some groups opposed to the concept of pre-charge detention. For example the submission by the Legal Aid Office:

> *Legal Aid opposes Recommendation 20.3*
> *This recommendation is not supported as the concept of pre-charge detention is opposed.*
>
> *Legal Aid opposes Recommendation 20.4, 20.5, 20.6 and 20.7. These recommendations are opposed for the same reasons as apply to Recommendations 20.3.* (1994:57)

The Council for Civil Liberties was only prepared to support the concept of pre-charge detention if it was for fixed periods. Mr T. O'Gorman speaking for the Council at the public hearing said:

> *It is quite unusual and with regret that we support the concept of post charge (sic) detention but only if it is for fixed periods. In relation to the concept of fixed time or reasonable time—if you have a look at it around the country, you would see what happened when a six-hour period was introduced in Victoria. The police maintained a scare scenario in the newspapers that their hands were tied. In due course, the Government—and I think this time it was a Labor Government being weak—gave in and changed it to "reasonable".*
>
> *I urge your attention to the Commonwealth scheme. The Commonwealth amended the Crimes Act in 1991. It brought in a scheme fairly similar to the CJC's of post-arrest detention for fixed periods. Inquiries that I have made prior to coming here today would indicate that that is under review, and significantly under review in the Commonwealth sphere. The Commonwealth people will not give this information to me, but they might give it to a more elevated body such as yourselves. It is my understanding that a substantial review has been done. The Australian Federal Police have not been able to put up any instances of where this fixed period has not worked. It has been going for a period of three years.* (1994:52)

Another proponent of a fixed maximum time was Mr R. Sibley, who in his submission, said:

> *Some finite limit would seem desirable and four hours seems on the research to be adequate.* (1994:112)

At the public hearing Mr Shanahan from the Legal Aid Office advocated a hybrid scheme which involved a fixed period at the outset. However, he expressed concern at the concept of a reasonable time to be determined by a police officer. In his words:

> *I would think that however you term it—"reasonable" or not—it has to be subject to ongoing independent review while it is occurring. I think judicial review is probably the only way to go, with perhaps a hybrid sort of scheme of four or 12 hours to start with. Any extensions of that really need to be judicial decisions. I cannot see the arguments against that. Some time within a 24-hour period you will be able to find a magistrate or a judge and you will have to establish a reasonable basis for extending the period of detention. But to leave it in the hands of police officers to determine what is a reasonable time or not and then hope that that will be sorted out at a later time in court is a recipe for trouble.* (1994:14)

The Bar Association appeared to have changed its position on this subject, moving from originally supporting a reasonable period to later seeing advantages with a fixed period.

In its submission the Association said:

> *Arrested persons should not be detained longer than is absolutely necessary to enable police investigations to be carried out. There are essentially two ways of achieving this. The first is to set a specified maximum period (with or without allowance for "dead time"), usually with provision for its extension by application to a Magistrate in appropriate circumstances. The second is to allow a reasonable period and provide statutory criteria defining those matters which may be taken into account in deciding what constitutes a reasonable time in all the circumstances of a particular case. The Bar favours the latter approach as adopted in Victoria following the report of the Coldrey Committee.*

However, Mr Jerrard, on behalf of the Association, at the public hearing made the following comments:

> *The Bar had recommended that any precharge detention be for a "reasonable period" with certain defined statutory criteria that any judge or magistrate have to take into account later on to determine whether it was a reasonable period. The report argues for a specified period, and their arguments do seem to be persuasive on that point. It does allow everybody to know what the outer limits of the period are.* (1994:22)

Later, in response to a question by Dr Watson as to the arguments against the reasonable time limit rather than an explicit time, Mr Jerrard said:

> ***Mr Jerrard:*** *If I was a police officer, I think I would much rather a set period of time. I would have a set of rules which would be very clear. If it is "reasonable time", then, for example, the senior officer might say, "Yes, that is quite reasonable, I think that this person should be held. That sounds perfectly reasonable to me"; all of the other policemen think that it is very reasonable; the lawyers who arrive might think it is reasonable; the Magistrate you are brought before might think this is reasonable, but the judge might have a totally different opinion and say, "No, that was all quite unreasonable." Why, even an hour is unreasonable, some might say. Some might say two hours is unreasonable. Some might say anything less than eight hours is perfectly reasonable. You just allow such a variety of potential differing views about what is reasonable at a much later stage, and an adverse ruling could lead to the exclusion of a lot of relevant probative evidence and could lead to the police being liable in damages, for example, for false imprisonment for wrongfully keeping you in custody.*
> ***The CHAIRMAN:*** *It is probably relevant to say that the Queensland Police Service favour "reasonable time" and I think it is probably also relevant to say that the Victorian Act has been changed now to get rid of the set time of six hours back to "reasonable time".*
>
> ***Mr Jerrard:*** *Yes, and our association argued originally for a reasonable time. I just personally prefer the notion of a fixed set of rules and to see how they function. I understand you are going to make inquiries in New Zealand. They have just come out in favour of a six-hour period. I think their press release came out today.*
> ***Dr WATSON:*** *You said your association originally argued for "reasonable time" to the CJC.*
> ***Mr Jerrard:*** *Yes, that if there was to be pre-trial precharge detention, that it should be for a "reasonable period" and there should be specific criteria deciding what is a reasonable time. I am just suggesting that it might be better to begin, as the CJC suggested, with a fixed period and see whether that produced practical difficulties as it has the advantage that you remove the possibility that probative relevant evidence*

could be later excluded because one person's view of what was a reasonable time differed from that of every other person who had been involved. (1994:26)

And again later Mr Jerrard stated his preference for a fixed time period:

> ***I am wary of the reasonable time period, unless one had a set of criteria that placed the onus on the police to justify the length of the detention by reference to each of these criteria and why the person had to be detained before being charged.*** *It may be, for example, that samples of hair or blood or something of that nature are being sought. It may be that somebody else is being interviewed and that there are perhaps even more serious charges that might be brought. I am not quite sure. I am against the looseness of the reasonable time period. I prefer the idea of a set time period.* ***I think most of the ways of getting extensions do not seem very practical.*** *Those are my basic objections. How you set the time, I do not know. The CJC has said four; New Zealand says six; Victoria said a set period and has gone back to a reasonable time. There is nothing that is going to be perfect. Perhaps you might ask the Queensland Police Service what it is that they propose they would be doing during this period of precharge detention that they could not do in four hours—which they need to do, despite the fact that they have already had enough evidence to justify an arrest.* (1994:28) [Emphasis Added]

The police groups were in favour of a reasonable time. The submission from the Queensland Police Service presented a thorough argument in reaching their conclusion and disputed each of the three arguments relied upon by the Commission. Acting Commissioner Aldrich, representing the Police Service at the public hearing, summarised the Service's stance:

> ***As to reasonable time versus fixed time—the Police Service recommended the implementation of reasonable time detention.*** *It is appalled that the Criminal Justice Commission has opted for an overly restrictive scheme of fixed-time detention, particularly when this scheme has been trialled and rejected previously in Victoria.*
>
> *The service notes that the Commission also recommends a review of the operation of fixed-time detention after 18 months. In the service's view, adequate reviews concerning fixed-time detention and reasonable time detention have previously been conducted throughout Australia. These reviews allow a conclusion to be drawn that the preferable method is that of reasonable time detention. There is little worthwhile point in repeating the costly Victorian experience.*
>
> ***The adoption of detention for questioning for a reasonable time allows for all relevant circumstances to be taken into account when a court considers whether the time a suspect was detained was or was not reasonable.*** *In fact, the Coldrey Committee in Victoria concluded that the courts are experienced in making judgments of reasonableness and stated that such formulation has a great advantage of bringing commonsense to bear on any issue before the court.*
>
> *The Coldrey Committee recommended the abandonment of fixed-time detention on the basis that it had the potential to create problems in the following circumstances: where investigations are being made into complex crimes and multiple offences; where there are delays occasioning travelling time, medical treatment, legal advice, arranging of interpreters, rest periods and refreshment breaks; where the continuity of interviews is broken during the investigation of complex and multiple offences; where people are held in custody in prison or in remand; and where it is not practicable to bring people before a court. Therefore, while the service notes the concerns expressed by the Criminal Justice Commission, it cannot accept those concerns as realistic given the experience of Victoria and the Northern Territory.* (1994:3) [Emphasis Added]

He went on to refute the suggestion that the reasonable time period would be abused:

> *I have worked under the Victorian system under that ridiculous six hour rule as well as a reasonable time and, as I understand it, there are no abuses, as you put it, of the reasonable time alluded to by the CJC.* (1994:6)

Acting Commissioner Aldrich also alluded to the fact that a fixed period, such as four hours, may be too long in some circumstances:

> *The Coldrey Committee set down a set of what constitutes or what should be considered when a reasonable time has been considered by the court, and they take into account such things as giving the suspect a break, a sleep and medical attention. The advantages, or the perceived advantages, of the set time to my mind are not realistic. And that allows for a court or a tribunal to decide in the circumstances what is reasonable.*
>
> *If I could equate it this way—if we had, God forbid, the four hours—but let us just stick with what has been recommended, the four hours—there are some occasions, arguably, when a court could quite properly rule that four hours was too long.* (1994:7)

Also at the public hearing, Mr J O'Gorman from the Queensland Police Union of Employees, stated that the Union was not opposed to a fixed time period provided that it could be extended:

> *We are not opposed to there being a fixed time period prior to it being reviewed. If it is decided that it will be reviewed after four hours, we do not have a problem with that so long as the legislation and conditions governing the review are realistic enough so that someone in authority is able to be satisfied that it is necessary for the period to continue.* ***We do not want the situation in which after the four hours there are almost impossible standards to meet to convince that person in authority of the necessity to continue with the investigation, and that is really what it amounts to.*** *I keep coming back to it. We have to understand the purpose of our investigations, that is, to establish whether an offence has been committed and whether the person whom we believe or suspect may be responsible for the offence is in fact responsible, and we have to be able to do that in a realistic environment. To restrict our ability to speak to people or ask them questions is not a realistic environment.*
>
> *... If you have somebody in a detention period that is too limited and those sets of circumstances come up and you are 10 minutes away from the end of the four hours and they give you an explanation of something that can be very quickly investigated and may either implicate them further or eliminate them from the investigation as a suspect, surely it is realistic to expect that that time should be available—in that person's interests as well as in the interests of the whole community.* (1994:34) [Emphasis Added]

However, he expressed the following cautions that a fixed time limit would put pressure on the police and that it would tempt police to "cut corners":

> *If in the future we are expected to go flat out for the first four hours—which is bluntly what it will force police to do—then that is very, very dangerous.* ***The opportunity or the temptation for police to cut corners and do the wrong thing would be concentrated in those first four hours, and I do not believe that sort of pressure should be put on police.*** *I do not believe the community expects police to have that sort of pressure on them. I am concerned that, if the first four hours is when all the investigation has to be done, then it is leaving a door open for people to walk out that should not be left open.* (1994:35) [Emphasis Added]

The Director of Prosecutions seemed concerned that the police would tend to allow the maximum to become the norm in the absence of measures to prevent this occurring. He argued:

> *In Williams (referred to at page 665) he was under arrest on some charges. The police had a statutory duty to take him before a magistrate as soon as possible. Any delay would constitute an unlawful detention. The law had to be obeyed and it was enforced by the High Court, excluding the confessions obtained in violation of the law. Once legislation authorises pre-charge detention and a caution is required, further questioning may be engaged in. No-one would quarrel with that proposition, and I do not.*
>
> *My point is a simple one and it is this. Why should the initial period of pre-charge detention not be four hours rather than requiring a Custody Officer to determine a specified period which is not to exceed 4 hours? Will a Custody Officer not play safe and specify the period as 4 hours rather than try to guess how long the necessary action will require?* ***It is said at page 690 that measures can be introduced to control any possible tendency for police to allow the maximum to become the norm. But what are they? They have not been expressed.*** *If this is to be a Code then all eventualities must be provided for by legislation.* (1994:87) [Emphasis added]

7.3.4 Analysis and Comment

The Committee has already stated that it sees the concept of detention for questioning as inherently at odds with the right to silence. The Commission has also indicated that it sees the right to silence as so fundamental that it warrants legislative basis. However, Recommendation 20.3 does not provide for a person to be immediately excused from questioning upon exercising their right to remain silent. The Committee views this as major flaw in the Commission's reasoning.

The Committee does not envisage a problem with a person voluntarily consenting to interrogation. With additional safeguards, such as an obligation to advise of status and video recording of the caution, consent and subsequent interview, the Committee believes that the current fiction of "voluntary attendance" will be largely reduced.

The Committee is concerned that the adoption of a fixed maximum time period will encourage police to detain persons for the full time period, even if the purpose for questioning has been satisfied. Equally, the Committee is concerned that a reasonable period with no outer time limit will be open to abuse by police officers. Although the Committee notes that abuse could be achieved through the time-out provision.

However, on balance, the Committee favours a reasonable time period if the Commission's recommendations are to be adopted. `Reasonable time' in the Committee's opinion has the overwhelming advantage of flexibility.

7.3.5 PCJC Recommendation

The Committee rejects CJC recommendation 20.3. However, if the CJC's scheme is adopted by Parliament the Committee would prefer reasonable time provisions.

7.4 Time-Out Period

7.4.1 CJC Recommendation 20.4

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

7.4.2 Background, Rationale and Scope of Obligation

The Commission argued that the four hour maximum fixed period for detention should only relate

to the time actually available for investigation. Time related to other matters , should not be included in the fixed period, but questioning should not be allowed in this "time-out".

The Commission listed the purposes for which time-outs should be allowed.

- time reasonably required to:
    - convey the person from the place of arrest to the nearest premises with appropriate facilities.
    - make and dispose of an extension application .
    - process the person through the watchhouse.
- time questioning is suspended or delayed:
    - to allow a person to communicate with legal practitioner, friend or relative or consular official.
    - to allow a legal practitioner, friend or relative or consular official to arrive at the place of questioning.
    - to allow a person to receive medical attention.
    - because the Custody Officer believes the person to be intoxicated.
    - to allow for identification procedures to be arranged and conducted.
    - to allow for a reasonable rest period". (1994:694)

The Commission relied on the following to support this time-out concept:

- A similar approach was taken by the NZLC (1992), the NSWLRC (1990), the ALRC (1975) and the Gibbs Committee (1989).
- The Victorian legislation originally provided for a 6 hour time limit but did not allow for time out. This was subsequently criticised by the Coldrey Committee which agreed that there were inevitably reasonable delays which could reduce the period available for investigation and interrogation.
- It serves the interests of both police and detained persons.
- It was especially important in Queensland because of geographical factors.
- It would make it more likely that the police will be prepared to co-operate in ensuring that the safeguards promised are actually available, because they will not be concerned that compliance is cutting into their investigation time. (1994:693 and 694)

7.4.3 Arguments Raised in Public Submissions

As discussed the time-out provisions have been included in schemes providing for maximum fixed period detention. However, the Queensland Police Service in its submission favoured the reasonable time period and stated that the time-out provisions should apply to it as well. Their argument was as follows:

> *The Criminal Justice Commission has made recommendations with respect to time-out periods during the course of a detention for questioning. While the Service favours `reasonable time' detention, both methods require time-out periods.*
>
> *However, on page 694 of its report, the Commission limits the circumstances in*

which time-out periods would apply:

... It is noted that the majority of the these circumstances are purely in the interests of the suspect and do not take into account delays associated with the investigative process which are legitimately experienced by police officers.

Two anecdotal examples of delays legitimately experienced by police follow:

Example 1
It has become common for recidivist offenders living in the Ipswich area to travel to the Gold Coast or Brisbane to commit offences because they are too well known to police in Ipswich. Police on the Gold Coast, who for instance, apprehend a property offender from Ipswich may need to travel to Ipswich with the offender in order to search his or her premises for stolen property. Clearly, this needs to be done while the offender is in custody and before he or she appears in court.

Example 2
During the interview of a suspect for murder it became apparent that a second person has assisted in the commission of the offence. As there was a need for the person to be detained as quickly as possible to prevent his escape, a separate team of detectives to those interviewing the first suspect were sent to locate and detain the second suspect. He was apprehended and conveyed to a Police Station. However, prior to commencing an interview with the second suspect, the detectives had to listen to the interview tapes pertaining to the first suspect. This procedure can take several hours and needs to be provided for.

Consequently, while the Service supports time-out provisions it considers that they should include reference to:

- *whether a police officer requires time to prepare for the interview of the person in custody*
- *the number and availability of other persons including co-offenders, victims or witnesses who need to be interviewed or from whom statements need to be obtained*
- *any need to visit a place where the alleged offence is believed to have been committed or where evidence may be found*
- *the time taken to complete any medical or scientific examinations.* (1994:35)

Support for the time-out recommendation contained warnings as to the manner in which it may be used. Mr R Sibley said in his submission:

This would seem reasonable in order that the time not be squandered on inconsequential matters. (1994:112)

At the public hearing, Mr T O'Gorman representing the Council for Civil Liberties supported the concept, but, in answer to a question by Mr Briskey said:

Mr Briskey: *Is there a possibility that the time out can be abused?*
Mr T. O'Gorman: *Yes, there is. I said facetiously when the time-out provision was brought in with the Feds and the Crimes Act in 1991 that we would have police stations full of drunks sobering up because drunkenness and sobering up to allow for questioning is a time-out provision. There is a possibility that it can be abused. There is a possibility that a lot of aspects of this can be abused. That is why it is a package or nothing. Particularly, the condition precedent—non-negotiable—of free*

legal advice—workable— would hopefully address that. But the monitoring that must go on by the CJC of this will hopefully address that. (1994:57)

7.4.4 Analysis and Comment

The Commission recognised two problems with the time-out provision:

- allowing exclusions may detract from the certainty benefits of the fixed maximum time limit scheme; and

- the Custody Officer should be required to record the length of, and reason for, any time-out to ensure that there is proper accountability. (1994:694 and 695)

The Committee stresses that these problems cannot be under-rated. The major argument for a fixed time limit is that it creates certainty for all persons involved in the investigation. The time-out provision is immediately at odds with that concept. The Committee foresees the following as a consequence of this recommendation:

- It is a viable means of abuse by police so that further questioning time can be obtained.

- The period of detention (whether it is actually for investigation or one of the other purposes listed) may well be for a considerable period of time . This will no doubt have an effect on the ability of the person to answer questions and could impact on his decision at any stage to exercise the right to silence.

- Inevitably debate will arise as to matters such as when the time-out period actually started and finished and whether a particular occurrence actually fell within the time-out period.

- The Commission states that the purposes "might include"... The purposes may well include others that relate to actual investigation of the offence, such as those referred to by Mr H. Woltring below.

Mr H. Woltring (1991:14) made the following comment regarding the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* which permits detention for a reasonable period of up to 2 or 4 hours depending on the status of the person, but excluded from the calculation are dead time periods. He said:

> *The suggestion that dead time should include time to search premises, collect exhibits, permit appropriate investigators to arrive, allow execution of search warrants etc.* ***is inconsistent with the concept that arrest should normally follow investigation rather than vice versa.***
>
> *I do not believe that the dead time provisions are chiefly in the interest of the accused. They are in the interest of the accused in that they seek to ensure that questioning does not take place at inappropriate or improper times, but they are equally in the interest of the police in preserving the integrity of the statutorily permitted investigation period. Nor do I believe that, given the scheme of the Act as a whole, it is open to the interpretation that a person can be kept in custody for a number of days whilst awaiting, for example, the arrival of a lawyer from overseas.* [Emphasis added]

The additional purposes that the Queensland Police Service propose seem to be fairly in line with the first part of Mr Woltring's argument. That is, they are inconsistent with the concept that arrest should normally follow investigation rather than vice versa.

The Committee notes that time-out periods only become necessary in a fixed time regime. However, the provision of time-out periods potentially defeat the purpose of a fixed time regime. As previously stated, the Committee prefers a reasonable time regime.

7.4.5 PCJC Recommendation

The Committee rejects CJC Recommendation 20.4.

7.5 Extension of Detention

7.5.1 CJC Recommendation 20.5

The Commission recommends as follows:

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

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

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

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

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

- *the investigation is being conducted diligently and expeditiously; and*
- *a further period of detention without charge is reasonably necessary to preserve or obtain evidence or to complete the investigation; and*
- *there is no reasonable alternative means of obtaining the evidence other than by the continued detention of the person in custody; and*
- *circumstances exist which made it impracticable for the investigation to be completed within the four hours (see those circumstances relevant to determining a `reasonable period') OR other circumstances of emergency made it impracticable for the investigation to be completed within that time.*

7.5.2 Background, Rationale and Scope of Obligation

To cater for cases where investigation and interrogation cannot be completed within the four hour time limit, the Commission proposes a recommendation allowing for an extension of detention time.

The NSWLRC Report (1990:para 4.44) noted that *the adequacy of procedures governing extension of the period of custodial investigation is crucial to the operation and success of the fixed time model.* It stated that the procedures must be:

- *logistically sound;*

- *cater for after-hours applications;*

- *smooth enough to ensure that appropriate cases gain ready approval so as not to hamper police investigations; and*

- *substantial enough to amount to more than merely a rubber stamp for police requests.* (1990:para 4.44)

The Commission's recommendation contains the following key aspects:

- The first extension is for a period up to eight hours, such application being made to a magistrate.

- The second extension is to a Supreme Court judge who specifies the further period of authorised detention.

- Telephone applications can be made where appearance is not practicable because of the time of day or the remoteness of the location.

- The arrested person or his lawyer have a right of appearance at the application.

- If the extension involves further questioning then the arrested person must consent.

- The onus is on the police officer to establish a case for extension based on the four listed matters.

7.5.3 Arguments Raised in Public Submissions

The Council for Civil Liberties spokesman, Mr T O'Gorman, was in favour of the extension provided that there were two additional pre-conditions as follows:

> *In terms of the extension of detention beyond four hours—to the extent that there is going to be an application to a magistrate, we would see that as being acceptable with these preconditions: (1) that the person must be legally represented and (2) that the prosecution must be obliged to put before the magistrate what evidence they have so far, otherwise we will have the very real risk that it will simply be a de facto protection of the type that I outlined before you when I was here some weeks ago—or was it months now—in relation to the 259 under the Criminal Code body sample provision.*
>
> *... Let me make it clear to you that merely saying that a person has to be brought before a magistrate of itself is no protection. There must be mandatory legal representation; there must be a mandatory requirement for the prosecution or the arresting officers to outline what the nature of their evidence is such that further detention is justified.* (1994:53)

There was also query as to why a Supreme Court judge and not a District Court judge should hear the application for the second extension. The Director of Prosecutions said:

> *The recommendation is made that an application for the first extension might be made to a magistrate, but an application for a further extension has to be made to a Supreme Court judge. Are District Court judges not to be trusted to the extent that Supreme Court judges will be trusted? If they are not to be trusted then they should not have been appointed to that Bench at all. The argument is advanced that applications for extension beyond 12 hours should be made to the Supreme Court recognises that fundamental rights are at issue. But fundamental rights are at issue in all criminal trials and District Court judges are entrusted with jurisdiction in almost all criminal cases (excepting murder and certain drug offences).* (1994:88)

Mr R Sibley agreed:

> *There are bound to be exceptional cases where extension beyond the 8 hours is necessary. In that event I can see no reason why an application should not be made to any Judge of either the Supreme or District Courts. It seems illogical that a District Court Judge should have jurisdiction to rule on the admissibility of confessional materials and exercise discretions to exclude same in trials on a range of very serious offences yet not be empowered to grant an extension of time for interrogation.* (1994:112)

A similar view was voiced by Acting Commissioner Aldrich from the Queensland Police Service. He also expressed concern about the practicalities of contacting a judicial officer out of hours.

> *As to extensions by judicial officers—irrespective of its total lack of support for the entire concept of fixed-time detention, the service cannot see the need for a judge of the Supreme Court to be required to approve a second extension. Surely, a magistrate is sufficiently independent of police to be in a position to consider all aspects of the detention. Needless to say, in many instances it will be a magistrate who is the final adjudicator of guilt in subsequent court proceedings. Having said that, I would add that the service does not consider it appropriate that its officers contact directly magistrates or judges of the Supreme Court in order to apply for detention periods. Where it is necessary for an application to be made to a magistrate or a judge under other existing legislation, that application is made on behalf of the service through either a police prosecutor or a prosecutor from the Office of the Director of Prosecutions. However, while this more formal method is appropriate, it would be unworkable for detention applications, due to time restrictions.*
>
> *Should such a concept be adopted, the service perceives that after business hours difficulty will be experienced in contacting a magistrate. This will be much more difficult in the case of a Supreme Court judge. Both judicial officers will undoubtedly also be occupied with trials and other business during business hours. The problem will only be exacerbated in isolated areas of Queensland, where all applications would need to be conducted by telephone.* (1994:3)

This was supported in the written submission from the Queensland Police Service. In the same extract the Police Service argued that the necessity to make applications for an extension in the case of a fixed period, was likely to cause interruptions to the investigation/interrogation process. The Service observes that this would not occur in the case of a reasonable period.

> *The Police Service strongly objects to a `fixed time' scheme including the need to obtain judicial sanction to continue questioning a person beyond a four hour limit.*
>
> *A portion of the reasoning supplied by the Criminal Justice Commission in supporting its recommendation is as follows:*
>
> *The Commission recognises that, in rare circumstances, the extended period may be insufficient for the police to carry out their duties properly. In such cases, before the end of the extended period, a police officer should be able to apply to a judge of the Supreme Court for a final extension of the detention period. The proposal that a Supreme Court judge should have to determine the application recognises that fundamental rights are at issue, and that applications for extensions beyond 12 hours should only be entertained in the most serious and complex cases. (page 696)*
>
> *Irrespective of its lack of support for the entire concept on the basis that it is impractical,* ***the Service cannot see the need for a Justice of the Supreme Court to be required to approve a second extension when a Magistrate is obviously considered suitable to approve the initial extension. Surely a Magistrate is***

sufficiently independent of police to be in a position to consider all aspects of the detention. *Needless to say, in many instances it will be a Magistrate who is the final adjudicator of guilt in subsequent court proceedings.*

Additionally, ***the Service does not consider it appropriate that its officers directly contact Magistrates or Judges of the Supreme Court in order to apply for extensions of detention periods.*** *Where it is necessary for an application to be made to a Magistrate or Judge under other existing legislation, that application is made on behalf of the Service through either a Police Prosecutor or a Prosecutor from the Office of the Director of Prosecutions. However, while this formal method is appropriate, it would be unworkable for detention applications.*

As mentioned earlier in this submission, the Chief Commissioner of the Victoria Police was requested to provide information concerning the benefits emanating from the replacement of `fixed time' period of detention with a `reasonable time' period (Question 3 relates). Portion of his reply mentioned that:

- *interviews do not have to be interrupted to apply for extensions, thus avoiding irreconcilable breaks in continuity of those interviews;*

- *time does not have to be spent searching for a Magistrate out of court hours in order to hear an application for extension of the `fixed time' period.*

The Service perceives that difficulty will be experienced after business hours, in contacting a Magistrate. This will be much more difficult in the case of a Supreme Court Justice. *Both judicial officers will undoubtedly also be occupied with trials during business hours. The problem will only be exacerbated in isolated areas of Queensland where all applications will need to be conducted by telephone.*

At page 697 of its report the Criminal Justice Commission comments:

- *... the magistrate or where appropriate, the Supreme Court judge, should look carefully at a number of matters when considering the application. These should include:*
  ...

- *the extent to which a person in custody is co-operating in the investigation.*

The Service points out that while in some circumstances this point may be relevant, it does not take into account that although a person may not be cooperating, it may be necessary to hold that person pending the results of medical or scientific examinations being made available. In some cases those results will provide sufficient evidence to charge a suspect with an offence, irrespective of whether the suspect chooses to answer questions. (1994:37) [Emphasis Added]

The practicalities of "out of hours" extensions were also considered by Mr Jerrard from the Bar Association at the public hearing:

There are rather unconvincing suggestions in the report about the manner of extending the period of detention. It may well prove very difficult to get, for example, a judge at midnight or 2 o'clock in the morning. It may be better to simply recommend in favour of a specified period without provision for extension. The report rather optimistically assumes that you would be able to find a magistrate in person or on the telephone at, say, 9 o'clock at night and that the police will have the numbers of the Supreme Court judges and that the Supreme Court judges will be home and answering the phone. Some of them might even take it off the hook if there are too many of these applications. (1994:22)

On the issue of the arrested persons consent, Mr Shanahan from the Legal Aid Office had the following to say:

> ***The CHAIRMAN:*** *What about the issue of the suspect having to agree to the extension? Not too many suspects who understand their rights under such a system will agree?*
> ***Mr Shanahan:*** *I see that as a fundamental flaw in the logic of the report. If a suspect has been in custody for about 24 hours and the police are applying to a court to extend it, if the decision by the court will depend on the suspect's agreement, I really do not see very many suspects agreeing.* (1994:14)

7.5.4 Analysis and Comment

The Committee recognises that there may be exceptional cases, such as complex and serious offences, where investigation is time consuming. The need for an extension of time has been recognised in other legislative schemes.

The Committee notes the following in relation to the Commission's recommendation 20.4:

- The Custody Officer is not responsible for making the application.

- The initial application to a magistrate may lead to police "forum shopping". In this regard the NSWLRC (1990:para 4.54) recommended that police be given a single, central telephone number for all after hours applications.

- On page 697 of its report, the Commission notes that police officers may "shop around" in order to get a time extension after an application has been denied. To preclude this the Commission states that it should be a requirement that where an application has been refused, any further applications for an extension in respect of the same matter, must be supported by new evidence.

  The NZLRC's draft legislation seeks to avoid this scenario by draft section 17(3)(h) which requires the police officer making the application to provide the judge with a statement as to whether one or more applications have already been made, and the outcome of such application. The reason being that judges can keep track of applications rejected by other judges.

  This was also recommended by the NSWLRC (1990:para 4.68).

- There is no provision that the detained person again be cautioned on the hearing of the application for the first extension. In the case of the second extension the recommendation provides that *the application shall not be granted unless the person indicates to the court his or her willingness to be interviewed further*. The Committee queries why this is not relevant to the first extension or the initial detention.

- Information given by police over the telephone should be on oath. This was also recommended by the NSWLRC. (1990:para 4.63)

- There is no provision for the judicial officers decision to be reduced to writing. The NSWLRC (1990:para 4.67) thought that this was necessary because *upon the trial of a person who was subject to a further period of custodial detention, the detention warrant must be tendered in court as a condition of the admission of any evidence obtained by the police during this period. The warrant is prime facie (but rebuttable) evidence of the lawfulness of the detention.*

The provisions for extension of time only become necessary under a fixed time regime. The Committee has previously stated that if the Commission's scheme is adopted it should be based on reasonable time.

7.5.5 PCJC Recommendation

The Committee rejects CJC Recommendation 20.5.

7.6 Procedure at end of Detention Period

7.6.1 CJC Recommendation 20.6

> *The Commission recommends that once the authorised period of detention has expired (including any authorised extension) the police must either:*
>
> · *release the person without charge*
>
> · *release the person on the basis that a summons has issued or will issue against the person*
>
> · *take the person to the watchhouse or other appropriate facility for the purpose of being charged and*
>
> · *released on bail; or*
>
> · *taken before the first available Magistrates Court.*
>
> *Where a Magistrates Court is not immediately available, no further questioning shall be allowed of the person in custody.*

7.6.2 Background, Rationale and Scope of Obligation

The Commission at page 699 of its report states that *if, at the end of the detention period(s), there is insufficient evidence to charge the person, the person must be released. ... This is, in effect, a power to "unarrest" a person.*

The Committee again stresses that it is the power to arrest for the purposes of detaining and questioning a person, followed by this power to unarrest, that it sees as being open to abuse.

7.6.3 Arguments Raised in Public Submissions

The Queensland Police Service, in accordance with its earlier argument that detention for questioning should be pre-arrest, said:

> *In the main, the Police Service has no objection to the concepts contained in this recommendation although it fails to see the logic in the need to `arrest' a person to question them so that they can later be released and summonsed for the offence.*
>
> *Additionally, the Service opposes the ban on questioning of a person following the charging of that person with an offence. It may be the case that questioning should not be permitted in relation to the offence for which they have been charged. However, police should not be restricted in questioning the person in relation to other offences, particularly should police become aware of more offences committed by the person.*
>
> *Clearly, under the Commission recommendation, if the person is charged with an offence on a Saturday afternoon and held in custody until the Monday when the court*

> *next sits, a considerable amount of time has been wasted when police could have been questioning the offender. The recommendation is contrary to the situation currently existing and permitted by the Judges Rules.* (1994:39)

7.6.4 Analysis and Comment

The Committee is opposed to the Commission's proposed regulated scheme and therefore is also opposed to this recommendation.

The Committee, in its report No. 23B, supported the concept of police being able to "unarrest" a person, and provided specific recommendations to this effect.

However, the Committee believes that the power to "unarrest" in the context of the Commission's report will lead to an abuse of the arrest power. Suspects will be arrested simply for the purposes of questioning and, if that questioning does not produce a confession, they will be released, that is unarrested. It is then up to the person involved to make a complaint about the arrest.

7.6.5 PCJC Recommendation

The Committee rejects CJC Recommendation 20.6.

7.7 Re-Arrest

7.7.1 CJC Recommendation 20.7

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

7.7.2 Background, Rationale and Scope of Obligation

The Commission, the NSWLRC (1990:97) and the ALRC (1975:para 89) all identified that provision for re-arrest needed to distinguish between:

- abuse of the rules regulating detention times by releasing a person and then immediately re-arresting him/her in order to gain an extension of detention time; and
- genuine cases where new evidence justifying a further arrest has come to light either during detention or after release of the person.

In the latter case such evidence must be sufficient to satisfy the arrest threshold.

7.7.3 Arguments Raised in Public Submissions

The sole submission on this point, from the Queensland Police Service, supported the recommendation:

> *Depending on the scheme introduced, the Police Service has no objection to this recommendation.* (1994:39)

7.7.4 Analysis and Comment

The Committee considers scope for abuse of this recommendation as being wide. Dr R. Harrison QC (1994:10) made a timely warning regarding the proposed New Zealand equivalent:

> *In any ongoing major investigation where the police are assembling evidence from a variety of sources...it will not be difficult for the police to claim repeatedly - that they*

have come into possession of "additional material information", such as to justify a fresh arrest for detention and questioning. Thus the Law Commission's proposal will permit the police to play a "cat-and mouse" game with the suspect, with repeated questioning sessions over weeks if not months.

In its Discussion Paper, the Commission argued that provision for re-arrest was needed, because fairness requires that a suspect should be given the opportunity to respond to any new evidence obtained by the Police. However, the issue is not whether the suspect should be given the ***opportunity*** *to respond - that opportunity can be given without arrest or detention - but whether the Police in this country should have a power to arrest and detain on repeated occasions a suspect whom they are by definition unwilling to charge by reason of insufficient evidence.*

The Committee concurs with Dr Harrison's logic.

7.7.5 PCJC Recommendation

The Committee rejects CJC Recommendation 20.7.

7.8 The Position of Volunteers

7.8.1 CJC Recommendation 20.8

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

7.8.2 Background, Rationale and Scope of Obligation

The Commission has stated in its rationale for this recommendation that a volunteer at a police station:

- is likely to be under pressure to remain; and
- because of the manner of presentation of his rights, he may not take them up. (1994:701 and 702)

Further, the Commission felt that if there was no time limit on questioning volunteers the police may try to evade time limits set on questioning suspects by continuing the alleged practice of deeming them "voluntary attendees". (1994:702)

7.8.3 Arguments Raised in Public Submissions

The Legal Aid Office in its submission supported the concept of including volunteers in the formal questioning regime on the following conditions:

This recommendation is supported, provided that he remains because his is a genuine voluntary attendee and has had his rights explained to him by an independent person, including his right to receive legal advice, and that he is free to leave at any time. (1994:58)

Mr Jerrard on behalf of the Bar Association also seemed to support the recommendation but had misgivings regarding the conduct of a hearing with a magistrate by telephone. He opined that the

telephone conversation should be tape recorded and failure to so record should render the evidence inadmissible.

> *In recommendation 20.8, at page 702, reference is made to a person having a chat to a magistrate on the phone and agreeing to tell the magistrate that he or she is happy to be at the police station. The magistrates will not be very keen on that, I do not think, because they may end up having to be witnesses again and again. The police will say, "They told the magistrate that they were happy." The person may say, "No, I didn't. I said to the magistrate that I didn't want to be there." There is a risk about the efficacy of that proposal: that you are putting the magistrates in a position where they have to give evidence about the attitude of the person spoken to.* ***It would be much better to simply insist that all of this be tape-recorded, otherwise the whole thing is inadmissible if it is not, the detention is deemed unlawful, anything said is excluded from evidence, and people are to be disciplined if they do not tape-record all of these conversations.*** (1994:24) [Emphasis added]

On the other hand, the Crown Prosecutors Association considered the recommendation unsound and based on a misunderstanding of the law. Their submission argued:

> *The recommendation (20.8) that voluntary attendees at police stations must be taken before a magistrate after a fixed time is, with respect, logically unsound and seemingly based upon a misunderstanding of the law.*
>
> *Statements made in the report to support the recommendation are both broad and totally unsupported and insupportable by empirical data. For example, at page 669 the following appears -*
>
> *"The police have been assisted in this regard by the willingness of courts to accept legal fictions and loopholes such as voluntary attendance and out-of-hours arrests, and to admit evidence obtained in contravention of the rules."*
>
> *A more broad or more inaccurate statement of the role of the judiciary in this area could not be imagined.*
>
> *The courts of Australia, led by the High Court, have been vigilant to ensure fairness to an accused person in the course of police investigations and have consistently developed the law to this end. See, for example,*
>
> *Bunning -v- Cross [1978] 141 CLR 54*
> *Cleland -v- The Queen [1982] 151 CLR 1*
> *McPherson -v- The Queen [1981] 147 CLR 512*
> *McKinney -v- The Queen [1991] 171 CLR 468*
>
> *The misunderstanding of the law in this area is that it is assumed in the report that police actions are not reviewable by courts. At page 702 of the report it is said -*
>
> *"Most importantly, if there is no time limit set in the questioning of voluntary attendees, the police will have an incentive to evade the time limits by continuing to deem people to be voluntary attendees rather than under arrest."*
>
> *This statement, which is apparently the main basis for the recommendation, credits police with a power that they do not possess. Rather, it is the court which ultimately determines what was the true position.* (1994:96)

Two final reasons were also given for rejecting the recommendation:

> *Finally, it is noted, firstly, that no other jurisdiction is said to have such a requirement, and secondly, that if a person truly is a volunteer (a question ultimately*

> *for the courts) what useful purpose is achieved by disrupting an interview or investigation by seeking out a magistrate after an arbitrary time period?* (1994:97)

The Queensland Police Service also rejected the recommendation on the basis that sufficient safeguards were already offered to a voluntary attendee. These safeguards included the electronic recording of interviews for indictable offences and the keeping of a custody register. Moreover the Service argued that if a reasonable time was adopted there would be no incentive to evade time limits.

> *The Criminal Justice Commission has argued for the inclusion of voluntary attendees in the investigative detention scheme. In particular the Commission has recommended a time limit be set for the interview of voluntary attendees. At page 702 the Commission states:*
>
> *... if there is no time limit set in the questioning of voluntary attendees, the police will have an incentive to evade the time limits by continuing to deem people to be voluntary attendees rather then under arrest. This would largely defeat the purpose of bringing in a regulated scheme.*
>
> *The Service disagrees with this assertion. In Queensland, all interviews for indictable offences are electronically recorded either by video or tape recorder. Together with entries of detention kept in the Service's computerised Custody Register, the Service considers that ample safeguards and records are available to ensure that the rights of a voluntary attendee are not abused. If, for example, a person was questioned for several hours after having stated that he or she did not want to be interviewed, this fact would automatically be electronically recorded along with the rest of the interview. Consequently, any admissions which might be made would be inadmissible in any subsequent trial. This of course does not even take into account the civil and criminal remedies available to a person who is held against their will. Additionally, if a scheme of `reasonable time' is introduced there will be no need to evade time limits.*
>
> *Therefore, the Police Service submits that sufficient measures already exists to ensure the legal rights of a voluntary attendee are protected and that there is no need to enact legislation in keeping with the Commission's recommendation.* (1994:39)

This position was affirmed by Acting Commissioner Aldrich at the public hearing.

> *The Criminal Justice Commission has argued for the inclusion of voluntary attendees in the investigative detention scheme. In particular, the Commission has recommended that a time limit be set for the interview of voluntary attendees. The Commission argues that, if there is no time limit set in the questioning of voluntary attendees, the police will have an incentive to evade the time limits by continuing to deem people to be voluntary attendees rather than under arrest. The service disagrees with this assertion. In Queensland, all interviews for indictable offences are electronically recorded, either by video or tape-recorder, together with entries of detention kept in the service's computerised custody register. The service considers that ample safeguards and records are available to ensure that the rights of a voluntary attendee are not abused. Additionally, if a scheme of reasonable time is introduced, there will be no need to evade time limits.* (1994:4)

Also at the public hearing, Mr J O'Gorman from the Queensland Police Union of Employees, reiterated that **true volunteers do exist** and that it is in the public interest that they be questioned.

> *People must accept that there are plenty of instances where people do voluntarily agree to accompany us to a police station any number of times.*
> *... If we are going to put a blanket ban on people attending police stations as voluntary attendees, with the greatest respect, I would submit that we are doing a*

gross disservice to the criminal justice system in this State and to the community. (1994:33)

The Crown Prosecutors Association submission also made this point.

7.8.4 Analysis and Comment

The Committee has already expressed its view that it sees no problem with (and indeed it is in interest of the public) true volunteers assisting police in their enquiries.

The Committee queries whether true volunteers should be included in the time limit requirements for the following reasons:

- Similar recommendations have not been included in other jurisdictions' legislation.

- A volunteer has already been advised of their status and that they are free to leave. (This is in accordance with CJC Recommendation 19.1)

- In accordance with the *Electronic Recording of Evidence Manual 1989*, all interviews for indictable offences are required to be electronically recorded.

- It is an unnecessary and time wasting exercise for police to obtain authorisation from a magistrate after four hours where the person is voluntarily co-operating.

- Inclusion of volunteers in the formal questioning regime may be taken by the police as implicitly conferring on them the authority to detain voluntary attendees. The NZLRC (1992:160) considered the issue and had this to say:

  We consider that no time limit should apply if there is good cause to suspect that a person has committed an offence but that person is not in custody and is free to go - in other words, if the suspect is in fact voluntarily co-operating. And to apply the time limits to any custodial questioning of a suspect, even if the suspect has not been formally arrested, would create the (mistaken) impression that it is legitimate to detain for questioning a person who has not been arrested provided that the detention is for a limited time.

- The Commission's proposed regulated scheme has otherwise catered to stop the alleged police practice of questioning "voluntary attendees" by applying the safeguards to persons other those who have been arrested. For example, Recommendation 19.1 which obliges a police officer to inform a person whether he or she is under arrest, or is not under arrest and is therefore free to leave police company.

The Committee also notes that the hearing for an extension of time is to be heard by a magistrate. The Committee reiterates its comments in para ? regarding the possibility of police "forum shopping" or making repeat applications after refusal. The potential abuse in this regard would seem to undermine the Commissions rationale for the recommendation.

7.8.5 PCJC Recommendation

The Committee rejects CJC recommendation 20.8.

8. FREE LEGAL ADVICE

8.1 CJC Recommendation 21.1

> *The Commission recommends that the Custody Officer (see Chapter Twenty-two) be required to advise the suspect of his or her right to contact a lawyer. The Custody Officer should advise the suspect that if he or she does not have a lawyer, a free and independent legal advice scheme is available to provide the services of a lawyer at the police station, or, in remote areas, over the telephone.*
>
> *Where a suspect indicates a wish to communicate with a lawyer, the Custody Officer should arrange for the suspect to do so in private and must defer questioning and other investigative procedures involving the suspect until that has occurred. Where the suspect indicates a desire to have a lawyer present for an interview or other procedure, the interview or other procedure should be deferred until the lawyer arrives and has consulted with the suspect.*
>
> *Where a lawyer having agreed to attend does not arrive within a reasonable time (up to two hours) the Custody Officer should make an attempt to contact another lawyer. In such circumstances the suspect is not to be questioned until he or she has had access to legal advice.*

8.2 Background, Rationale and Scope

The Commission's report states (1994:655) that the recommendations providing for pre-charge detention should not be introduced unless the Commission's proposed free legal advice scheme is implemented. The Commission emphasised that it would not support the introduction of pre-charge detention without the free legal advice scheme, stating that the provision of free legal advice is *crucial to the proper balance of the scheme*. (1994:704)

The Commission emphasises that the pre-trial processes are of vital importance in the adversarial system and that suspects need lawyers at that stage as much as they do at trial. (1994:745)

Whilst the Commission's report recommended a free legal advice scheme it failed to provide full details of the form of the scheme stating:

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

The Commission suggested that the scheme may be operated via a tendering arrangement, similar to that currently being used to supply duty lawyer services.

The Commission rejected possible objections to the scheme such as:

- legal advice would lead to suspects being advised not to answer police questions.
- the lack of willingness on the part of legal practitioners to participate.
- the quality of the advice would be poor.
- the difficulties associated with distance.

Finally, based on predicted utilisation rates, the Commission estimated that the proposed scheme

would cost in the range of $1.55 - $2.59 million.

The Committee believes that four major issues have arisen in relation to the Commission's recommendations concerning a free legal advice scheme:

- What would be the quality and value of a free legal advice scheme?
- Is a free legal advice scheme, funded by the public, in the public interest?
- What would be the cost of a free legal advice scheme?
- If a free legal advice scheme is introduced does it mean that there should be modifications to the right to silence?

All of the above issues are inter-related.

8.3 Arguments Raised in Public Submissions

Most submissions received either supported a free legal advice scheme or stated no major objections to the scheme. Most also stated that such a scheme was essential if the Commission's recommendations were implemented.

Mr O'Gorman from the Council for Civil Liberties supported the proposals for pre-charge detention only if was accompanied by free legal advice scheme. Mr O'Gorman rejected that such a scheme would be geographically impractical and emphasised that the Law Society should be capable of maintaining adequate quality control:

> ***Mr T. O'Gorman:*** *If I can go back to page 10.* ***We would indicate that the proposal for post-arrest detention is workable only if the legal advice scheme that is outlined as a precondition is implemented****. I have very grave concerns that this or any other Government is going to be prepared to spend the money on that. I have concerns that, even if the money is spent in the initial phase, it will in due course be whittled away so that the package will remain but the protection will be whittled away by this or some subsequent Government, whether a Labor Government or a conservative Government, because that is currently the trend in the UK. It was a precondition in the UK for this post-arrest detention that it was contingent upon police station legal advice being readily available and free.*
> *One of the problems with that scheme was that grossly underqualified lawyers were sent down. Indeed, in the research papers that Baldwin and McConville prepared for the Runciman royal commission there is one quite funny story which is not funny in the overall but where it is recounted that a particular lawyer who was being monitored as part of this research scheme and who turned out to be particularly inexperienced actually in an interview said to the police officer, "What's arson?"*
> ***Dr WATSON:*** *Is that, "What you askin'?"*
> ***Mr T. O'Gorman:*** *Not quite! Baldwin tells me that his research has shown that firms tend to send down the inexperienced. I do not want to overstate this, but there is in fact a group of retired police officers who now attach themselves to solicitors firms to go down to police stations to advise suspects. With the greatest respect to police officers as a class—and there are some exceptions to this—they cannot get out of the mould of their lifelong behaviour, just the same as when I retired: if I was appointed police investigator, no-one could really take me seriously.*
> ***Could I express the gravest of reservations that this package cannot be introduced without that absolute of police station free legal advice availability****. There has to be some clause written into the legislation that if that police station scheme loses the support, say, of the Law Society, either because the monetary backing for it is gradually whittled away or because the quality of representation becomes as it has in the UK—that is, considerably inadequate—then the whole package falls. (1994:53)*

...

***Dr WATSON**: I guess the obvious question is the one that has exercised this Committee already earlier in the day before you came here. I refer to the issue of the free legal advice service. Irrespective of whether a Government was prepared to fund it, it has been asked whether or not it could in a practical sense be implemented in Queensland in any case.*

***Mr T. O'Gorman:** I think it can. The argument could be put that because Queensland is so geographically spread it is not workable. My response to that is that the Law Society over the years has provided throughout the State a bank of solicitors, who now have to be accredited, for duty lawyer schemes in courts. **I think that the Law Society is quite capable, so long as the task is given to it to maintain quality control, of convincing lawyers to take part in it.** Lawyers did, after some hesitation, start to take part in it in the UK. I think it can happen here.* (1994:54) [Emphasis added]

The submission from the Legal Aid Office (Queensland) gave qualified support to the recommendation:

> *This recommendation is strongly supported, subject to the following qualifications:-*
>
> *(a) The right to obtain legal advice, whether from his own lawyer or from a Legal Aid solicitor free of charges must be explained at the first contact with police. If left to a point where he has already been arrested, at the start of pre-charge detention, the damage may well already have been done in the form of damaging admissions.*
>
> *(b) This advice should be given by an independent person, such as a Justice of the Peace, not a Custody Officer or anyone who is a police officer.* (1994:58)

However, during the Committee's review process few representatives accepted that the scheme would cost as little as the amount estimated by the Commission. In addition, many submissions also expressed concern to ensure that the quality of the advice given was adequate.

At the public hearing Mr Shanahan, representing the Legal Aid Office, expressed an opinion as to the cost of the scheme and highlighted practical problems in its implementation and ensuring the quality of advice:

> ***Mr Shanahan:** ... duty lawyer scheme. **That scheme would be an expensive one to run**. It would be imperative that the scheme was run properly. I think the UK scheme gives examples of the cost, the inefficiencies and, ultimately, the ineffectiveness of such schemes. The report talks of the legal aid officers tendering out duty lawyer functions. If such a scheme were to be introduced, I think that would be the way the Legal Aid Office would approach it-—it would try to tender to particular firms or practitioners who are up to the task. **I think that there will be difficulty in finding—certainly in some geographical locations—practitioners who are willing to do that sort of work.** We would have to monitor closely that scheme. We would have to ensure that practitioners who were part of it were properly trained and knew what they were doing.*
>
> *The report talks about the Law Society's rules about referral back to duty lawyer, and that may be an incentive for practitioners to take part in the scheme if those rules were to be relaxed. Recently, the Law Society has relaxed those rules in relation to the duty lawyer court scheme. They allow the referral back of clients picked up in that scheme to the duty lawyers. That does give an incentive to practitioners to become involved in such schemes.*
>
> *... I would imagine that if this pre-charge detention is introduced, then **we will see a lot of lawyers being approached**—if it is to also involve a duty lawyer scheme—at **2 a.m. or 3 a.m. in the morning. I think that that will prove practically difficult in getting lawyers to agree to be involved in this sort of thing.** (1994:11-12)*

> ...
> *The **duty lawyer scheme**—that is the court scheme that operates in every Magistrates Court around the State—is an in-house operation and private profession operation, but the private profession component of that is standing at about $850,000 a year. That delivers a pretty good service. It is an on-the-run service. You do not have much time with your client, because you only see the clients on the morning. **It involves a lot of practitioners around the State not being particularly well remunerated for their time**, but it is a good system in that it allows people before the courts to have representation. As I say, that costs the Legal Aid Commission about $800,000 as far as the private practitioners are concerned. **This scheme is a much bigger scheme, and I see practical difficulties in getting it to work. I see practical difficulties in finding solicitors in every town who are prepared to do it. I think there are practical problems with it.*** (1993:16-17) [Emphasis added]

At the public hearing, Mr Carberry from the Aboriginal and Torres Strait Legal Service, in response to a question by the Chairman, also expressed the opinion that the Commission's estimated cost of the scheme was too low:

> ***The CHAIRMAN**: We will now have questions from the Committee. You said that the Aboriginal Legal Service operates a 24-hour service and there is a recommendation in here that legal advice be available. I am a bit interested in what the budget of the Aboriginal Legal Service would be. Obviously there are some estimates in this report of the CJC as to how much this would all cost and they range from roughly $1.5m to $2.5m - in that order. That just seems to me to be incredibly low.*
> ***Mr Carberry:** That seems incredibly low to me, too. The Aboriginal Legal Service budget in totality for Brisbane this year is about $1.14m. That includes, of course, provision of solicitors in the criminal courts during the day, as well as a civil law service and as well as a welfare in prison visiting service. But throughout Queensland I am not too sure how much it could possibly cost for the service advised by the CJC. **I think it is going to cost a lot.** One of the ironies is that the duty lawyer system for courts is under tremendous financial pressure. As it is at the moment, it is funded completely by the Legal Aid Office and they have, in the last financial year, gone to a tender system, presumably because it is costing too much, and **there is debate in the Law Society as to whether we really are, under the present system, providing a proper duty lawyer system for the courts.*** (1994:46)[Emphasis added]

Mr Bill Potts from the Queensland Law Society supported the concept of a free legal advice scheme but acknowledged the potential cost of such a scheme. He classified the scheme as a "novel" method of using public funds. Mr Potts suggested that the costs may be contained through the use of a 24-hour phone advice scheme with visiting lawyers for the most serious offences:

> ***Mr Potts:** So what we say is this: if we believe in rights—the right to remain silent—we should not only entrench that right but the explanation to every person who comes before the police's notice of that right. We commend very thoroughly the report of the Criminal Justice Commission in which they argue for the introduction of a compulsory duty solicitor police scheme. **The difficulty with that is, of course—and the Law Society faces reality—that it is a very expensive scheme, in fact, so much so that it may even exceed the present Legal Aid budget.** I suppose many people in society become cynical about politicians and politics in general, but it seems that it would be a very brave—I am not trying to use the Yes Minister phrase—but it would certainly be a novel way in which to use moneys, moneys which I am sure criminal lawyers would applaud gleefully, but something which I really doubt in reality is going to happen. The Law Society says that, if we are serious about protecting people's rights, then we should at least make that available and back that with funds.*
> ***It seems that it is not entirely without possibility that a system could be made of 24-hour phone advice at a very much cheaper rate than perhaps even solicitors***

> ***attending.*** *That is something which may be explored. It is something which the Law Society may be able to assist by having people on rotation and available. It may be that, in certain circumstances, particularly for serious charges, that would extend to people attending at police stations. But I would hardly imagine that the Government would wish to fund people going down to police stations to be questioned about bad driving, driving without due care and attention, and the like. But for charges of murder and rape, offences where there are serious custodial implications, we say that that is a protection which the society should be able to afford through whatever means.* (1994:38) [Emphasis added]

Some submissions argued that the introduction of a free legal advice scheme would upset the "balance" between civil liberties and law enforcement and, therefore, in order to offset the effect of legal advice, consideration should be given to alteration of the right to silence. These submissions argued that adverse inferences should be able to be drawn from the refusal of a suspect to answer questions.

The submission from the Crown Prosecutors Association of Queensland is typical of this view:

> *In principle, the Association has no difficulty with the proposal that suspects being detained by police for questioning should have access to legal advice.*
>
> *The present situation is that where a suspect detained for questioning requests to speak to a lawyer, the police invariably grant the request. The Association is not aware of any real problem in this regard.*
>
> *The report correctly identifies the importance of the pre-trial process. Yet we should not underestimate the importance of the court hearing. It is important that those who cannot afford legal representation are properly represented at trial. It would be absurd if a person can obtain legal advice at the police station, but is then left by himself in the court room.*
>
> *The Association considers that the recommendations in this Chapter be a part of a complete overhaul of the criminal justice system, similar to that undertaken in England and Wales.* ***There needs to be a balance between the rights of the accused and the rights of the victims and the community. If the rights of the accused are to be enhanced. Otherwise the scales, already weighted in favour of the accused, will topple over.***
>
> ***Measures such as requiring the accused to disclose his defence, and the right to comment adversely on an accused's failure to give answers in certain circumstances are two areas being considered in England and Wales.*** (1994:101) [Emphasis added]

Mr John O'Gorman, representing the Police Union of Employees, did not object to the free legal advice scheme. However, Mr O'Gorman noted potential practical difficulties and opined that if the scheme was adopted it was reasonable to expect that alterations to the right to silence be also considered:

> *The introduction of a free legal advice scheme is something with which we do not have a problem. The people who utilise free legal advice now are the people at the bottom end of the socioeconomic strata in society. They are entitled to legal advice. The people who do not use the free legal advice are usually the rich people at the other end of society—or the police, who have the legal defence fund of the union to help them through.*
> ***But our serious reservations about its practicality—and they have been spelt out in the document—are in relation to the preparedness of competent, experienced lawyers to attend.*** *If you get someone who does not fit into that category at 3 o'clock in the morning and who has not made his or her name yet and is prepared to try*

some of the tricks that lawyers are prepared to try—the same as I am prepared to try some of the tricks that the police are prepared to try—then the quality of legal advice would definitely be suspect.
The union believes that, if a free legal advice scheme is introduced, it would have to have a parallel consideration with the submission that we make that the judiciary have the option to advise the jury that this person had the opportunity to explain the circumstances, chose to remain silent on legal advice and, therefore, the situation was not addressed at that stage. (1994:33) [Emphasis added]

The Director of Prosecutions submitted that there was no need for a free legal advice scheme:

Lawyers have a vested interest in recommending the intrusion of lawyers into all things legal. Even the simplest conveyancing matters, lawyers would say, should be left in the hands of lawyers. The question is whether, to safeguard the rights of persons in pre-trial custody, the presence of a lawyer is essential. ***Of course it would be of advantage to have a lawyer at his or her elbow but would it be impossible to devise a scheme that would ensure fair play without the intervention of lawyers?*** *After all, there must be a limit to the advice that a lawyer can give, and it must be either to speak or not to speak. And there can be no guarantees, the lawyer not knowing the truth, that the advice given will be sound in the particular case.* [Emphasis added]

The Queensland Police Service objected to the proposed scheme:

Irrespective of the conclusions drawn by the Commission, ***the Service is firmly convinced that the mandatory provision of free legal advice will result in less confessions being made****. A suspect who is otherwise willing to confess to an offence will no doubt opt for silence after receiving legal advice.*

Police currently allow a suspect to have a lawyer, friend, relative or independent person present during an interview. No objection is raised to this facet of the Commission's recommendation.

However, the Service does raise objection to the inability to interview or examine a person until a lawyer is present where the delay experienced could result in the loss of valuable evidence or where emergency circumstances exist.

The recommendation allows an initial period of two hours for a lawyer to arrive, with a further unlimited time period for a second lawyer to attend if the first should not arrive. In the case of investigations for serious offences such as murder or rape, it may be necessary to conduct a forensic examination of the suspect in order that valuable evidence is not lost, e.g. samples of a victim's skin under the suspect's fingernails or a victim's pubic hair or blood on the suspect's body or clothing. Under section 259 of the Criminal Code, police are required to obtain an order from a Magistrate prior to permitting the examination to be conducted. Consequently, the legal rights of the suspect are protected by the Magistrate's consideration of the application. Therefore, the delay experienced in waiting for a lawyer to arrive is unwarranted.

Additionally, in cases, for example an abduction, where police have reason to believe that the safety of the victim is in imminent danger, police should be permitted to commence questioning a suspect immediately and, if necessary, prior to the arrival of a lawyer.

Further, there may be occasions when it is necessary to refuse friends or relatives access to the suspect. These occasions would arise where communication between the suspect and a friend or relative could result in the loss of evidence or the

warning of an accomplice.

It is noted that the Victorian legislation has provision for the types of circumstances mentioned above.

The issue of whether free legal advice should be available to all suspects is one for the consideration of the Government and not the Police Service. [Emphasis added]

At the public hearing in response to a question by Mr Barton, Acting Commissioner Aldrich expanded upon the Service's difficulties with the proposed free legal advice scheme:

Mr BARTON: *What is your view in an overall sense about people having an automatic right to legal access from the minute they are detained, if in fact that detention were to be picked up—putting aside whether it should be free legal access, the overall principle? Is there a problem from the perspective of the Police Service with that as a principle?*
Acting Commissioner Aldrich: *Yes, I am sure there is, if for no other reason than it is impractical. People will often speak freely and honestly without another person being present. It would not be the first time I have interviewed two offenders separately, only to have one offender later deny having said to his mate that he ever told the police anything.* ***I believe the present practice of giving offenders the opportunity to speak to their legal adviser per phone or get instructions is adequate and practical.***
We have enough trouble now—we accept the need for it, but we spend an enormous amount of resources sitting around waiting for independent parties to be located and made available to sit on the interview of juveniles, and that is notwithstanding that there are a lot of good people in the community who make themselves available to perform that function. ***If we were at the beck and call of the legal profession to make themselves available before we could interview a suspect, I fear how we would work, to be honest.*** *Once again, proper recording of interviews should give the defendant or the accused every opportunity, and his counsel subsequently, to negate or challenge the conduct of the police if it is recorded.* [Emphasis added]

Mr Shanahan in evidence before the Committee provided a frank opinion upon what may happen under the CJC's proposed scheme:

Mr BARTON: *Ultimately, if we recommended, and if the Government agreed, to allow detention for questioning, do you think that more people might be found innocent in the court system because of flaws in that system? In your experience, in trying to fix one problem are we likely to create another one?*
Mr Shanahan: *It is hard to say what the ramifications of this system would be.* ***I can see a lot of legal advice to the suspects being not to answer questions, if this system introduces a duty lawyer scheme and gets lawyers involved very early in the process****. That would result in pressure on the right to silence. The next step would be to say, "Look, we have all of these suspects who are not answering questions. We can't use their silence. We should take away their right to silence." I think that is what is happening in the UK at the moment. It is hard to work out what the ultimate ramifications of tinkering with one part of the equation would be.*
Mr BARTON: *It could go either way.*
Mr Shanahan: *Yes.* (1994:13) [Emphasis added]

The experience of the Aboriginal and Torres Strait Legal Aid Service as explained by Mr Carberry, appears to reinforce the Committee's opinion that a free legal advice scheme will lead to an increase in the exercise of the right to silence:

We have previously made submissions regarding the decision to arrest as distinct from the decision to issue summonses. Otherwise we agree with the Queensland Law Society submission; I had the opportunity of reading it before I did this outline and I

spoke to Mr Potts before he gave his submission today so I knew what he was going to say, and for the reasons propounded by the Law Society we agree with that. It may interest you to know, and I do not know where it leads us, but ***the Aboriginal Legal Service at least in Brisbane provides something akin to the service of providing a solicitor on a 24-hour a day basis and, as far as I am aware, in every police station in the Brisbane area there is a circular advising police of our 24-hour a day number and police can obtain the services of a field officer or a solicitor on a 24-hour a day basis should they want one to attend during an interview or prior to an interview.***

My experience in the last three and a half years is that that procedure, coupled with the printing by the Aboriginal Legal Service of a Know Your Rights card, has vastly increased the percentage of our clients who decline to give interviews. Speaking to solicitors who are doing current case work, I am told that at present more than half decline to give interviews to the police. Three or four years ago I think it would have been a much lower figure. *However, the population of Aboriginal prisoners still varies no lower than 20 per cent of the prison population and sometimes above 25 per cent. So, I doubt whether getting Aboriginal people to give a statement in a police station really makes much difference to conviction rates. If the only reason for changing the law is that, "Well, there are crimes which are going unpunished", I agree with Mr Potts, that, really, I do not think anyone has produced the evidence to sustain that.* (1994:46) [Emphasis added]

Later Mr Carberry stated that most lawyers advise their clients not to speak to police, although he doubted whether it effected the conviction rate:

Mr BARTON: *I was just trying to think if your experience as a service can give us any indication that might be helpful for that proposal to have a legal service available 24 hours a day to clients in a broad way if, in fact, this compulsory detention is accepted.*

Mr Carberry: *It is slightly different. It is still optional for them to ring us under the present system. I do not know whether you can draw any comparisons.* ***The only comparison, which your chairperson thinks might be unhelpful, is the fact that if you deliver that service people more and more do not give statements—definitely. In fact, my experience is that—and I take on board something Mr Potts said about the latest case about exculpatory statements—it has got to the stage where a practising lawyer, almost without thinking, advises people of their right to remain silent or their privilege against self-incrimination; because in the middle of the night you do not really have enough information to assess whether or not a statement should be made.***

Mr BARTON: *Even if you know you are innocent—whether you should make a statement to clear yourself?*

Mr Carberry: A lawyer is not gifted with prescience, so he does not really know whether a person can make a statement that will in fact clear everything up, which is what police often say to suspects: "Look, just come to the station and we can clear everything up", the implication being, "If you do not come to the station and it is not cleared up, this investigation will continue." Practising lawyers tend to just tell people of the right that they have not to give a statement and persuade them not to give statements.

Mr BRISKEY: *You seem to be suggesting that if your clients do not give a statement, then, by the numbers of your clients who are in gaol, they are getting convicted anyway?*

Mr Carberry: *I consider they are being convicted at the same rate, even though they are declining to give statements.*

Mr BRISKEY: *So they are getting convicted on police investigation rather than confessions or what they say?*

Mr Carberry: *Yes. But the police use what other people say as well.*

Mr BRISKEY: *So they go out and investigate, rather than just get convictions on*

statements?
Mr Carberry: *I think they do. I think there are some crimes which cry out for it. Unlawful use and burglary and those sorts of things are examples.* [Emphasis added] (1994:47-48)

Mr Terry O'Gorman also acknowledged that lawyers would tend to advise their clients to exercise their rights to remain silent. However, Mr O'Gorman referring to research done in relation to the PACE scheme indicated that confessions would still be forthcoming:

> ***The CHAIRMAN****: What sort of advice generally would the solicitor give to the client?*
> ***Mr T. O'Gorman****: In a police station?*
> ***The CHAIRMAN****: Yes.*
> ***Mr T. O'Gorman****: Are you asking what advice would I give?*
> ***The CHAIRMAN****:* ***Would you not just tell them that they do not and should not answer any questions?***
> ***Mr T. O'Gorman****:* ***I think a competent solicitor would give that advice, particularly if the police were not prepared to reveal what it is the client was there for and what evidence they had****. If it has been said today that allowing solicitors into police stations under this mandatory legal advice scheme will mean that confessions suddenly dry up, that has not been the experience in the UK. Again, I would urge you to address the research papers that were prepared at the request of Runciman. It just is not happening, and, if it does, then all it is doing is giving reality to what the right to silence is and is ending the charade, because at the moment you look at many police interviews where people talk, and they talk because the police give the warning as superficially and quickly as possible, skim off it and go on to something else.*
> *If a person has a right to silence, that right has to be enforceable, but there are many reasons why people do answer questions in the police station whether it is when the solicitor is called or later. Indeed, I urge you to the parts in this report which indicate that it is only a small percentage of cases which do not result in a conviction because a person exercises their right to silence. The research—the figures quoted in the report show that the police scare story of—and this is in effect what the police position is—"Allow lawyers in and people will in fact for the first time be able to exercise their right to silence, therefore we will get no confessions, therefore the whole system will fall down"—experience in other jurisdictions, particularly in the UK, has shown that to be a scare story and nothing else.* (1994:55) [Emphasis added]

8.4 Analysis and Comment

It is necessary to analyse the Commission's recommendation under the following headings:

- Quality;
- Value;
- Cost;
- Public interest; and
- Effect on the right to silence.

Quality

The following is an extract taken from a case study in England. During a break in a police interview of a suspect, the interview room was occupied by the suspect, a law clerk and the researcher:

> *Clerk: (to our researcher) I don't know what to advise - what do you think?*
>
> *Researcher: I'm sorry, I'm not in a position to say.*

Clerk: But you've been to far more of these [police stations] than I have.

Client: (to clerk) So what are you?

Clerk: I'm a trainee solicitor, an articled clerk.

Still troubled by the matter, the articled clerk went out and telephoned the office to get further advice. On her return she said that she had only been able to speak to another clerk (a legal executive) and had been told that "it will have to be argued at a later date"! (McConville,1993:2.7)

The Commission's report acknowledged that research had been critical of the free legal advice operating in England. (1994:707-708) The Philip's Commission, which recommended the introduction of PACE and a free legal advice service, noted that persons in police custody required experienced lawyers. (1981:100) However, most of the criticism levelled at the English free legal advice scheme has centred around the lack of quality legal representation at the police station.

Dixon (1991:235) refers to studies concerning the legal advice provided under the PACE regime. The studies tend to demonstrate that regular contact between legal advisers and police formed social bonds and co-operative expectations. However, Dixon also emphasises that there were significant variations between legal advisers, for example, some legal advisers display strong civil libertarian views whilst others *spoke in crime control terms of which any chief constable would be proud*. (1993:236)

The Runciman Royal Commission commissioned research studies in relation to, amongst other things, the incidence and quality of legal advice provided at police stations. The Commission stated that the results of research undertaken was *disturbing*. (1993:37)

McConville (1993) found, amongst other things, that:

- Solicitors firms in England, in order to maintain or increase profits, employed clerks or others with little or no formal qualifications to attend at police stations to provide advice to clients under the free legal advice scheme.

- A *very prominent pattern in high volume criminal defence firms was the employment of former police officers to discharge police station advice work as well as to undertake other tasks such as the interviewing of witnesses*. (1993:2.2) McConville noted that some firms contracted out police station work to independent agencies which are set up to service a number of legal firms in a particular locality. The agents in the studies research sample were all former police officers. (1993:2.1)

- In a sample study of 180 cases, responses for requests for legal assistance from suspects, only 44, or 24.4%, resulted in the attendance of an admitted solicitor. Others attending included:

    - Articled Clerks - 28 out of 180 or 15.6%.
    - Clerk on staff - 56 out of 180 or 31.1%.
    - Former Police Officers - 38 out of 180 or 21.1%.
    - Non-staff clerk - 8 out of 180 or 4.4%.
    - Outside Agency - 6 out of 180 or 3.3%.

- Solicitors have an aversion to police station work as a result of the low renumeration and the perception of it being low status work.

- Law firms do not contemplate that solicitors will attend police stations on a routine basis which is reflected by the division of work, that is, that non-qualified staff and outside agencies make up the in-house 24 hour rota. Even when solicitors appeared on the rota, clerks often substituted for the solicitors.(1993:2.4)

- The primary motivation for law firms being involved in police station work is in order to acquire or retain clients. Accordingly, there is *fierce competition to gain access to suspects in custody* albeit by clerks and inexperienced lawyers. McConville cites one clerk who explained her firm's policy as follows:

  > *Clerk: I think telephone advice is enough sometimes, but [the partner] wants somebody to go - even if it's the cleaner ...*

- The allocation of police station work was not only as a result of economics. Police station work was generally regarded as routine and low grade work. (1993:2.4)

- There are a number of problems with the use of non-qualified staff, including: lack of legal expertise, lack of confidence, role conflict (such as the duty to the community as opposed to the duty to the client) and over identification with police. (1993:2.7)

Baldwin's research (1993) indicated that in 66% of cases representatives made few interventions in the interviews of suspects by police. Further, in only 9% of cases did the representative actively intervene on behalf of the client or object to the questions put by police.

Conversely, what safeguard against the Commission's scheme is an ineffective legal scheme which the community will pay substantial amounts.

Value

The Commission's report referred to the following matters as demonstrating the value of a lawyer at a police station:

- Advising as to whether their client's conduct amounted to an offence.

- Advising as to the elements of the offence that must be proved by the prosecution.

- Advising as to availability of defences.

- Advising as to whether an early confession will be helpful.

- Advising as to what other offences may be considered and whether admissions to these matters should be made.

- Advising as to how long the person can be detained.

- Advising as to what powers of investigation the police may exercise.

- Advising as to the availability and probability of bail.

- Advising how complaints can be made.

- Providing an informal role such as supporting the client, aiding communication with police, and negotiating with police about a number of non legal matters.

- Providing an important guarantee of fair treatment.

- The presence of a lawyer changes the nature of the interview room for the suspect. (1994:706)

However, it appears to the Committee that the overriding factor as to the value of a legal advice is the quality of the lawyer involved. An inexperienced lawyer, or a non-lawyer, is unlikely to be able to provide the services mentioned above. Therefore, quality and value of legal representation are inseparably linked. Indeed an unqualified person or an inexperienced lawyer could give advice which is not in the interests of the suspect.

The CJC's report appears to reject the concept that the primary advice that will be given to suspects by their legal advisers is to exercise their right to silence. The CJC cites one source for this proposition.

The Committee is not convinced that this would necessarily be the case. The Committee notes that the Commission has failed to point to any research conducted in Queensland which indicates that lawyers would not in the majority of cases inform the client to exercise his/her rights to silence.

There is ample authority to indicate that support for the proposition that which argues that opinion which argues that the only competent course for a lawyer to take, at least initially, is to advise silence, unless they believe that their client has an alibi or sufficient defence.

Odgers states:

> *Why not, then, actually require that legal advice be obtained before questioning? Why not provide that any admissions will not be admitted into evidence unless the suspect first received legal advice? The reason is simple and is, indeed, the reason why the police oppose even being required to inform a suspect of the right to see a lawyer.* ***It is because any competent lawyer will in nine cases out of ten advise the suspect to exercise his rights and say absolutely nothing at all****. A solicitor writing in the English Law Society Gazette last year made the same point - "in order to be in a position to advise a client to answer questions the solicitor must know in advance" that the prosecution case is strong, usually the police do not disclose their case at this stage so, he said, "when in doubt (of the prosecution ability to prove their case) say nowt". Don't even attempt an explanation of innocence. Justice Jackson of the United States Court made the point rather elegantly in 1949:*
>
> > *[there is] a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of crime because, under our adversary system, he deems that his sole duty is to protect his client and under this conception of a criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.*
>
> *While it may be a good thing that a suspect has a right to a lawyer, it may not be in the public interest that the right is exercised if it has these consequences, just as it is not in the public interest that everyone exercises their indisputable right not to work or not to bear children.*
> *A dilemma, indeed!*

John Mackenzie (1990) an English solicitor noted that most times solicitors are required to advise their clients not to speak to police:

> *It is the received understanding among criminal practitioners - both solicitors and barristers - that in the case of 90 per cent of suspects under investigation the only safe advice for a solicitor to give is for the suspect to decline to answer any questions. The reality is that it would be very difficult for the Law Society to incorporate this advice in a publicly available document. The right of silence as with most constitutional safeguards is like a well rolled umbrella, designed for show and not for use. If it is used then it becomes an abuse and a candidate for abolition.*

The Committee's visit to New Zealand tended to confirm that many of the calls for legal advice are in relation to less serious matters. For example, anecdotal advice suggests that almost 50% of calls upon lawyers are in relation to drink driving offences.

More will be said later about the possible results of the overuse of the right to silence.

Cost

The Commission estimates that the proposed free legal advice scheme would cost in the range of $1.55 - $2.59 million.

The Committee is not convinced that the Commission's estimate is a reliable guide.

The estimated costs are based upon a number of assumptions, none of which the Committee believes may be reliably founded:

- An offer rate of 80 percent. The offer rate refers to the percentage of cases in which police will wish to detain persons for questioning.

- A take-up rate of between 30 and 50 percent. The take up rate refers to the percentage of persons who will take-up the offer of legal assistance.

- A utilisation rate of between 24 and 40 percent. The utilisation rate is the result of the offer rate and the take-up rate.

The Committee makes the following observations about the above assumptions made by the Commission:

- In relation to the offer rate, the Commission's report concedes that: *In the absence of any data, it is very difficult to estimate the proportion of cases where police will not wish to detain a person post-arrest, but 20 per cent of the total number of cases to which the scheme potentially might apply would seem to be a conservative estimate. On this basis, the offer rate can be assumed to be in the vicinity of 80 per cent.* (1994:A48) The Commission concedes that it has no reliable data on which to base the assumption. Therefore, the percentage is little more than a guess.

- In relation to the take-up rate, the Commission concedes that the percentage provided (30-50 per cent) has been assumed for *the sake of the following calculations*. Therefore, this assumption is not even an educated guess. The Commission does attempt to draw some support from research in the United Kingdom, where about one-third of suspects take-up the offer of assistance. However, the Committee notes that this data is in respect of a free legal advice that has been heavily criticised. Surely the quality of advice affects the take-up rate. As would the quality of the method of explaining the right to a lawyer.

  The Committee believes that the take-up figure will largely depend upon the quality of the service and the anecdotal feedback to those persons who will be likely to avoid themselves of the service. If the service offered is staffed by qualified and experienced practitioners then the service will receive a "good reputation" and will more likely be utilised. It is dangerous to rely on utilisation rates from other jurisdictions such as England, because as the Commission's report acknowledges these legal advice schemes do not have a good reputation. Therefore, it appears reasonable to assume that people do not utilise them as much as they would if the reputation was high. The Committee notes that the Runciman Commission estimated that with improvements to the English free legal advice system, such as advising that the advice was free etc to the English system, the utilisation rate could reach 66%. A utilisation rate of that magnitude would increase the Commission's costs to approximately $4.2m, based on 1991/92 figures and their other guesstimates.

- Another problem with the Commission's estimate is that it is based on 1991/92 figures. It is reasonable to assume, on the basis of the increase in population alone, that in three years there have been substantial increases in these figures.

- Finally, the Commission has assumed that administration costs associated with the scheme will be approximately 7.5 per-cent. However, no evidence is put forward as to the basis of this approximation. The Committee doubts that the real administration costs associated

with the scheme would be this low.

The submissions to the Committee quoted above demonstrate that the Committee is not alone in the view that the Commission's estimated costs are not a reliable guide.

Public Interest

The Committee does not dispute a persons right to consult a lawyer. However, the Commission's proposed scheme goes further than recognising that right. The Commission's scheme recognises a right coupled with an obligation on the public purse to pay for that right.

Is it in the public interest to pay for the exercise of this?

The Committee is not convinced that a legal advice scheme funded by the public is in the public interest.

It must be emphasised that there is a legitimate public interest in the police interrogation of suspects. In particular, it is in the public interest that people make voluntary confessions to crimes they have committed. Confessions, whilst not the only method of securing a conviction, do expedite the investigation of criminal offences. Confessions almost undoubtably also result in earlier pleas of guilty and less criminal trials. The cost of additional resources required at both the investigative and trial stage of proceedings would undoubtably increase if there to be a significant decrease in confessions. These increased costs may be significant.

There is also considerable advantage accruing to an accused person who voluntarily confesses to a criminal offence early in proceedings. Although it aids in ensuring that persons ultimate conviction, the confession once made in most cases encourages him/her to plead guilty and receive all the benefits that flow from that decision. This sometimes includes a substantial reduction in penalty.

The Commission's report quotes research which suggests that:

· access to a lawyer does not significantly decrease the confession rate; and

· contrary to popular belief lawyers do not always encourage suspects to exercise their right to silence.

The Commission's report paid particular attention to the experience in England and Wales following the introduction of PACE and research which has criticised the quality of advice provided in that jurisdiction.

However, anecdotal evidence provided to the Committee suggests that the majority of lawyers would, at least initially, advise clients to exercise their right to silence. Indeed some lawyers with whom the Committee spoke suggested that there is often little benefit for suspects to co-operate with the police.

It should be noted that the research referred to by in large was conducted in relation to the PACE scheme and the legal advice provided under PACE. There has been much criticism of that scheme and the quality of the advice. The Committee questions whether the rate of confessions would have remained the same had there been high quality legal advice.

In 1989 in England a new code of conduct forced police to give better advice regarding the availability free legal advice. This resulted in an increased take-up rate. Home Office Research Study 129 (1992) which studied confession rates before and after the new code of conduct was implemented noted that there was a decrease in confessions from around 18% to 9%.

The Committee is not convinced that there would not be a substantial decrease in the confession rate if the Commission's free legal advice scheme operated effectively. This would not be in the public interest, however, the public would be left to pay the (uncertain) bill.

Effect on the right to silence

If, as the Committee suspects, the scheme advocated by the Commission results in less confessions, less pleas of guilty, more trials, and more offenders not being convicted, what will be the future for the right to silence?

Some submissions quoted above argued that if suspects are accorded protection such as video taping of interviews, the informing of all rights and the presence of a lawyer then, as a counter balance, there should be some alteration to the right to silence. The preferred option was to give the trial judge a discretion to allow an adverse inference to be made against a suspect who refused to talk in the face of questioning.

The Committee has previously stated that it believes in retention of the right to silence. However, the Committee concedes that the above proposition does have some merit if the Commission scheme as it stands is implemented. Why? Because the Committee believes that the Commission's proposed scheme put in danger the balance between civil liberties and law enforcement.

Some submissions to the Committee at the public hearing and views expressed privately also appear to accept that the inevitable effect of the Commission's scheme will be an amendment to the right to silence.

Zuckerman (1994) explains the situation that led to the English alteration to the right to silence as follows:

> *Under the regime of the Judges' Rules the right to legal advice was left largely unsupported and as a result the right to silence was effectively unavailable to the vast majority of suspects who have little choice but to succumb to police demands for answers.*
>
> *The operation of the Police and Criminal Evidence Act 1984 threatened to change the low take-up rate of the right to silence. For the first time in English legal history, suspects acquired a truly meaningful right to legal representation in the police station. When attended by a lawyer, the suspect will be made well aware of the advantages of keeping quite and could be given the support necessary for maintaining silence in the face of persistent police attempts to get him to talk. Since the investigation of crime is heavily reliant on the interrogation of suspects, a reversal of the present position where only a minority of suspects decline to make a statement, would create so momentous an obstacle to the fight against crime that no criminal justice system in the world would find it tolerable. Judges and policemen became alarmed that the balance was tilting too much in favour of suspects. They started pressing for the curtailment of the right to silence precisely because it was becoming a realistic option for suspects. The fact of the matter is that the right to silence could be tolerated because only a very small minority of suspects could resist police demands for an answer.*

To adopt the Commission's scheme as it stands would, in the Committee's view, ultimately lead to the alteration of the right to silence.

8.5 PCJC Recommendation

The Committee rejects CJC recommendation 19.1

If the Parliament accepts the Commission's scheme (together with the free legal advice service) then the Parliament should also consider whether the right to silence should be modified in order to enable adverse inferences to be drawn in certain circumstances.

9. THE CUSTODY OFFICER SCHEME

9.1 The Custody Officer

9.1.1 CJC Recommendation 22.1

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

9.1.2 Background, Rationale and Scope of Obligation

The Commission's report (1994:716) stated that in allowing for pre-charge detention it was *essential* that a designated Custody Officer be responsible for the care of the person and the protection of his or her rights during this period. [Emphasis added]

Further, the Commission stated that the advantage of implementing the custody officer scheme is that someone will be made responsible and *accountable* for the treatment of persons while in custody. (1994:719)

The Commission has based this recommendation on the custody officer concept contained in the PACE system. Despite the plethora of reports produced regarding this area of the law, with the exception of the NSWLRC report (1990), this concept has not been incorporated into any other jurisdictions' legislation governing pre-charge detention schemes.

The following issues regarding this recommendation can be identified:

- Is this concept, designed around the English police force, capable of implementation in Queensland bearing in mind the population concentration and distance/area differences between the two jurisdictions?
- In addition to questioning the practicality of the concept, is it economically viable?
- Will a custody officer be truly objective or is there a real risk that the custody officer will just "rubber stamp" the actions and decisions of the investigating officer?

Regarding the situation where there is no independent officer and so an investigating officer must assume the role, subject to telephonic approval by a commissioned officer:

- Does this open potential abuse for the police to claim that there was no independent officer to become a custody officer?
- Is telephonic approval effective given that the commissioned officer:
    - will have no appreciation of the actual situation; and
    - may also be likely to "rubber stamp" the actions of the investigating officer making the application?

9.1.3 Arguments Raised in Public Submissions

Support for the concept of a custody officer was scant. One proponent was the Crown Prosecutors Association, which said in its submission:

> *The Association does not have any difficulty with this proposal. While there have been some concerns about the position of custody officer in the United Kingdom, the recent Royal Commission on Criminal Justice advocated the retention of the custody officer role.* (1994:101)

Doubts were expressed by many groups. Mr Shanahan, representing the Legal Aid Office, could not envisage the custody officer being an objective person. At the public hearing he said:

> ***The Chairman:*** *Could I just ask your impression of the recommendation for custody officers?*
> ***Mr Shanahan:*** *Again, I think I have touched on it, but I think it is difficult to say that a custody officer is going to be an objective person as far as the suspect is concerned, particularly with that recommendation that a custody officer could actually be involved in the investigation.* ***I think our experience is basically that, to a suspect in these situations, the police are just one.*** *It does not matter who the person is—whether they are an inspector or a superintendent or the commissioner—it is the police that have got me here; they are questioning me. If they have got someone that I have never seen before who comes in and says, "Is everything okay?", it is just another police officer. I do not think it is an effective overview. As I said before,* ***I think having an independent person, a JP, is not going to be practical, but I think having a court system which is available all over the place is practical.*** (1994:15) [Emphasis added]

The submission from the Legal Aid Office was similarly opposed to the recommendation:

> *This recommendation is strongly opposed for the following reasons:-*
>
> *(a) Pre-charge detention is opposed for reasons already stated.*
>
> *(b) If the need for such a officer could be justified,* ***the last person it should be is a member of the police force, as a conflict of interest will arise****, and most likely, will be resolved in favour of a police officer eg. in deciding whether pre-charge detention is warranted,* ***it is not hard to envisage a custody officer, particularly if it is the investigating officer `doubling' as custody officer, coming to the conclusion that such detention is warranted.*** *The potential for abuse is manifestly obvious, and puts the best-intentioned and honest police officers in an intolerable position.* (1994:59) [Emphasis added]

The adoption of a concept developed in England, and found to have not worked there as well as planned, was also discussed. Mr Potts from the Queensland Law Society stated at the public hearing:

> *It appears the the English experience, so far as custody officers, has been poor. We are somewhat concerned, particularly in situations where the arresting officer is also the custody officer, particularly in remote stations. The Law Society particularly opposes that type of imposition on a person's rights.* (1994:39)

Mr T O'Gorman, representing the Queensland Council for Civil Liberties, echoed those concerns at the public hearing:

> *However, we do have considerable worries about the custody officer scheme, keeping in mind that this is borrowed from the UK PACE scheme. Last Thursday, I had the opportunity of talking for a couple of hours with Professor John Baldwin, who is one of the leading commentators in the UK and one of the authors of the research papers on these areas for the Runciman royal commission.* ***It is his view that the custody officer scheme under PACE has not worked. I certainly have a concern that the current form of the scheme will not work here.*** *There has to be something better than the equivalent of the watch-house keeper—that is what it will be—being the custody officer.* (1994:52) [Emphasis added]

Mr R. Sibley, in his submission, also voiced concerns over the impartiality of custody officers and that they may thereby act as a "rubber stamp":

> *It is acknowledged that the reinforcement of the right of silence by a Custody Officer can only be helpful although some doubts remain about the impartiality of such a person and the danger of his or her functions simply becoming a "rubber stamping" of the investigating police officers activities. As remarked earlier this is the fundamental right which must be brought home to all suspects from all backgrounds.* (1994:113)

The strongest opposition came from the Queensland Police Service and the Legal Aid Office.

The Queensland Police Service submission read:

> *The Police Service strongly objects to this recommendation in that it has the* ***potential to be economically unviable and totally impractical to the Queensland situation.***
>
> *The position of `Custody Officer' was established under the English Police and Criminal Evidence Act. It has been suggested that the concept works well in the United Kingdom. Concentrated populations and large numbers of police officers in small geographical areas undoubtedly contributes to the stated successful operation of the system.* ***However, the geographic and demographic nature of Queensland is vastly different to that in the United Kingdom.***
>
> *The Service has 335 Police Stations and 18 Police Establishments throughout the State. The appointment of custody officers in many of these Stations and Establishments would necessitate officers who are normally operational being taken off the street to perform duty within the confines of the Station.*
>
> *Additionally, several Custody Officers would need to be appointed to each 24 hour Station in order to cover the full period of each day. Clearly, this would have the effect that* ***services to the public would either be restricted or additional police would need to be employed. This would mean that a substantial burden would be placed on the Service's budget.***
>
> *Further, it is impractical to appoint custody officers at all police stations throughout the State due to the very limited number of personnel at many stations, e.g. Camooweal has two officers and Birdsville has one.*
>
> *It has been suggested that officers at these small stations contact a commissioned officer for permission to act both as arresting officer and Custody Officer.* ***If the need really exists for the position of custody officers, then the Service fails to see how the appointment of an arresting officer to act as a Custody Officer can possibly achieve the goals outlined by the Criminal Justice Commission.***
>
> *It is noted that the concept of appointing Custody Officers has not been adopted in any legislation in Australia, although each of the States and Territories with detention legislation have had the opportunity to assess the operation of the system in the United Kingdom.* (1994:41) [Emphasis added]

At the public hearing, this position was also adopted by Mr J O'Gorman from the Police Union of Employees, who criticised the concept as being unworkable:

> *As to the role and responsibilities of the custody officer—we earnestly believe that the custody officer, as proposed in this document, is* ***not only unworkable but is also the product of someone's probably fervent hope that we can get somewhere near***

> ***the British system of policing.*** *The fact of the matter is that we will never get near the British system of policing in terms of police numbers per square mile. Similarly, our population density will never reach Britain's population concentration figures. Without the human resources, and without the number of police, to be able to remove X number of police from operational duties to perform the role of the custody officer, we see this as simply not a viable proposal, even in its broadest terms.* (1994:33) [Emphasis added]

Later in response to a question by The Chairman, Mr O'Gorman expanded:

> ***The CHAIRMAN:*** *In relation to the custody officer recommendation, you were just saying that that is completely unworkable.*
> ***Mr J. O'Gorman:*** *Really, that is what I am saying. To cover three shifts a day for seven days a week, you need five police officers to allow for court, recreation leave, etc. Considering that the custody officers will have to be at most police stations that are operating on a 24-hour basis—at least those police stations—then the number of custody officers is going to be a very, very high number of police. You cannot give the job to a junior constable; it has to be someone probably at the rank of sergeant—and that is what I understand is the British system, that a sergeant at some level is the custody officer—and they have to be people pretty broadly experienced operationally. Even in the first stage, we are going to be removing some very important resources to try to get experience for the young people, and the majority of the people are young people. We are going to be removing the support for them that is absolutely necessary.*
> *If we take those people out of the system, then we do not know whether they are going to be sitting around for how many hours a day without anything to do or whether they are going to need two or three of them at a particular station. At the Brisbane watch-house, I would suggest that most police there would fall into the category of custody officer now, without all the responsibilities and duties that these recommendations place on them.* (1994:34)

9.1.4 Analysis and Comment

The Commission relies heavily on the English experience in its argument for the introduction of custody officers. Under PACE, a formal custody officer scheme is established. Officers above the rank of Sergeant are specifically assigned to stations as custody officers and they are responsible for ensuring the lawfulness of arrests as well as the sufficiency of evidence.

The Runciman report (1993:30-32) in reviewing the English system, had the following relevant comments to make about the performance of the custody officer scheme:

- The report referred to research which indicated that the police were *not entirely comfortable with the role* of custody officer and that their performance *of it, though improving still leaves* as custody officers *something to be desired*. It was also recognised that it may *be unrealistic to expect a police officer to take an independent view of a case investigated by colleagues. As far as the evidence needed to substantiate a charge is concerned, the custody officer is hardly in a position to take a different view from the investigating officer because in the nature of things he or she will not have the same direct and detailed knowledge of the case. (1993:31)* However, the report recommended that the custody officer concept remain with the police.

- The report recommended that the custody officer should continue to be a police officer of at least the rank of sergeant, and that *an officer whose substantive rank is less than that of sergeant should never be employed as custody officer at any police station where a suspect may have to be detained for a full initial six hour period.* (1993:31)

- The report regarded of paramount importance that custody officers should be properly

equipped by training for the task. In addition to a minimum of two days training provided to all newly promoted sergeants, there should be re-familiarisation training where necessary. (1993:31)

· PACE requires a custody officer not to be involved in the investigation of any offence for which he is the custody officer and **this separation of roles is fundamental**. The difficulty of achieving this was recognised and meant that the commander of the police station must carefully manage and supervise both custody and investigating officers. The report recommended that station commanders be fully trained in this regard and that this requirement be part of their job description. (1993:32)

· The report recommended that custody functions could be centralised and a central specialist custody officer service provided. (1993:32)

The Committee believes that it is that the manpower, structure and budget of the English Police Service is at an entirely different level to that which exists, or can feasibly exist, in Queensland.

The NSWLRC report (1990:93-94) recommended that the NSW police service consider the introduction of a formal system of "Custody Officers" to supervise their proposed custodial investigation scheme. This was based on the "success" of the English model. However, it is to be noted that the NSWLRC report (1990) was produced three years prior to the findings of the Runciman report. The NSWLRC did recognise that:

> · *In England and Wales the distances are much smaller and the population is less spread out, so it is possible to designate regional police stations as custody stations, provide each with at least one custody officer per shift, and expect all arrested persons who might be subject to custodial investigation to be brought to those stations. In New South Wales there are many small country stations, often staffed by only one or two officers. (1990:para 4.30)*
>
> · *Secondly, the British police forces are also older and more experienced, on average, with many senior sergeants who can be expected to handle the role of custody officer.* (1990:para 4.30)

However, the NSWLRC did not see these differences as fatal to the adoption of a similar system in NSW, and said it would be *easy enough to build in common sense exceptions to the requirements (as PACE does, in fact) to cater for the impracticality of providing a full-time custody officer in some areas, and for the temporary absence of the custody officer in other police stations.* The Report did not go on to provide how this "easy enough" task would be achieved.(1990:para 4.31)

The Commission has placed a lot of weight on the concept of a Custody Officer. At page 718 it reasoned that if the concept was not adopted, the alternatives were to:

A. Abandon the scheme and maintain the existing practices with all the attendant problems documented in Chapter Seventeen; or

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

With respect to the above reasoning the Committee makes the following comments:

· Alternative A represents a blatant closed-mind approach to the issue at hand.

· Alternative B is in total derogation of the argument by the Commission that espouses the importance of Custody Officers. If custody officers are *essential* to the proposed pre-charge detention scheme then the Committee questions how the proposed scheme can be considered when the investigating officers are left to function without supervision.

The Queensland Police Service submission also made this point:

It has been suggested that officers at these small stations contact a commissioned officer for permission to act both as arresting officer and Custody Officer. ***If the need really exists for the position of custody officers, then the Service fails to see how the appointment of an arresting officer to act as a Custody Officer can possibly achieve the goals outlined by the Criminal Justice Commission.***

The Committee believes that the custody officer concept as exposed by the Commission is neither practical or economically viable in the context of Queensland. The PACE system of custody officers is tailored to the English police service. It may be regarded as a success there, (although this is doubted) but, it is not a concept that can be transferred to a completely different jurisdiction such as Queensland.

The Committee feels that any success of the English system is no doubt attributed to a police force serving a country with a high population density and relatively short distances between settlements. Manpower and budget allowances there are at a far different level to that in Queensland. The Custody Officer scheme, if introduced properly (which the Committee doubts would be possible) will no doubt be expensive to establish and maintain.

The Committee doubts whether there will, in all reality, ever be impartiality on behalf of police custody officers. The Committee believes that an arrested person will have the same perception of an investigating officer as a custody officer, as they are both uniformed police officers. In any event, the Committee doubts whether there are sufficient senior police to perform this function without seriously affecting other police work.

9.1.5 PCJC Recommendation

The Committee rejects CJC Recommendation 22.1.

9.2 Responsibilities of the Custody Officer

9.2.1 CJC Recommendation 22.2

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

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

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

9.2.2 Background, Rationale and Scope of Obligation

The Commission defines the role of the custody officer as being responsible and accountable for the welfare of suspects at the police station including:

- arrested persons during the detention period; and

· volunteers attending for investigative purposes. (1994:719)

The Committee notes that throughout the report the Commission has delegated other responsibilities to the custody officer, but has not made specific reference to them in recommendation 22.1. These include:

· Recommendation 20.2: The custody officer, upon being satisfied that the person was lawfully arrested, may authorise the detention of the person for a specified period on the grounds that it is necessary to carry out certain matters.

· Recommendation 20.3: The custody officer authorises the detention of an arrested person for what he determines to be a reasonable period, such period not to exceed four hours.

The Committee queries why these have not been specifically referred to in this particular recommendation.

9.2.3 Arguments Raised in Public Submissions

By way of overall comment on the recommendation Mr J O'Gorman, from the Queensland Police Union of Employees, said the following at the public hearing:

> *As to the roles, duties and responsibilities of the custody officer and the expectation that it can work in the method that is being proposed, we again respectfully submit that it is not indicative of a grasp of the realities of policing.* (1994:33)

The Queensland Law Society submission also stated:

> *Recommendations 20.2 and 20.3, 21.1 and 22.2 deal at some length with powers, duties and discretions of the custody officer to ensure compliance with the proposed procedures. Each of the recommendations referred to forms part of the regulatory frame work which the Commission sees as essential to protect the rights of a suspect. Recommendation 22.1 stipulates however that, in certain circumstances, the custody officer may in fact, be actively engaged in the primary investigation which has brought the suspect into police custody. The suggestion that the custody officer may be actively engaged in the investigation recognises the isolated nature of many police establishments in Queensland and the inevitability of circumstances that will frequently lead a police officer fulfilling both roles. The possibility that the investigating officer and the custody officer may be one and the same person is unacceptable and renders even the appearance of safeguards illusory.* (1994:63)

As to each responsibility, the submissions were as follows:

· *Informing the suspect of his or her rights*

Mr Shanahan, the Legal Aid Office representative at the public hearing, reiterated the concern regarding police fulfilling the role of custody officer. In response to the following questioning he said:

> ***The CHAIRMAN:*** *You made the comment there that suspects should be informed of their rights at an early stage. Practically, what are your suggestions?*
> ***Mr Shanahan:*** *We suggest that those rights be explained to them by an independent person, by a JP—a person not the police involved in the investigation. Quite frankly, the way we see rights being explained now by police officers is a quick flurry of words with no attempt to make sure that the person understands what the warning is about. It is simply, "Do you understand that?", "Yes", and away we go. The warning by police is a warning by people whose interest is that the person does not abide or*

does not understand their rights and so continues to talk to the police. (1994:12)

Mr Shanahan also proposed that a reading of rights should be recorded:

> ***Mr Shanahan:*** *That is so, but I would think over time, if it was a police practice to inform people of these rights and where it was done it was recorded and attempts were made to record it, even if they were physically unsuccessful in doing so, then the scope of attack is reduced over time, especially if it is later confirmed in the video at the police station.* (1994:12)

Mr Jerrard, representing the Bar Association, made it known at the public hearing that the Association originally suggested that it should be a statutory duty on the police to warn persons in custody of particular rights. Mr Jerrard also noted that the recommendation does not actually oblige the custody officer to inform a person of the right to have a legal representative or, if necessary, an interpreter. Mr Jerrard said:

> *The Bar Association had originally suggested that, if there were to be a power of precharge detention, there should be a statutory duty on the police to warn persons in custody of particular rights. The ones that we had identified were the right to remain silent or to refuse to participate in any investigation, the right to communicate with a friend or relative, the right to have a legal practitioner present during any interrogation and the right to an interpreter where this is necessary. The report recommends that the custody officer be under an obligation to advise of the right to communicate, the right to remain silent and of a right to free legal representation or advice. It does not actually suggest a duty in the custody officer to inform of a right to have a legal practitioner present, nor of a right to an interpreter where necessary. Those are two things that the custody officer should be obligated to advise of.* (1994:22)

The Queensland Police Service questioned the viability of the requirement that the person must sign an acknowledgment of having been informed of his or her rights:

> *Additionally at page 722 of the report the Commission recommends that:*
>
> *The information regarding the rights of the suspect should be given both orally and in writing by the Custody Officer. It would be insufficient to provide it only orally because the suspect may be in such a state of shock or nervousness at being at the police station for investigation that he or she may not be able to take in the information. By providing the suspect with a written notice, the suspect can refer to that during the period at the police station to be reminded to the rights. The provision of only a written notice would disadvantage those who were unable to read. The notices should be produced in a number of languages.*
>
> *Upon receipt of the information, the suspect must sign an acknowledgment of having been told and having received written notice of his or her rights.*
>
> *The Service questions the viability of including the rider contained in the second paragraph.* ***Clearly, experienced criminals will refuse to sign an acknowledgment that they have been provided with information on their rights.*** *Obviously, in subsequent court proceedings these persons will then deny ever being advised of their rights and argue that any confession obtained should, therefore, be inadmissible.* (1994:43) [Emphasis added]

· *Determining whether pre-charge detention is warranted*

In his submission, Mr R Sibley noted the lack of criteria on which a custody officer is to determine whether pre-charge detention is necessary:

> *As observed under Recommendation 20.2 above no criteria is clearly spelled out in this Recommendation upon which the Custody Officer is to base his or her determination that pre-charge detention is necessary.* (1994:114)

The Queensland Police Service queried the level of knowledge that a custody officer will be expected to have prior to determining whether pre-charge detention is warranted. The Service pointed out that in some cases this could involve considerable delays as a cursory review of the evidence would not be sufficient on which to base a determination.

> *The Service notes that at page 719 of the report, the Commission outlines the role of the Custody Officer. Reference is made to the following aspects of the suggested responsibilities:*
>
> *The Custody Officer should ... assume primary responsibility for the manner in which the suspect is treated, as well as supervising the detention. This responsibility carries with it a number of obligations ... These include:*
>
> · *determining whether pre-charge detention is warranted*
>
> · *authorising investigative procedures involving the suspect*
>
> *The Service has concerns with these two points. Initially, there is concern as to what level of knowledge of each case a Custody Officer will be expected to have prior to determining whether pre-charge detention is warranted. It is possible that considerable delays may result, particularly in complicated matters such as fraud investigations, while the Custody Officer acquaints him/herself with the details of the case. A cursory inspection of the available evidence would not necessarily allow for a considered decision to be reached.* (1994:42)

· *Authorising investigative procedures involving the suspect*

The Queensland Police Service also did not see the need for the custody officer to authorise some investigative procedures.

> *Secondly, the Service does not see the need for a Custody Officer to be required to authorise investigative procedures, such as the medical examinations of a suspect, when an application must first be made to a Magistrate to conduct any such examination. Surely, it cannot be suggested that a Custody Officer should have the power to override the judicial decision of a Magistrate to allow a medical examination to take place. Any such authority is fraught with danger, and is not one the Police Service would seek.* (1994:43)

· *Identifying and attending to any `special needs' of the suspect*

In relation to "special needs" persons, Mr Shanahan stressed that the presentation of a written notice to the person was not sufficient. The obligation needs to extend to actually explaining to the person the contents of the notice, and, if necessary, the explanation has to be in a language that the person understands.

> ***The CHAIRMAN:*** *So why would you not have a very succinct form which you would present to a person who is detained with their rights on it? It does not have to be voluminous.*
>
> ***Mr Shanahan:*** *No, but I think also that presupposes that that person can read; it presupposes that they will understand the language that is used in the document. I think that it has to go a bit further than that. There needs to be an explanation to them. A lot of them are non-English speaking now, too, so there needs to be an explanation in a language that they understand as to what their rights are. I think*

> *that there might be deficiencies in simply handing them a one-pager that says, "These are your rights." If you look at juveniles being questioned and the role of the independent person in the questioning of juveniles, their role, as set out in the legislation, is actually to ensure that the child, the juvenile, understands what their rights are and there is an obligation to explain it in a language that they understand.* (1994:12)

Mr Jerrard, on behalf of the Bar Association, also said that provision should be made for "special needs" cases:

> *The Bar Association had recommended that there be special provision made for persons suffering disabilities, for Aborigines and Torres Strait Islanders and for children, and that there should be a specific provision that persons in custody are to be treated with humanity and respect for human dignity—prohibiting any cruel, inhumane or degrading treatment in custody. There seems no reason for not including that in any relevant legislation or package.* (1994:22)

· *Ensuring that the suspect has medical assistance, rest and refreshment*

The Crown Prosecutors Association agreed with this responsibility, but, their submission contained a reminder that police officers are not social workers.

> *It is of course important that persons detained in police custody are properly treated, and that they do not have to endure inhumane conditions. However it should be remembered that police officers are not social workers, and they should not be forced to undertake that role. Moreover, most of the persons detained in police custody are in fact guilty of crimes, and the police should not be forced to adopt an overly benevolent attitude towards them.* (1994:101)

· *Ensuring proper custody records are maintained*

Mr Sibley raised a valid point regarding potential abuse of the custody record. His comments were as follows:

> *The Custody Officer is responsible for ensuring that proper complete and comprehensive custody record is maintained. This will ultimately be by way of computer entry and is in some ways similar to that presently kept by the Watchhouse Keeper. (Report p 728) The important question that is not addressed is what form of outside monitoring is proposed to ensure that the system is not abused over time? Some questions that present themselves are:*
>
> *Who will have access to the records and for what purpose?*
>
> *What in the way of regular outside review is proposed to ensure that the inevitable rubber stamping of the investigative officer's actions and beliefs is not taking place?*
>
> *What mechanism will be put in place to attempt to develop over time appropriate policies for the determination of what are acceptable grounds in the light of what is being entered in the record as the basis for detention?*
>
> *In Chapter 23 it is proposed that there be greater accountability in the form of internal monitoring processes by the Queensland Police Service itself and a reporting of breaches by the courts and its officers (Recommendation 23.1). This will no doubt be of some effect in the more blatant cases of abuse however in my view some form of routine external and independent assessment of the way this important and novel intrusion into Queensland citizens lives is being administered is required.* (1994:113)

9.2.4 Analysis and Comment

The Committee's comments regarding this recommendation are as follows:

- No specific responsibility is placed on the custody officer to review the lawfulness of the arrest and the sufficiency of evidence supporting the arrest. The Committee believes this will exacerbate the potential abuse of the power to arrest in order to question a person. The Committee reiterates its prior comments that this objective element is open to abuse and, in many cases, a true assessment of the matter may not be made and the custody officer will simply "rubber stamp" pre-charge questioning. This may be particularly so in the case of complex matters where familiarisation by the custody officer will be lengthy.

- The Committee is of the opinion that, where practicable, the reading of rights and subsequent acknowledgment should be recorded. This would overcome the situation identified by the Police Service where a person refuses to sign an acknowledgment. In any event the recording of the advice as to rights and acknowledgment of the suspect is a far superior objective measuring tool than merely signing a form. The recording of the process alleviates the need for a custody officer to perform the function. The recording of interviews was not widespread when the custody officer concept was introduced in the UK in 1984.

- There is a need that provision should be made for persons with "special needs". The Committee rejects the Commission's scheme, but in any event queries whether a reduced time limit on questioning should also be considered.

- Security procedures would need to be implemented to ensure that access to any custody record is controlled.

- An external system of review would need to be implemented to ensure that:

    - The functions of a custody officer are in fact being carried out and that it is not simply a "rubber stamp" of the investigating officers actions; and

    - Policies are developed to provide guidance on what are suitable grounds for detention.

- A system of "custody officer" training would need to be developed so that:

    - police officers undertaking the role are fully conversant with the requirements of that position; and

    - the role is considered by police officers to be important and distinct from normal police functions.

The Commission's recommendation suggests that the custody officers responsibilities should be included in legislation. However, the Committee notes that this requirement is contrary to the Commission's conclusion on page 729 of its report. There the Commission states that *it is conscious of the need to integrate its proposals as far as practicable with the current administrative arrangements.* And further that it is *important that, in drawing up the responsibilities of the Custody Officer at the police station, reference be made to the newly developed QPS Policies and Procedures Manual and, as far as practicable, the new requirements and procedures be integrated with existing procedures.*

The Committee considers that, if the concept is accepted by the Parliament, the requirements, procedures and responsibilities should be contained in the QPS Queensland Police Operational Procedures Manual and not in legislation. Breach of such provisions would have the following consequences:

- Any confessional material obtained during the investigation period under question would

not be automatically inadmissible. But, any voluntary confessional statements would be subject to exclusion by the exercise of the trial judge's discretion. The judge can consider each case on its particular facts by reference to the nature and severity of the breaches and the effect they had on the person being questioned.

- Possible disciplinary action against police officers responsible for such breaches.

9.2.5 PCJC Recommendation

The Committee rejects CJC Recommendation 22.2.

10. COMPLIANCE

10.1 Notification of Breaches

10.1.1 CJC Recommendation 23.1

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

10.1.2 Background, Rationale and Scope of Obligation

The Commission notes three available sanctions in situations where a police officer misuses or exceeds his powers and made the following comments on each:

Civil action

The Commission states that this is an expensive and time consuming option which people may not be aware of and, even if successful, may not prevent criminal proceedings being taken against the person.

Criminal prosecution

The Commission notes that it is often difficult to establish a case to meet the required standard of proof.

Disciplinary action

The Commission observes that a review of complaints against police revealed very few allegations of unlawful detention. (1994:731 and 732)

The Commission also states that, in addition to the features improving compliance offered by the Commission's proposed regulated scheme, both internal and external monitoring was needed. (1994:732)

The Commission notes the following in respect of monitoring:

- A breach of a statutory duty will often constitute an offence under the statute.
- A breach of the Commissioner of Police's instructions may constitute a disciplinary offence under the *Police Service Administration Act 1990*.
- Breaches of rules by police are most likely to be revealed during court proceedings, and, whilst there have been cases where serious breaches have been referred to the Director of Prosecutions to determine if the laying of charges is warranted, there is no obligation on any party to make such referrals. (1994:733)

Therefore, the Commission recommends a formal referral procedure whereby, if during court proceedings, it became apparent that a breach warranting criminal, disciplinary or remedial action had occurred, the matter should be referred to the Commissioner of Police.

The Commission places emphasis on the requirement that someone *who is independent of the police* should be involved in the proceedings. In this regard the Commission recommend that the Director of Prosecutions refer breaches in the higher courts, whilst in lower courts, which employ police prosecutors, an obligation be placed upon the Magistrate. (1994:733)

10.1.3 Arguments Raised in Public Submissions

The Legal Aid Office submission supported the recommendation on the condition that the matter be referred to the Criminal Justice Commission in the nature of a complaint. The Office was adamant that such matters not be referred to the Commissioner of Police who would effectively be a judge in his own court:

> *This recommendation is supported, subject to the report being made to the Criminal Justice Commission in the nature of a complaint. In no circumstances should the matter be referred to the Commissioner of Police who is being asked to be a judge in his own court. If the avenue exists for other complaints to be made to the Criminal Justice Commission, why should such a serious matter not be referred to the Criminal Justice Commission, serious because it involves a breach of obligations concerning the legal rights of an individual, particularly as it affects his liberty.* (1994:60)

The Crown Prosecutors Association gave conditional support to the recommendation. The Association's submission stated that the referral should only be required when the judge or magistrate has found that there is compelling evidence to that effect.

> *This Association has no objection to the recommendation which creates an obligation to refer instances where a police officer may have contravened a statutory duty or a general instruction. However it is our view that such a referral should only be required when there has been a finding to that effect by a Judge or Magistrate or there is compelling evidence to that effect presented in the case.*
>
> *Experience has shown that cases arise where an accused person might allege police misconduct and no compelling evidence supporting the allegation is given. Bald allegations, in our view should not be sufficient justification for the requirement to refer. Similarly, a finding of not guilty should not, of itself, be viewed as a sufficient basis to require a referral.* (1994:102)

The Queensland Police Union of Employees, represented at the public hearing by Mr J O'Gorman, had little difficulty with recommendation:

> *As to recommendation 23.1, which relates to the notification of breaches, basically my summation of it is that the judiciary has a responsibility to advise the Commissioner of Police or the Director of Prosecutions of breaches of these proposed procedures. We do not have a difficulty with that. As to any decision that it become a statutory duty rather than the existing situation in which members of the judiciary make an assessment as to whether it is serious enough to recommend further investigation and so on, that is fairly irrelevant to us in the current day and age because the CJC can and does commence investigations in the public interest, if it becomes aware of that sort of an irregularity.* (1994:33)

However, the Queensland Police Service objected to some of the Commission's comments in relation to this recommendation:

> *While the Service is not attempting to avoid accountability, it does wish to express its displeasure with some comments contained in relation to this recommendation.*
>
> *At page 731 of the report the Commission claims:*

> *It is often difficult to establish a convincing case to meet the required criminal standard of proof against those who abuse their powers. For instance, section 137 of the Criminal Code creates the offence of `Delay To Take a Person Before a Court'. Experienced criminal practitioners have indicated that numerous Queensland Courts have found that confessions have been obtained during periods of unlawful detention after arrests. Despite such claims, the Commission was unable to find any instance where a police officer was charged with an offence. Inquiries with the Office of the Director of Prosecutions also did not reveal any such cases.*
>
> *Later, at page 732, the Commission adds:*
>
> *A review of complaints against police made to the Commission revealed very few allegations of unlawful detention. This could be explained partly by the fact that the law in the area has been so unclear.*
>
> *The Service objects to the conclusion drawn in this portion of the report, particularly in view of the fact that no evidence is produced to substantiate the claims made. It is equally probable that few allegations of unlawful detention are made because very few occur.*
>
> *The Commission then discusses improving compliance with the law yet offers no evidence that police officers are not presently complying with it.*
>
> *Additionally, the Police Service deeply regrets the Commission's thinly veiled suggestion on page 733 that police prosecutors would not report breaches of the law committed by police officers to the Commissioner. The Service's Prosecutions Corps is comprised of a very professional, highly trained, and committed group of officers. Unfounded innuendos can only damage the high esteem with which these officers are held by the Courts.* (1994:44)

The Director of Prosecutions in his submission posed the question as to whether sanctions would be imposed on those who failed to refer a matter:

> *Yet the Commission recommends that, even though evidence has not been excluded by a court (recommendation 23.1), where in a criminal proceeding it is revealed that a police officer may have contravened a statutory duty or a general instruction issued by the Commissioner of Police certain persons, the Director of Prosecutions or the magistrate (note that no obligation is to be placed on a judge - I wonder why?) who has heard the matter should be responsible for informing the Commissioner of Police of any breach that may warrant criminal, disciplinary or remedial action. Is the magistrate or myself to be subject to penalty if we do not so inform the Commissioner of Police. If police are themselves to be subjected to sanctions, why should not we?* (1994:85)

10.1.4 Analysis and Comment

The public submissions generally supported the concept requiring notification of possible breaches by police officers of statutes or instructions. However, the Committee notes that some submissions suggested that conditions be placed on that requirement, namely:

- A referral should only be made where the judge or magistrate has made a finding that there has been such a breach, or the evidence to that effect is compelling.

- The referral should not be made to the Commissioner of Police because he is not an independent person.

Another issue, not raised in the Commission's report, is the form that the referral should take.

The Committee is not convinced that it is necessary that a judge or magistrate make a finding that there has been a breach of a regulation or statute in order to trigger the referral mechanism.

The Committee's reasoning for this is simple: the judge or magistrate may have no need to resolve the issue. For example, it may be complained that a confession was obtained in breach of the Commissioner's guidelines relating to video taping requirements. However, the judge may, before determining this issue make a ruling excluding the evidence on another basis. Equally, the court may be able to make a ruling on the basis of undisputed evidence, therefore alleviating the necessity of adjudicating on the credibility of the witnesses.

The Committee questions the Commission's reasoning for nominating the Commissioner of Police as the receiver of referrals. The Commission's report states:

> *The most important requirement is that someone, who is independent of the police and involved in the proceedings, be given the specific responsibility to ensure that such matters are referred.* (1994:733)

On this basis the Commission placed the responsibility to make referrals on a magistrate in the lower courts (where police prosecutors operate) and to the Director of Prosecutions in the higher courts.

The Committee concurs that independence is important. However, independence is not as important in the referral process as it is in the investigation of complaints referred.

The Committee is hesitant to recommend that any court, including the Magistrates Court, be required to implement administrative action such as referral for disciplinary action.

The Committee does not see any problem with providing that police prosecutors or the Director of Prosecutions refer matters when they arise.

The relevant court, at its discretion, may take action if it deems it necessary to ensure that matters are referred. This may include requesting the relevant officer of the Court to take action.

The Commission believes that all referrals of breaches of statute or directions should, in the first instance, be referred to the CJC, not as the CJC suggests to the Commissioner of Police. The CJC may subsequently refer the matter to the Commissioner of Police, the Director of Prosecutions or a misconduct tribunal. However, it is important that the CJC is responsible for overseeing complaints against police.

10.1.5 PCJC Recommendation

The Committee amends CJC Recommendation 23.1

The Committee recommends that where, in a criminal proceeding, it is revealed that a police officer may have contravened a statutory duty or a general instruction issued by the Commissioner of Police, the person prosecuting the matter should be responsible for informing the Criminal Justice Commission of any breach that may warrant criminal, disciplinary or remedial action.

The referral should be made even if the court does not exclude any evidence obtained in breach of these requirements.

The obligation to refer should not be contained in statute. In the case of police prosecutors, the Commissioner, and in the case of Crown Prosecutors, the Director of Prosecutions should issue a direction explaining the criteria and process, for referral.

The obligation to refer should not be placed on any court. However, a court may at its discretion take any further action it deems necessary.

10.2 Exclusion of Evidence

10.2.1 CJC Recommendation 23.2

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

10.2.2 Background, Rationale and Scope of Obligation

The Commission opined, at page 736 of its report, that exclusion of improperly or unlawfully obtained evidence *is potentially a valuable strategy for promoting police compliance with procedural requirements*. This was despite the Commission recognising the greater willingness of the High Court to exclude such evidence on the basis of judicial discretion.

The Commission favoured the definition of exclusionary rules in legislation rather then relying on the discretion of the courts. The Commission supported its argument by relying, inter alia, on the following:

- ALRC criticism of the Australian exclusionary rules.
- The shift by the High Court to the exclusion of evidence is yet to be demonstrated by the District and Supreme Courts.
- Traditionally the police have been willing to "take a chance" because of the courts' reluctance to exclude unlawfully or illegally obtained evidence.
- Definition in legislation of circumstances where such evidence can be admitted will provide:
  - greater guidance to courts; and
  - clear guidelines to police. (1994:734-737)

10.2.3 Arguments Raised in Public Submissions

Qualified support for this recommendation was offered by the Legal Aid Office:

> *This recommendation is supported, with the qualification that if it is so obtained it is prima facie inadmissible and the onus is on the prosecution to show why it should be admitted.* (1994:60)

But, by and large, the recommendation was not well received. Most submissions argued that judicial assessment of the circumstances was an important part of the criminal trial process and should not be superseded by legislation.

Mr J O'Gorman at the public hearing stated the Police Union of Employees position as thus:

> *As to recommendation 23.2, legislative recognition of exclusionary rules, we have a serious concern with that. We believe it should be up to the judicial officer in the court, whether it be a magistrate or a judge, to assess the admissibility or otherwise of evidence.* ***If that role is taken away from the judiciary and made a very tight, restricted set of rules, that does not benefit the proper discharge of the criminal justice process in our society.*** *I think we are all aware that, if there are rules to cover a certain set of circumstances, it either makes it far too restrictive or makes the rules available for manipulation. I do not think that we need either set of circumstances. I think it should stay as it is—that is, the judiciary can make an informed assessment of whether something should be admitted as evidence or not,*

and then the course of appeal is still open. (1994:33)

The Queensland Police Service was similarly opposed because it would be impossible to define all circumstances in legislation:

> *The Commission recommended that the circumstances under which unlawfully or improperly obtained evidence may be admitted in court proceedings should be defined in legislation. The Police Service is of the view that it would be difficult to define all such circumstances within legislation. The resultant legislation could have the effect of restricting the discretion of the judiciary. The decision laid down in Bunning v Cross (High Court of Australia) adequately addresses the situation of judicial discretion in admitting evidence. Additionally, any error in the exercise of judicial discretion is subject to remedy by appeal.* (1994:45)

In his submission Robert Sibley also saw the trial judges discretion as an important balancing feature:

> *I am not yet convinced that such a legislative scheme is either necessary or desirable. The discretion of a trial judge is an important balancing feature of a criminal trial. The grounds upon which and the way in which such discretions should be exercised have been extensively spelled out in the various judgements of the High Court in recent times.* (1994:114)

The submission from the Crown Prosecutors Association of Queensland also stressed that the best method of ensuring justice is done, is for a judge to consider all circumstances of a case before determining whether to exercise his discretion. The submission also refuted the Commission's suggestion that the courts are reluctant to exclude unlawfully or illegally obtained evidence. Generally, the Association stated;

> *This Association agrees that there is a need for a degree of certainty in this area. However, it must be recognised that the investigation of serious criminal offences is an area which calls for discretionary judgements at all stages of proceedings.*
>
> *That is to say, it must always be borne in mind that the public have an interest in the detection and punishment of criminals, and most fair minded members of the public would be outraged if the "guilty" were allowed to go unpunished because of technical breaches at the investigative stages.*
>
> *Thus whilst the prescription of regulations and guidelines is, prima facie, a positive step, the judiciary must be left with a discretion to admit evidence which is highly probative, but which was obtained contrary to the strict letter of the regulatory system.*
>
> *To give the obvious example, assume a 4 hour detention period is adopted. What happens in a case where an accused confesses to murder, on tape, 15 minutes after the expiration of the period?*
>
> *This Association has full faith in the judiciary to achieve fairness in such a situation and would be appalled if a rigid system compelled the release of such an offender.* (1994:96)

This position was later reiterated:

> *The Association wishes to reiterate its concerns that whatever rules are enacted regarding the treatment of suspects by police, room is left for the exercise of judicial discretion. The Members of this Association are greatly troubled by the prospect of any transgression of*

these rules rendering a confession inadmissible as a matter of law.

It has long been the law that breaches of the Judges' Rules by investigating police do not, of themselves, render a confession inadmissible (see Lee v. The Queen [1950] 82 CLR 133; Dansie v. Kelly; ex parte Kelly [1981] QdR 1).

It is submitted that there are sound reasons for such an approach. As was observed, by the High Court in Lee (at 154):

"the protection afforded by the rule that a statement must be voluntary goes so far that it is only reasonable to require that some substantial reason should be shown to justify a discretionary rejection of a voluntary admission".

It is submitted that breaches of rules regarding the treatment of suspects ought not of themselves render a confession inadmissible, but that each case ought to be considered on its merits with the nature of the breach and its effect in procuring the confession being evaluated by the Court (see Duke v. The Queen [1989] 64 ALJR 139 at 141).

The creation of an inflexible set of rules where any breach of which, however technical, leads inevitably to the exclusion of an otherwise voluntary confession, will greatly hamper the investigation of criminal offences and the administration of justice generally. (1994:98)

As to Recommendation 23.2, the Association's review, and subsequent conclusion, is as follows :

Chapter 23 includes a recommendation (23.2) "that the circumstances under which unlawfully or improperly obtained evidence is to be admitted in court proceedings should be defined in legislation". The object of this recommendation is said to be the need to send a strong signal to police that non-compliance with the procedural rules will result in the strong likelihood that a prosecution will be lost. Thus, police compliance will be encouraged. The reason, it is argued, for the requirement of a legislative scheme setting out rules of admission is the "reluctance of the courts to exclude unlawfully or improperly obtained evidence".

This Association wholeheartedly supports efforts to encourage police compliance with procedural rules in the investigation of criminal offences. ***However, we do not accept at all suggestions that the Courts are in any way reluctant to exclude unlawfully or improperly obtained evidence.*** *Argument in support of the recommendation asserts firstly that only recently has the High Court given more emphasis, towards "guarding the rights of a suspect in police custody" and secondly that "the shift in approach is yet to be demonstrated to any great extent in the Supreme and District Courts of the States."*

In the case of the High Court we need only refer to the long line of decisions which have established the law in relation to the admissibility of evidence unlawfully or improperly obtained, for example:

The King v Lee [1950] 82 CLR 133;
The Queen v Ireland [1970] 126 CLR 231;
Bunning v Cross [1978] 141 CLR 54;
MacPherson v The Queen [1981] 147 CLR 512;
Cleland v The Queen [1982] 151 CLR 1;
Williams v The Queen [1986] 161 CLR 279

The decisions in Pollard v The Queen [1992] 110 ALR 385 and Foster v The Queen [1993] 113 ALR 1 referred to in support of the claimed recent change of emphasis by the High Court are merely examples of specific application of the same rules of admissibility and discretionary exclusion as have been confirmed by the High Court since at least 1950. ***It is the view of this Association that the law in this area is clear and well settled and is applied appropriately on a daily basis by the Courts of this State.*** *At the time of writing, this Association is aware of 2 murder cases currently proceeding in which the Supreme Court will be required to apply those rules. This Association has every confidence that the law will be correctly applied given the particular circumstances of those cases. Many recent examples where Supreme and District Courts have applied the same rules can be given. In some of those cases evidence was excluded, in others it was admitted.*

The point is not whether a message has been sent to police officers in those cases where the evidence was excluded but rather whether justice was done in those specific circumstances. We believe that the Criminal Justice system should not be constructed around an intention to ensure that police officers behave appropriately. Rather, its objective should be that offenders are brought to justice.

As recognised by the High Court in The Queen v Ireland circumstances will arise which require the Courts to exclude evidence unlawfully or improperly obtained. Barwick CJ explained the positions concisely: (at p.335):

"Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighted against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

However, one of the consequences of having rules of admissibility defined in legislation is that it is not possible to do justice in all circumstances unless the legislation is drafted so as to give an overriding discretion to the trial judge. If that be the case then we see no need to change the current position. To do so would be to legislate for the sake of legislating.

In our view, since criminal cases provide a myriad of circumstances in which those issues must be considered, the best method of ensuring that justice is done in individual cases is to retain the discretion in the trial judge. *With respect we adopt the following passage from the joint judgement of the High Court in The King v Lee wherein their Honours adopted the words of Street J in R v Jeffires [1947] 47SR (NSW) at pp.311-314.*

"It is a question of degree in each case, and it is for the presiding Judge to determine, in the light of all the circumstances, whether the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him.

The obligation resting upon police officers is to put all questions fairly and to refrain from anything in the nature of a threat, or any attempt to extort an admission. But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon the particular circumstances of each case

depends the answer to the questions as to the admissibility of such evidence."

This Association therefore does not accept that there is a need to provide greater guidance to courts so as to improve the effectiveness of exclusionary rules. Nor do we believe that one of the objects of the Criminal Justice system should be compulsory exclusion of evidence in order to ensure appropriate police behaviour. (1994:102) [Emphasis added]

Finally the submission from the Director of Prosecutions made a timely comment regarding the jury considering "unlawfully" obtained evidence and public confidence in the criminal justice system:

At page 669 it is stated that convicting on unlawfully obtained evidence does little for public confidence in the legal system. ***The truth is that the public confidence in the system would be eroded if, when justice required it, "unlawfully" obtained evidence could not be taken into account by a jury in determining whether the accused was guilty.***

One cannot leave the comments appearing on page 669 to the effect that the High Court is increasingly unwilling "to tolerate" the practice of unlawfully obtaining evidence without reminding the Parliamentary Committee that the Court was concerned with maintaining the supremacy of parliament over the courts. In Williams there was a statutory requirement that the person be taken before a magistrate as soon as possible and in Ireland there was also a statutory requirement that was breached. The High Court recognises the supreme right of parliament in respect of these matters; it is therefore incumbent upon a parliament to enact legislation that will do right to victims as well as to wrongdoers. If the parliament gets it wrong, even though justice is the victim, the parliament's will must prevail. It behoves the parliament then to ensure that it does not get it wrong. The parliament will get it right if it considers the rights of victims of crime and then balances those rights against the rights of the wrongdoer to be protected against oppression, deceit, unfair practices and inducements.

Any legislation recommended by the Parliamentary Committee will determine the course of our criminal justice system for a good many years ahead, for good or ill. I therefore implore the Committee to take account of the abovementioned views before determining a final outcome. (1994:86) [Emphasis added]

10.2.4 Analysis and Comment

The CJC's recommendation 23.2 is hard to justify in the public interest.

The ALRC (1975:para 298) recommended that any evidence obtained in contravention of the law (common or statutory) should be inadmissible in criminal proceedings unless the prosecution could convince the court to exercise its discretion to admit the evidence, on the basis that the admission of such evidence would specifically and substantially benefit the public interest, without unduly derogating from the rights and liberties of any individual.

This recommendation, including a statement of balancing test factors to be applied by the court, was adopted by the NSWLRC (1990:para 6.45). The NSWLRC drew on support from submissions that stated if the new regime gave police clear rules to operate under and the power to detain for questioning, then the courts should no longer be prepared to tolerate police illegality or impropriety.

In contrast the Tasmanian LRC (1990:13) recommended that its proposed legislation *should not change in any way the judicial discretion to exclude evidence which has been illegally obtained, or which, if given, would unfairly prejudice the accused.*

The Committee notes that the ALRC report was written in 1975 prior to the significant

developments in electronic recording. Further, the NSWLRC Report published in December 1990, whilst supporting electronic recording, was published prior to such recording commencing in that State. At page 144 (para 6.15) it was noted that electronic recording was to commence in Sydney in 1991 with equipment to be provided to all district stations in New South Wales over a period of about 2 years. Therefore, both reports were written without the benefit of seeing whether video recording being available to judges would enhance their ability to decide whether confessional evidence should be excluded.

The Committee has already expressed its concern that it is impossible to legislate to cover every eventuality. The advantage of the current law regarding exclusion of evidence based on the trial judge exercising either the "fairness" or "public policy" discretion, is that each case is considered on its own facts and circumstances. It must also be noted that prior to considering these matters the court must be satisfied, on the balance of probabilities, that the confession was voluntary. The Committee considers that the case law in this regard, as developed over the years, has provided sufficient guidance as to the circumstances in which evidence may be excluded. It must be stressed that, in addition to the possible exclusion by the trial judge, the accused has an opportunity to subsequently appeal a decision not to exclude such evidence. However, after an acquittal, the Crown, representing the public, whilst it may appeal against the judge's decision, cannot present further charges.

The public submissions revealed strong opposition against this recommendation. The favoured view was that legislation could not provide for all circumstances of a case. Proper consideration could only be given by a judge, and this was in the interests of justice. Further, some submissions argued that courts currently do exclude evidence when the circumstances warrant exclusion. No evidence has been put before the Committee to support the allegation that courts do not exclude evidence when necessary.

The Committee notes the apparent absence within the CJC's report of any empirical evidence to back up its claims that the lower courts do not often exclude evidence. The anecdotal evidence which the Commission received clearly conflicts with views expressed to the Committee on the issue.

As the submission from the Crown Prosecutors Association noted:

> *The Association does take exception to a number of extraordinary factual assertions contained in the report. For example, the statement made at page 734 of the report that "By and large, the tendency for courts is to admit available evidence, even if it was unlawfully or improperly obtained." This is wrong. As we indicate later in our submission, it is the experience of our members, which is considerable, that judges in this State do exclude such evidence if the circumstances of the particular case so demand.* (1994:94)

In any case, the threshold question must be asked: is it in the public interest that probative, voluntary but unlawfully obtained evidence be excluded? The answer can only be answered in the affirmative in rare cases. The Committee considers that the Commission's recommendation is a misguided attempt to force an increase in the incidence of exclusion.

The Committee concurs with the view of the majority of submissions that the CJC's recommendation circumstances under which unlawfully obtained evidence may be admitted, which seeks to define in the legislation be rejected.

10.2.5 PCJC Recommendation

The PCJC rejects CJC Recommendation 23.2.

10.3 Admissibility of Unrecorded Confessions

10.3.1 CJC Recommendation 23.3

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

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

10.3.2 Background, Rationale and Scope of Obligation

At the time of writing the ALRC Report (1975) and when PACE was introduced in England (1984) electronic recording of interviews was almost non-existent.

In 1986 when the Coldrey Committee published its report, the potential use of video recording was still being explored, although the value of tape-recording was highlighted. (1986:ix)

The NSWLRC Report (1990:para 6.12) supported the electronic recording of police interviews, stating:

> *Apart from providing a high degree of certainty as to the contents of a record of interview, the recording provides evidence of the fairness and propriety of police practices.*

The Director of Prosecutions also highlighted the importance that electronic recording has in the area of police interrogation:

> *What we should be concerned with is the removal of pressure to speak, pressure which in these days of electronic recordings will be evidence, if it exists at all. Not enough weight has been given in the Report to the profound effect this instrument has had in ensuring that pressure is not exerted by police.* (1994:87)

The Director also noted that electronic recording was not being utilised in England when PACE was introduced. (1994:84)

As discussed in Chapter 2, the merits of this reliable form of corroboration has also been judicially recognised by the High Court in *McKinney v R*.

In Queensland since 1989, audiovisual recording has been mandatory for all interviews in relation to indictable offences. This is in accordance with the *Electronic Recording of Interviews and Evidence Manual*.

Two main issues arise from the requirement to electronically record police interviews:

- Should recording be required in relation to all offences, whether indictable or simple?
- Should unrecorded confessional material be rendered inadmissible?

Subsidiary points were also raised in the public submissions.

10.3.3 Arguments Raised in Public Submissions

Before discussing the submissions on each of the issues, some general submissions should be noted.

General support for the recommendation was contained in Mr Sibley's submission:

> *This recommendation seems reasonable and mirrors the existing Victorian Crimes Act provisions considered by the High Court in Pollard's case.* (1994:114)

The submission from the Legal Aid Office (Queensland) also supported the recommendation, but added that the explanation of rights, the giving of the caution and the person's decision should also be recorded:

> *This recommendation is supported, with the additional stipulation that there should be a record of the independent person explaining the rights of a suspect at the time of his initial contact with police, his understanding of those rights and cautions, and his decision.*(1994:60)

Mr T O'Gorman representing the Council for Civil Liberties noted that as a result of the current requirement to record interviews relating to indictable offences, the number of confessions obtained had not decreased. Further, there was a saving in court time because of the reduced need for a voir dire:

> *The obligation to caution suspects prior to any questioning is, in our view, absolutely mandatory. While I have not been here for the police and their friends today, for it to be suggested that that will somehow or other lead to a diminution of suspects talking is, in fact, to ignore the reality of what has happened since, in effect, mandatory tape-recording from a police station has been brought in. Any of you who have followed this debate with any interest over the years would have seen the Armageddon cries of the police lobby when Lucas said in 1977 that police should be obliged to tape-record all interviews. The police union and the Police Commissioner then said that the police would never get confessions. The experience since 1989 has shown that to be the lie that it was. Police are getting more confessions now under mandatory tape-recording than they ever got.* ***No material exists in the Queensland Police Service to show that tape-recording, which is now required, has led to any diminution in confessions. And, indeed, it has had a hugely salutary effect of a great saving in court time in relation to voir dire****—that is, the almost inevitable challenge to police confessions that occurred under the old regime.*
>
> *So I urge you not to be taken in by the expected argument of the police lobby that the obligation to caution suspects prior to any questioning will lead to a drying up of confessions. They brought that Armageddon spectre before us all in relation to tape-recording in 1977 and succeeded. And so, for another 12 years, the verbals flourished. But since 1989, if you talk to most police officers—except the irredeemable ones—they will express complete surprise about how many confessions they are still obtaining with video and tape-recording.* (1994:51) [Emphasis added]

Submissions Regarding Issue 1 - Should interviews relating to all offences be recorded?

The Queensland Police Service considered that it would be impractical to extend the recording requirement to all offences. The QPS submission argued:

> *At page 738 of its report, the Commission stated that:*
>
> *... the requirement that interviews be electronically recorded should apply to all offences, not only indictable offences. As a matter of practice, for most simple offences it will not be necessary for the police to conduct a formal record of interview with the suspect. However, if police choose to use any confessional material in a prosecution of a person for a simple offence, the evidence should conform to the same standards set down for indictable offences.*
>
> *The Police Service introduced electronic recording of interviews for indictable offences in 1989.* ***The Service is opposed to extending electronic recording of interviews to simple and regulatory offences.*** *The majority of interviews for these*

> *offences are conducted in the 'field'. Surveys have indicated that field recorded interviews have a success rate as low as 33% due to voice distortion caused by background noise.*
>
> *Therefore, in subsequent court proceedings in order to rely on admissions made by a person interviewed by police it would have been necessary to have transported that person to a police station and electronically recorded those admissions.* ***Clearly, it is impractical to take every speeding motorist to a police station for an electronically recorded interview so that their admission of speeding can be used in later court proceedings.*** *Again, this situation would arise at every traffic accident attended by police where it is necessary to interview the driver of the vehicle responsible for causing the accident.* (1994:45) [Emphasis added]

This view was echoed by Acting Commissioner Aldrich at the public hearing when answering a question posed by the Chairman:

> ***The CHAIRMAN:*** *... As a general question in terms of resources, if you are going to spend resources on custody officers and free legal advice, I was just wondering whether a question could be asked as to whether those sorts of funds should be spent on better videotaping equipment or more videotaping equipment.*
> ***Acting Commissioner Aldrich:*** *The short answer is, "Yes, I agree with you." I think it is important when discussing any of these issues that we separate simple offences from indictable offences. For a range of reasons which we have alluded to in our submission, it is not practical to insist upon full recording of interviews for simple offences. In respect of indictable offences, we would welcome sufficient funds to extend the range of video-recording equipment the service currently has. It needs to be remembered that it is not just the video equipment itself but you also have to have the proper facilities. Many of our older police stations are in no way soundproof, and any attempt to record interviews we currently make are almost unreadable or cannot be interpreted. I would support that, and that is purely on a financial basis as well as the other areas that we touched on.* (1994:5)

The Director of Prosecutions also expressed some concerns as to the practicality of recording interviews relating to all offences:

> *At one time I would have opposed the recommendation that there should be a requirement that all interviews be recorded whether the offence being investigated is an indictable offence or not. However, if it be the case that some offences in the present Criminal Code are removed from the new Code and are included in a Summary Offences Act then I would have no objection.*
>
> *However, it will be necessary to consider other Statutes which create offences.* ***Should the investigation in those cases as well, e.g. the police officer investigating offences under the Traffic Act, be required to electronically recorded the interview at the police station? Should a caution be required?*** *Police powers, after all, extend beyond the investigation of offences presently in the Criminal Code.* (1994:88) [Emphasis added]

However, the Queensland Law Society proposed that interviews relating to both indictable and summary offences should be recorded, and that the recording requirements should be on a statutory basis:

> *The Committee proposes that the current administrative basis for tape-recording a suspect in respect of a indictable offence be put on a statutory footing, and further proposes that the mandatory tape-recording of interviews with suspects be extended to summary offences as well as indictable offences.*

When the administrative tape-recording scheme was introduced in 1989 by the Queensland Police Service, it was said at that time that it was impractical to extend such a scheme to police interviews in respect of summary offences. The relative success of tape-recording in respect of indictable offences demonstrates the need for a similar requirement of mandatory tape-recording to be extended to simple offences, particularly where imprisonment is a potential result of a simple offence charge.

Many police have indicated their acceptance of the tape-recording procedure in respect of indictable offences and it is the Committee's experience that the rate of confessional material obtained from suspects has not in any way diminished as the result of the requirement to tape-record, despite the protestations of police to the contrary when the scheme was first proposed.

Indeed, it is the collective experience of the Committee members that not only has the rate of confessional material via tape-recording not declined but it is also significantly added to the rates of pleas of guilty.

The Committee contends that the current tape-recording scheme should be placed on a statutory footing rather than left on the current administrative basis, so that the failure by police to follow the tape-recording procedure now administratively prescribed can carry consequences of evidence exclusion if it is not followed other than for substantial and provable good reason. (1994:72)

Submissions Regarding Issue 2 - Should confessional material obtained during unrecorded interviews be rendered inadmissible?

At the public hearing, Mr J O'Gorman representing the Police Union of Employees, aired the view that to legislate so that unrecorded confessions are rejected, is unrealistic. He argued:

As to the admissibility of unrecorded confessions or admissions—I think that the basis upon which this is founded accepts that every police officer is a person absolutely devoid of any integrity, decency or honesty and that you cannot believe a word that a police officer says unless you have an electronic recording of it. I believe that is totally unfounded. There have always been allegations of verballing, manufacturing of evidence and so on. There always will be allegations of it. However, the only thing that is not challenged is the electronically recorded interview in the formal sense, which is why people are advised with increasing frequency now not to submit to electronic interviews.

To say that by legislation unrecorded confessions or admissions are rejected is not being realistic. *In the pub brawl example that I used earlier, I could talk to somebody three or four times, and that person could be a witness at that stage. I would not be recording every word that person was saying. At some stage, that person could become a suspect.* ***So the evidence that is available from earlier statements, explanations and so on is not available, because I might not have recorded them. It is not realistic. It certainly is not designed to place the best standard of evidence before the courts.*** (1994:34) [Emphasis added]

The submission from the Crown Prosecutors Association indicated that recording may, in some cases, be impracticable and that the discretion to exclude unrecorded confessions should remain with the trial judge. The Association said:

Much of that expressed in respect of exclusionary rules applied equally to the admissibility of unrecorded confessions. This Association acknowledges the desirability of recording of all confessions however ***many factors may make the***

recording of confessions improbable or extremely impracticable.

Given the current state of the law and its implementation ***this Association sees no reason why the discretion to exclude confessions and to warn juries of the dangers associated with unrecorded confessions should not remain with the trial judges.*** *Alternatively, if it is considered appropriate to legislate to make unrecorded confessions prima facie inadmissible their common sense dictates that the trial Judge must have a discretion to admit the evidence if in the circumstances of the case it would be just to do so.* (1994:104)

Conversely, the Bar Association submission stated that admissions obtained in breach of the recording requirements, should be inadmissible subject to the courts discretion to admit the evidence in special circumstances.

The most important statutory provision to ensure the proper conduct of police questioning is the requirement that a reliable record be kept. In McKinney v. The Queen (1991) 171 CLR 468, in a joint judgement, a majority of the High Court (Mason CJ., Deane, Gaudron and McHugh JJ.) were strongly influenced by the existence and increasing availability of reliable and accurate means of recording confessional statements to conclude that there should be a rule of practice requiring a trial judge to warn a jury that it may be dangerous to act upon a disputed confessional statement where there is no reliable corroboration. In the Bar's view, the statutory protection of persons held in police custody against the fabrication of incriminatory evidence is long overdue.

To guarantee adequate protection to suspects, there should be a statutory requirement that a video recording (or, if this is not possible, a audio recording) be made of police interviews. ***Admissions obtained in breach of this requirement should be rendered inadmissible subject only to a court's discretion to admit the evidence if it is satisfied that in the special circumstances of the case reception of the evidence would not be contrary to the interests of justice. In such a case, the burden of proof should rest upon the prosecution to justify the reception of the evidence.*** (1994:?) [Emphasis added]

At the public hearing Mr Potts from the Law Society discussed this issue at length. He argued that it should be compulsory to tape all conversations from the first point of police contact with the interviewee.

We say—and I have already mentioned this briefly—that ***the taping of persons from the very beginning should be made not only compulsory but there should be a change to perhaps even the Evidence Act or the Code that if conversations are not recorded then those conversations cannot be used.*** *The technology is available, and it is relatively cheap. It is the experience of many lawyers these days that police are availing themselves of doing so. There have been High Court authorities which suggest that, if the technology is available and it is not being used, then the suggestion may be made fairly that the admissions made are open to suggestions of verballing and the like. Many people in the society hoped that there would be a change after the Fitzgerald commission. I am glad to report that, at least so far as my experience is concerned, there has been a real change in police culture, but not to the extent that maverick officers, cowboys or, indeed, lazy officers—as Mr O'Gorman referred to—sometimes take short cuts, and those short cuts include recording uncorroborated conversations in their notebooks or simply, hours later, recording conversations which they believe may have occurred. Inevitably, and every day in the courts, lawyers get to cross-examine on these points, and we discover that many things simply are not recorded.*

If you go for the option of recording right from the beginning, I do not believe that you will find a situation where the police job would be made that much more

difficult. *It seems—even from the Criminal Justice Commission's reports—that very large numbers of people already simply give up the right to remain silent. It is well up in the high 90 per cents. There will inevitably be people who will rely upon their right to remain silent. We say that that right, as I have previously indicated, should be protected.* ***But the reporting, or at least the tape-recording, removes any allegations that people have been threatened or forced or there has been some pressure—however subtle or however obvious—placed upon people.*** *For example, tape-recording records of interview at the moment is one of the greatest tools for pleas of guilty to be obtained that I have ever seen, simply because your clients cannot say, "I did not say anything." When you get the tape, which they inevitably carry with them, you find that they have made full admissions to the offences. It really is a very good tool which is being used to shorten proceedings.* ***The difficulty is that, not having taping from the very beginning, quite often the interview which the person is taking part in takes place after various threats have been made or after discussions have been had about what the police are going to do and the investigations they are undertaking.*** *The end result is that, particularly after a period in the police station, many people, simply to get out of the police station, will say some things just to get out—things that they later obviously regret.* ***So we say that the taping of all conversations should really be encouraged and encouraged to the extent of being made compulsory.*** (1994:38-39) [Emphasis added]

Mr Potts stressed that the damaging statements were often made at the first point of contact and therefore taping should commence at that stage:

The CHAIRMAN: *In relation to the Queensland Law Society's submission, Item 7, Tape-Recording from Point of First Contact, I would like you to explain what the first paragraph means. Do you have the submission there? The latter part of it says—*

"... there may be a growing tendency for police to move the focus of their contact with the citizen away from the police station with the consequent greater potential for abuse of power and fabrication of evidence to occur between the point of first contact and the police station interview."

Mr Potts: *If you could just give me one moment, Mr Davies, I will reread it. The position is this: at the present time, all police stations have the triple-deck tape-recorders and video recorders. The police, when they form a view that they wish to question somebody, normally take them to the police station where an interview takes place. At some point in an interview, under the present Judges Rules, if they form a belief that there is sufficient evidence to charge the person, that person is given a warning under the present Judges Rules. Inevitably, what happens is that they give that warning as late as possible, and sometimes it is absolutely illusory to work out at what stage they have reached sufficient evidence.*

Inevitably, by the time people are being questioned these days, the police are doing so for a very good reason, that is, they believe that there is something which the person can help them with; or, alternatively, they believe that the person has committed an offence. Inevitably, it consists of somebody saying, "He did this" or "She did that." ***The concern is that many police officers, rather than getting back to a police station where an interview is conducted formally in front of a panoply of cameras and tape-recording devices, sometimes seem to use the field interview in preference—the idea being to get the person to make admissions at the earliest possible stage.***

I have previously indicated that quite often the first reaction is the best one. I am sure it is the experience of police officers, particularly when they might be dealing with someone who has some experience with the criminal justice system, that by the time that person gets back to the police station they have thought up a story or they have worked out what they should do. Quite often, they either do not take part in the record of interview or they have made up a story which may end up with the police being somewhat frustrated.

> *So the situation referred to is the focus of contact with the citizen is the roadside record of interview, the interview on the field tape, and then by the time they get back to the police station, quite often they have a person who simply says, "Now I am here, I do not want to take part in the record of interview." I suspect that that is what is really being referred to.*
> *The concern is that quite literally police officers, if they do not have the tapes available to them, and/or do not use them, inevitably in court we have a young police officer saying, "I spoke to him at the scene. He made the following admissions: a, b, c, d, e, f and g. I recorded these five hours later after I arrested him." That is done in circumstances in which he is not being shown the conversation, not being given an opportunity to corroborate it by signing it or adopt it in any way and, quite often, in circumstances, when it is finally explained to him what his rights are, he then relies upon his right to remain silent. Quite often, we have police officers who use that roadside, field tape record of interview as being their full interview.*
> ***The CHAIRMAN:** I was not quite sure what you meant when I read it. Are you suggesting that there is some softening up happening outside before the recorded interview takes place?*
> ***Mr Potts:** Without a doubt. From the police point of view, it is good policing. As I say, that very first contact is one where quite often that person's defences are down; they are unaware of their rights. From the police point of view, it is very good policing and they try to record exactly what is said then. **But the concern of the Law Society is that in those circumstances where it is not taped there are very great possibilities for verballing to occur, for admissions to be taken down which simply are later proved to be ones that are heavily contested by the defendant.** That is something that happens every day of the week, and it is done. I think we can all remember the illustrious Mr Jack Herbert who very clearly gave evidence that within the Police Service at the time that he was there verballing was really a way of life. We cannot legislate for morality; we cannot legislate to stop people taking short cuts, but what we can do is make sure that those short cuts, if any, are recorded and that a person is treated fairly, so there cannot be some threat that is used and then a tape-recorder being started sometimes hours later.* (1994:40-41) [Emphasis added]

Mr Shanahan from the Legal Aid Office supported this:

> *I would like to stress that we would suggest that there should be taping from point of first contact.* (1994:11)

As did Mr Carberry representing the Aboriginal and Torres Strait Islanders Legal Service:

> *Just by way of information—we also do agree with the proposal by the Law Society to somehow or other bring in tape-recording from first contact, but it should be informed tape-recording and that secret tape-recording should cease. But, as I have said, much of what we have said is in common with what the Queensland Law Society has said.* (1994:46)

10.3.4 Analysis and Comment

The Committee recognises that the advent of electronic recording is undoubtedly a valuable tool in:

- Providing a high degree of certainty with respect to the contents of interviews.
- Protecting police from allegations of fabrication of evidence or unfair questioning.

However, as is apparent from the submissions above, there remains some unresolved issues regarding the extent and use of electronic recordings.

The Committee makes the following comments in relation to those issues:

- It would be impracticable to require electronic recording of interviews in relation to all offences, particularly traffic offences and the like. So what is the Committee's decision? Is it just to apply to indictable offences?

- The explanation of rights, the giving of the caution and the interviewee's acknowledgment of his understanding of those matters should, where possible, be electronically recorded.

- Legislation should not provide that unrecorded confessions are prima facie inadmissible. There is no demonstrated need to make such confessions prima facie inadmissible, nor is there sufficient evidence before the Committee which would justify the substantial change to the law which the Commission is advocating. Judicial discretion to exclude will remain, its primary advantage being that all circumstances of a case can be considered before a ruling on the admissibility of evidence is made.

  In para 2.7 the case of *The Queen v Mc Laughlin* was discussed. It will be recalled that there the accused allegedly made a confession during an unrecorded interview. The failure to record was in breach of the Police Commissioner's instructions and the trial judge exercised his discretion to render the confession inadmissible.

  Further, as a result of recent High Court decisions, uncorroborated confessions may be admitted into evidence but may equally carry a warning to the jury as to their weight.

- Recording of interviews from the first point of contact is desirable, but the Committee understands that this will not be practical in all cases. Where it is not practical and the interviewee makes confessional statements, rather than perhaps truly confessional material proving the persons guilt being automatically rendered inadmissible, the trial judge will be able to consider the reasons for the failure to record and, by exercising his discretion, rule accordingly. Shouldn't this go into ERIE? In these cases should the interview be repeated at the station and recorded there?

- The above requirements should not be embodied in legislation, but rather are to be contained in guidelines issued by the Commissioner of Police pursuant to the Committee's proposed *Police Powers and Procedures Act*. This really only relates to point two and four. Point three would not be covered.

- The Committee believes that the current regiment pursuant to ERIE, which mandates interviews relating to indictable offences are to be electronically recorded, should remain unaltered.

10.3.5 PCJC Recommendation

The Committee rejects CJC Recommendation 23.3.

11. OTHER MATTERS

In addition to commenting on the recommendations contained in the Commission's Report on Volume 4, some submissions raised other related matters for consideration. Whilst it is not within the scope of this report for the Committee to comment on these ancillary matters, they are recognised in this chapter.

11.1 Disclosure

The submission from the Crown Prosecutors Association of Queensland urged reconsideration of the current position which prevents pre-trial disclosure of the defence's case. The Runciman Commission has recommended that in criminal cases the defence should be required to disclose in general terms the nature of its case prior to trial.
The Association sees the advantages as being:

. enhanced definition of issues which will shorten trials and clarify to the jury what they must decide; and

. great assistance in the ascertainment of truth.

The Association's submission argued:

> *We believe that it is time to reconsider some features of the criminal justice system. While maintaining fundamental principles such as the onus of proof and the standard of proof, there are some rules which are antiquated and in fact hinder the ascertainment of truth.*
>
> *One example is disclosure. At present, the law requires the prosecution to disclose all relevant material to the defence, and indeed that is how it should be. The defence have no obligation to disclose their defence prior to trial.*
>
> *Quite often, the prosecution are faced with what the Royal Commission on Criminal Justice all "ambush defences". Accordingly, the Royal Commission recommended that the defence in criminal cases be required to disclose in general terms the nature of its case before the trial starts. Such a requirement does not affect the fundamental principles that an accused person is presumed innocent, and that the prosecution must prove its case beyond reasonable doubt.*
>
> *The advantages of "two-way disclosure" are obvious. The issues can be defined and narrowed so as to shorten trials and clarify for the jury what they have to decide. it will also greatly assist in the ascertainment of the truth.*

11.2 Admissibility of Self Serving Records of Interviews

At the public hearing a point was raised by Mr Jerrard during the discussion on the right to silence. In Australia the right means that a person does not have to answer questions, and that an adverse inference cannot be drawn from the exercise of that right. He noted that as a result of the second branch of that rule *one cannot have it drawn to the jury's attention against one that the exculpatory account one is now giving in the witness box is being given for the first time and was not given to the police.* (at p23) This position, he noted, was different to that which will exist in United Kingdom.

Recommendation 19.2, at page 682, recommends the retention of the current right to remain silent. At page 681, reference is made to the recommendation of the majority of the United Kingdom Royal Commission on Criminal Justice, which recommended the retention of the right to remain silent in the face of police questioning.

You should know, or should be informed, that in the United Kingdom the Government is about to pass a criminal justice and public order Bill—you have probably been informed about that—which will introduce a new package. One of the things introduced by the package is, in effect, the abolition of that strict right in that now a different caution will be given. It was printed in the Guardian Weekly of 28 August. I brought along a copy of it to read to you. The article states that the new caution that British police will be obliged to administer will be in these terms—

"You do not have to say anything. But if you do not mention now something which you may later use in your defence, the court may decide that your failure to mention it now strengthens the case against you. A record will be made of anything you say and it may be given in evidence if you are brought to trial."

That substantially modifies what is recognised here as the right to silence in that under Australian common law one cannot be questioned and cannot have it drawn to the jury's attention against one that the exculpatory account one is now giving in the witness box is being given for the first time and was not given to the police. It is worth considering whether or not it might not be time to have a change, which might look like this.

At present, if we are arrested and questioned and we give an entirely exculpatory account when being questioned, that exculpatory account is not admissible. There is a recent decision of the Queensland Court of Appeal confirming that to be the position in Queensland. It is a case of Calligan, reported in Volume 70 of the Australian Criminal Reports at page 350. I am giving you that just for a bit of background.

Mr Jerrard suggested that a change to the current situation was worth considering.

The position now is that, if you are taken down to the police station and you protest your innocence, explain the whole thing and put forward a very good defence, the record of your having done so cannot be led into a trial by you. If you are later charged, you cannot lead that; you cannot establish your exculpatory account.

There is certainly room for the view that in a new package of rights it might be desirable in exchange for people being able to insist that the account that they first gave be admitted in evidence - even if it is self serving and so on - that that be insisted on as a right that people get, and in return that a jury be able to be told that, if you do not put forward a reasonable excuse or defence which is later advanced, the fact that you did not put it forward at the first reasonable opportunity is a circumstance that a jury can consider in determining whether a case has been proved beyond a reasonable doubt.

At the moment, the situation is perhaps unsatisfactory in both ways. If you do put forward a defence, the jury does not get to know that you actually did say that at the time. Equally, if you do not put forward a defence at the first opportunity, the Crown cannot make anything of the fact that you came up with a wonderful story

> *later. You may think that this is a little outside of the present set of recommendations, but it is a comment that has to be made about the recommendation that there be a retention of the right to silence. It is a matter that needs to be considered, and there is perhaps a package of rights that people can be given that modifies that slightly.* pp.23,24

Mr Potts from the Queensland Law Society raised the same matter at the public hearing. He stressed that, at the moment, there is little practical use for a defendant to give an exculpatory version of events. Mr Potts argued:

> *The Committee may be aware that there has been a recent change in the law, at least in the way it is interpreted by the High Court. There is a present authority that seems to suggest that if at the very first opportunity in a record of interview a defendant gives an exculpatory version, that is, he gives his defence totally—he explains where the property came from; he explains how the offence took place; he gives his entire defence, in effect—at the earliest opportunity, then what happens is that a prosecutor may look at that evidence, at that tape-recording, and simply reject it, that is, not admit it into evidence in a subsequent case on the basis that it is simply self-serving and hearsay. So these days the advantage to defendants in giving a record of interview that exculpates themselves has been very much weakened by the High Court. There is almost—and I know that it sounds terrible—no point in giving your excuse at that stage if someone can simply say, "We reject that as being self-serving", at a later time. The reason for it, and this is something which I think is going to be addressed in the amendments to the Criminal Code, is simply this: firstly, if you give that record of interview, it could be used in a trial and you may then avoid having to give evidence. But by refusing or at least having a prosecutor not use it, in effect, it forces the person to give evidence. The prosecution then has the right of last address. I think the new legislation is going to change it so that the defence will always have the right of last address. But at the present time, there is really little practical use to the defendant in giving an exculpatory version. What happens is that, if you give a version which is partly exculpatory, or can be demonstrated to be wrong, the only use the prosecution can put to that is to use it to say, "This demonstrates the consciousness of guilt." So we find that practically in the courts that records of interview of an exculpatory nature are useless.* pp.41,42

As discussed in para ? confessions are admissible as an exception to the Hearsay Rule because they are statements against interest, and therefore likely to be true. Conversely, purely self-serving statements are inadmissible as to the truth of their contents. The proposition that they be an exception to the hearsay rule has been considered *contrary to principle*. See R v Kochnieff (1987) 33 A Crim R 1 where a record of interview which was edited to contain only self serving denials was excluded by the trial judge.

The rationale behind this rule is that such statements are inherently unreliable and there is a danger of manufactured evidence being put before the jury. Callaghan (1993) 70 A Crim R 350 at 354

However, there is a distinction between:

a. purely self serving statements; and

b. statements which are "mixed", that is partly inculpatory and partly exculpatory.

In the case of the latter, the entire statement goes into evidence; the incriminating parts as well as the excuses or explanations. But, in determining where the truth lies the jury may decide that the exculpatory parts deserve less weight than the incriminating parts which are more likely to be true. See R v Beck [1990] 1 Qd R 30

In the recent case of Callaghan the following submission was made on behalf of the appellant:

> *A previous consistent statement of an accused is admissible where the accused is confronted by the police and his answers are spontaneous, relevant and add weight to other testimony in the case, particularly where the accused gives evidence.*

The submission arose in an attempt to bring an exculpatory record of interview taken on videotape into evidence. The evidence was not tendered by the Crown and so the defence sought to adduce it through cross-examination of the police. The statements were consistent with the evidence the appellant gave. The judge ruled that the self-serving statements were not admissible and could not be introduced in that way.

Based on the authorities discussed, the submission was rejected. The Queensland Court of Appeal recognised that in the case of mixed statements the exculpatory parts go in with the incriminatory. But it is for the prosecutor to choose which evidence he will use as part of his case against the accused. It may be that there is a version which is substantially exculpatory but "There is no general obligation on the prosecution to call such evidence." (p.354)

Conclusion

Thus there is an argument for modification so that the accused be able to lead in evidence his exculpatory statements, all be they self-serving. But to offset that, if an accused does not offer an excuse at the first appropriate opportunity, the jury is entitled to draw an adverse inference. To allow such modification means that a person who is silent from the outset may not be acting in their best interest.

11.3 Special Provision for Aborigines and Torres Strait Islanders

Mr Carberry, the Aboriginal and Torres Strait Islander Legal Service representative raised some particular considerations regarding the questioning of Aborigines and Torres Strait Islanders. Both in the Services' written submission and at the public hearing, he drew to the Committee's attention extracts from a book by Diana Eades titled *Aboriginal English and the Law*.

Mr Carberry submitted that the current police instructions on questioning Aborigines and Torres Strait Islanders should be amended to incorporate points raised by Ms Eades.
In the case of warnings, police officers should be under an obligation to determine the bi-cultural competence of the person being questioned. This was essential to determine the person's understanding of the warning and their right to silence. There are a series of questions to be asked in determining this bi-cultural competence. (Neil - these are in the written submission if you want them listed)

Ms Eades proposes that many Aborigines do not pass the test of bi-cultural competence and are more easily overborne than other members of the general population. At the public hearing, Mr Carberry also referred to some idiosyncratic speech patterns and cultural manners which may operate against an Aborigine during dealings with the police. These include:

. there is a tendency to gratuitously concur, and they may do this in order to terminate the interview as soon as possible.

. some will play up their involvement in an incident for theatrical effect, which derives from a tradition of story telling.

. there is a strong sense of family obligation, to the extent that it is culturally appropriate to take the rap for a relatives actions.

Mr Carberry's full argument is as follows:

> *In relation to the procedures for police officers—I do not know whether you have been referred to the current standing orders or general instructions for the Queensland Police Service. On the issue of questioning of Aborigines and Torres Strait Islanders, which is contained in paragraph 4.54A (c), the standing orders, or general instructions, state—*
>
> *"Whilst many Aborigines and Torres Strait Islanders would fall into the category of persons under disability, pigmentation of the skin or genealogical background should not be used as a basis for this assessment. Whilst all of the factors outlined above should be considered, particular attention should be given to the suspect person's educational standards, knowledge of the English language, or any gross cultural differences.*
>
> *Aborigines and Torres Strait Islanders who come within the category of persons under disability will be questioned in the presence of a solicitor or other legal adviser or a person concerned with the welfare of those races.*
>
> *Where this is not practicable, any such person will be questioned in the presence of an independent adult person in whom the person being questioned has confidence and by whom he/she feels supported and who can act as an interpreter if necessary.*
>
> *The questioning must be conducted under conditions whereby the person being questioned is not oppressed or overborne by condition, circumstance or person."*

We would like to see that requirement expanded a bit to take into account some of the things that Diana Eades was talking about, which are summarised in the first page of our submission.

The present standing order can be traced to the Anunga rules from the Northern Territory or it is lifted from them. They came into being in 1976 as a result of a judgment of Justice Foster in a Northern Territory Supreme Court case of Anunga. Those rules were of course designed with the needs or cultural requirements of what could be called traditional people—people living in traditional lifestyles—or for those who have little or no English and speak traditional languages. However, in our submission, the work of Dr Eades demonstrates that many Aborigines living in an urban environment do not pass the test of bicultural competence and are more easily overborne than members of the general population.

There are a number of idiosyncratic matters in Aboriginal speech patterns and cultural matters which bear this out and which anecdotally solicitors of the Aboriginal Legal Service even in Brisbane have seen. One is a tendency to gratuitously concur—and this is documented by Dr Eades—that is, the tendency of Aboriginal people when confronted by an interview with a person apparently in authority to agree to propositions put to them in order to terminate the interview. They are uncomfortable in the interview—not necessarily overborne, but just do not want to be interviewed. They will often agree to propositions with the only intention really being to terminate it. They soon get the message that, if they agree to what the person in authority is saying, then they can get out of there—they can move somewhere else.

Secondly, there is a great tradition in Aboriginal culture which is based on oral history. There is a great tradition of story-telling. It has to be said that some Aboriginal clients against their own interest and in certain circumstances will play up their involvement in an incident that is being investigated for theatrical effect—and "for theatrical effect" is the closest thing in English that I can think of to describe this phenomenon. If there was a minor scuffle in a hotel, it is not unknown for an Aboriginal person to, when telling the story, increase the number of his opponents and increase the vigour with which he defended himself. This is a factor which is culturally ingrained.

Another aspect which is also documented by Dr Eades and of which I have had some experience and other lawyers at the Aboriginal Legal Service have had experience is the influence of family obligation. A lot of non-Aboriginal people literally are not very good at making physical identifications of Aboriginal people and telling the difference between them. There are lots of stories of Aboriginals, particularly young men, being arrested for something that their brother, cousin or uncle has done. From that point on, they consider it culturally appropriate for them to take the rap for their relative. These phenomena are special to Aboriginal people, but they do emphasise the tactical advantage that police have when they are interrogating or when they have de facto detention of a suspect.

Much has been said in the report about some of the artifices used by police. We know that probably the most commonly used artifice at the moment is the artifice that the person has voluntarily gone to a police station. In our submission, this does not justify amending the law to fit the artifice and in our submission that is a

curious way to drive public policy. One thing from the Anunga rules which we consider would be very good to be implemented in Queensland is a requirement, apart from having a legal friend there or a prisoner's friend there, that when explaining the warning and explaining the right to remain silent, not to use some particular magic form of words but to do it in such a way that the person has to repeat back and demonstrate their knowledge of what it means. In our submission, particularly with Aboriginal people, that is essential. If they do not want to participate at all in that process, in our submission that means that interrogation should not continue. pp.44,45

11.3 Central Register

The submission from the Queensland Law Society Inc again called for the establishment of a central register of persons taken into custody so that that person's whereabouts could be immediately ascertained by their lawyer.

The Society noted that, despite numerous requests for such a register to be established ,the Police Service had to date been unwilling to comply. Therefore, the Society proposed legislation be enacted in order to overcome the Services' unwillingness to comply in this regard.

The relevant extract from the Society's submission was as follows:

Since the A.L.R.C. report entitled "Criminal Investigation" in 1975, there has been a constant push by the Queensland Law Society, the Bar Association and others for the establishment of a central register, all to no avail.

The A.L.R.C. recommendation wa that, whenever a person was taken into custody by police, that person's whereabouts should be immediately ascertainable by a single phone call by an enquiring lawyer to the main police number.

Despite numerous representations to the Police Department since that time and up to the present, there has been a complete unwillingness to establish such a register.

The most obvious conclusion to be drawn from this is that there is a lack of willingness on the part of senior officers in the Queensland Police Service to ensure that lawyers can quickly make contact with their clients.

The proposal of the A.L.R.C. was that in view of the "ducks and drakes" tactics which both the A.L.R.C. and the Lucas Enquiry in 1977 found that police commonly engaged in to prevent suspects making contact with their legal advisers, an apprehending police officer would be immediately required to radio into the Police Operations Centre or the like when a person was taken into custody.

The Committee proposes that it be specifically enacted that whenever a citizen who is the subject of enquiry or even a potential witness in a criminal investigation accompanies police anywhere, those police should be required to immediately radio that person's whereabouts so that any enquiring solicitor can easily make contact with that person. The Committee proposes that the concept of a Central Register be achieved by legislative enactment rather than a change in administrative practice due to the consistent opposition to the concept by the Queensland Police Service since it was first mooted by the A.L.R.C. in 1975.

11.4 Summary of Lucas Report

The Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (Commissioner Lucas, 1977) was prompted by allegations of police "verballing". The terms of reference addressed were broadly the same as the current issues.

The Committee in its deliberation bore in mind the necessity for preserving a balance between the requirements of police investigation and the liberty of the subject. Ultimately its recommendations included certain extensions to police powers including detention for questioning. But, by way of safeguard, made their adoption contingent on the mechanical recording of interrogations.

The Committee's recommendations can be summarised as follows:

. No statement made to a police officer that implicates, or intends to implicate, the maker of it in the commission of indictable offence should be admissible against him unless it has been tape recorded.

If it is not reasonably practicable to tape record the statement it should be admitted if it is written down, read back to the suspect and the suspect then has the opportunity to confirm, deny or amend it. These last two requirements must be tape recorded or in the presence of an "independent person".

The "independent person" should be a justice of the peace appointed by the Attorney-General. The person should be completely independent of the police department.

. There should be greater power of control given to the courts. The law concerning judicial discretion to exclude evidence obtained by unfair and unlawful means should be recast so that every appellate court has an unfettered discretion to consider afresh the admission of evidence.

. After noting that the police in practice exercise a de facto power of detention the Committee opined that they legally needed such a power to ensure efficient investigation of serious crime. Therefore they concluded that in the case of indictable offences defined as crimes in the Criminal Code, police should have the power to detain suspects for questioning but subject to controls including;

- the power should only be exercisable by a police officer of or above the rank of Sergeant 2/c;
- the power should only be exercised upon reasonable suspicion that the suspect has been implicated in the commission of a crime or an offence against section 130 of the Health Act;
- the interrogation is recorded;
- questioning should be for 2 hours with maximum extensions of a further 10 hours;
- the suspect has a right to contact a solicitor or friend
- the suspect must be informed of his rights and if possible a written acknowledgment obtained from him;
- a register of all detentions should be kept;
- a suspect cannot be detained more than once in respect of the same offence; and
- failure to observe the safeguards should render the evidence obtained during the interrogation inadmissible.

. The rule that prevents the drawing of an adverse inference from a suspects silence in

response to police questioning should be abolished.

. The Judges' Rules should be abolished and replaced with administrative instructions which provide how police officers should deal with suspects. They are not to be a statutory enactment but, if ignored, the court will almost certainly, rule inadmissible any evidence so collected.

These instructions include the handling of disadvantaged suspects and the giving of the warning. The warning is to be given when a police officer has made up his mind to charge a person with an offence and is framed in such terms that the suspect is warned an adverse inference may be drawn from his silence.

Conclusion

The Committee showed considerable forethought in recognising the value of tape recording in the interrogation of suspects. Interestingly, the power to detain for questioning was discussed in terms of it being "without arrest" (Lucas;137). However, the Committee concluded that the power was only exercisable where there was "reasonable suspicion" that the person had committed a crime. This concept is discussed further at para 11.3

More noteworthy is that the proposed changes were not to be implemented by a regulated scheme. The Judges' Rules were to be replaced by Administrative Directions, non-compliance with which would be a matter for the judge to consider when exercising his judicial discretion to rule the confessional material inadmissible.

12. THE PCJC'S ALTERNATIVE

The Committee does not doubt that there are some problems with the current regime of police questioning.

Of primary concern to the Committee is the apparent uncertainty attaching to Rule 3 of the Judges Rules as a result of its interpretation in the 1930 Explanatory Circular.

Also of concern is the limitations placed upon police questioning after arrest by s.552 of the *Criminal Code* and s.69 of the *Justices Act*. The effect of these provisions is to make it mandatory upon police to take an arrested person before a justice *forthwith* or *as soon as practical*.

The rationale behind the above statutory provisions, which are consistent with the common law, is to protect arrested persons from undue detention. However, the effect of the provisions is to deny police the opportunity to interrogate suspects after arrest unless there are impediments to take the arrested person before a magistrate, for example, the arrest has occurred after hours or on a weekend. Hence, the Commission claims that police have developed undesirable practices in order to circumvent the restrictions imposed.

As Whiddet states (1991:7-8), this is the most important issue to be addressed:

> ***The most significant issue, however, above all others, then and now, is whether or not police should be empowered to interview an acquiescent suspect following arrest and being bought before the court****. In most jurisdictions the requirement has been to take the person upon arrest before a magistrate "forthwith"; in others it "as soon as practicable". Both expressions nevertheless denote a level of immediacy which tends to preclude anything other than the most fleeting, perfunctory interview, on-the-run as it were, between arrest and charge.*
>
> ***This state of affairs has been of long standing and essentially ignored by the legislature, leading irresistibly to the overworked stratagem of suspects "assisting police with their inquiries" - whether voluntary or otherwise****. Of course the legal affray which inevitably follows plays into the hands of defence counsel, while others with less pecuniary interest simply turn a blind eye to law enforcement's plight.*
>
> *It is true to say that this significant, fundamental flaw was never addressed with any enthusiasm by reformers despite being raised repeatedly over the years by police. Certainly it has never been addressed as a threshold issue in its own right: as to whether denying police a period in which to interview suspects was an illogical short-circuit in the proper investigation of crime. It has only been an issue as one of the many components in the array of technical specifications and time zones which have come to be prescribed in, first, the Criminal Investigation Bill 1977 and now more acutely in the present Act.*
>
> *Added to this long-standing neglect at a time when governments and others are exhorting law enforcement to become more clever and more effective against increasingly better equipped organised crime - particularly in the corporate sector - is the encumbrance of the grudgingly-given investigative periods with a series of time-controlled steps in which "reasonableness" is a concept extended in fulsome detail to the accused but largely denied investigators.*
>
> *What protection it is "reasonable" to extend to the suspect, and what latitude it is reasonable to extend to the investigator, is a riddle which successive Royal Commissioners and those who have headed similar official inquiries have had time on which to reflect during their unfamiliar role as investigators.*

Surely the issue as to whether police should be able to question suspects after arrest is able to be determined and addressed without resort to a scheme such as that proposed by the Commission.

It appears to the Committee that a major issue which must be addressed in any consideration of police questioning is the voluntariness of the questioning. As discussed in Chapter 2, confessional evidence is only admissible when such evidence has been made "voluntarily". The Committee is not convinced that the Commission's proposed scheme accords with the concept of voluntariness. Under the Commission's scheme a suspect can be detained for up to four hours without his/her consent.

The Committee can see no objection to police questioning a person after arrest, provided that the person consents to that questioning and the subsequent delay of being bought before a justice. Technology, in the form of audio visual recording, is now available to ensure that the questioning is undertaken voluntarily and fairly.

Mr Shanahan, representing the Legal Aid Office, at the public hearing emphasised the importance of voluntariness and the logic of allowing police questioning after arrest:

> *I will start by returning to basic principles about the admission of confessional evidence. Those sorts of basic principles tend to get lost in these sorts of debates. The purpose, in my view, of precharge detention—whether it is prearrest or after arrest—is to allow an opportunity to question an accused or a suspect, and to gain from that suspect admissions/confessions or, in some cases, lies, which can later be used in evidence to prove guilt. That, I think, is the main purpose of detention.*
> *When one looks at why confessions and admissions are admissible and what use a court can make of them from first principle, those types of conversations—out-of-court conversations—are admissible because they are statements against interest. A person does not usually make a statement against interest unless it is true. So a court infers from confessions/admissions the fact that they are true and, because they are true, they indicate guilt. The rationale is that no-one would ever make a statement against interest if it was not true. Therefore, a court can rely on those statements to make findings of guilt.*
> *That is founded on the notion that such statements are made voluntarily. If anything is introduced into the equation that takes away from the voluntariness of those statements, then there is a question about whether they are true or not. In that regard, anything that impinges on voluntariness can take away from the reliability of the confession. Thus, any threats made, any promises made, any inducements made by people in authority that somehow convince people to make a confession or admission can taint that confession and so the court cannot be certain that it is true. There are plenty of examples of threats, promises and inducements by people in authority which sway people into making confessions.*
> *Part of the improper behaviour which can taint confessions is pressure that is placed upon a suspect—pressure that actually sways the suspect into confessing. Examples of that abound in the case work, for example, continued questioning in the face of statements that I do not want to answer questions, pressure being placed upon suspects, the type of questions that are asked, cross-examination of a particular person, continually fronting a suspect with inconsistencies in his account compared with other evidence, expressed disbelief by the police officers who are questioning and in some cases even ridicule of statements that are being made. When those sorts of things occur in relation to suspects who are suffering from disabilities—particularly in relation to those sorts of cases—they can result in false confessions.*
>
> *You do not have to look to the United Kingdom to see examples of those in which miscarriages of justice have occurred because of improper pressure. Queensland has a prime example of that in the case of Mannix. Mr Mannix was not a person who was suffering from a disability, yet after questioning by police he confessed to an horrendous murder, the murder of his father. It is only later, when the true culprits*

were caught, that the falsity of that confession became obvious. It resulted in quite a large-scale inquiry as to how Mr Mannix came to confess. The inquiry did not reach any positive conclusions, but one must come to the conclusion that at some stage, for some reason, Mr Mannix, in police custody, confessed to something that he did not do. That confession was in relation to the most serious offence of all.

In my view, and in the view of the Legal Aid Office, detention for questioning is simply an opportunity for the legalisation of continued pressure to be placed on suspects. The dangers of that are that it could well result in confessions that are not true. One must really question, in the entire context of this sort of proposal, whether any confessions or admissions that result after detention are truly voluntary. I think the illogic, perhaps, in some of the proposals can best be gained by looking at one of the extension proposals in which a Supreme Court judge must give the third extension and that a person can simply decline to be further interviewed. One must wonder who is going to agree to be further interviewed. If after four hours or eight hours, or whatever the period is the police are applying for as a further period of time to continue their investigations—and I would think that most of their investigations would be continued questioning of a suspect—what suspect is going to agree to a further period of time?

There are other quick points that I would like to make. The rationale that the present system results in trickery or law breaking by the police and because of that it is a reason to actually change the law to allow what they presently do to be legal, I do not think is particularly logical. The current system provides rights and obligations for both parties: citizens and police. To argue that because the police are abusing that system because it does not give them proper powers is an argument that could be mounted for any excess. I do not think it is a particularly weighty one. The end logic of that is to reduce crime by making everything legal. I do not think it is an acceptable sort of argument.

...

Mr BARTON:** What is your understanding of the Judges Rules post-arrest? In effect, can police ask questions of people after they have been arrested? That question intrigues me. It seems to me that, if police have a reasonable suspicion that someone has done something and they want to question that person about it, there is then a formal charging process that comes in even after that step. We seem to be boxing up another one in trying to allow police to question people before they actually arrest them.* ***Does the flaw really lie in the fact police cannot effectively ask people questions once they have been arrested?

***Mr Shanahan: I think that is the better view. Because it is so debatable, it is obviously an area that needs to be clarified.** Simply because you can ask the question, "Can they or can't they?", and you get different answers from different people makes it an area that needs to be clarified one way or the other. My own feeling in relation to whether it should be allowable or not is that, yes, it should. If people are prepared to talk and they make an informed decision to talk, then whether it is prior to arrest or not is not really relevant; it is whether they are voluntarily giving the answers.*

The opposition to this system is that it puts pressure on someone to say something that is not voluntary. However, if a person is prepared to talk, cooperate and answer questions voluntarily and in an informed way, whether it is prior to or post-arrest is not relevant. It is a voluntary decision that they have made to cooperate. People do confess to crimes. In many cases, it is an indication of remorse. ***It would be improper for a system to try to stop that. If a person makes an informed decision to confess, the system should accommodate that. Whether it is prior to arrest or after is not relevant. The fact that it should be voluntary is important.***

...

Dr WATSON: But the principal question is whether or not the confession is truly voluntary.

Mr Shanahan: That is in my view, yes.
Dr WATSON: Whatever system is developed, that has to be an important part of the issue.
Mr Shanahan: *Yes.*
Dr WATSON: *You might be able to get at that in various other ways if you can think of them, but that is the issue.*
Mr Shanahan: *That is the basic issue. I think that is the fundamental thing, that in order for a confession to become admissible it has to be voluntary. Because it is voluntary, it is usually true. Anything that impacts on the voluntariness, I suppose, should try to be avoided.*

The submission from the Director of Prosecutions noted the current deficiencies with the Judges' Rules and suggested a new promulgation of those rules:

> *The Commission's report correctly draws attention to the deficiencies in the, so called, Judges' Rules and to the fact that the High Court's view, expressed in several cases, does not seem to accord with the various propositions set forth in the Judges' Rules. But is the answer not to be found in a new formulation of Judges' Rules (referred to in Lee's case (1950) 82 CLR 133 at 149 as Commissioner's Standing Orders, because the Chief Commissioner of Police in Victoria had promulgated Standing Orders with regard to the questioning of persons by police) rather than in statutory rules, any breach of which may render a police officer subject to the threat of retribution?*

Some submissions to the Committee put forward alternatives to the scheme proposed by the Commission.

The submission from the Queensland Police Service stated the following:

> *The Service is firmly of the view that the vast majority of the public would have no objection to police officers being granted appropriate powers which allow them to carry out their role.*
>
> *Clearly it is pointless to enact a statutory power which allows for the apprehension and questioning of suspects if the same piece of legislation is to be overborne by restrictions placed on its use.*
>
> *This is not to say that police should be allowed to do as they wish. The Service does not seek ridiculous powers. It seeks effective powers which will allow police officer to do their job.*
>
> *In its submission to the Criminal Justice Commission, the Police Service made recommendations with respect to the lawful questioning of suspects. Those recommendations, however, did not follow the form of legislation adopted as a matter of course by other States and Territories. Nevertheless, the Service's recommendations are innovative, well balanced, and would form the basis of the most effective policing legislation in Australia.*
>
> *The Parliamentary Committee has the opportunity to recommend a balance in the current inequities in the law which favour the suspect, in preference to the investigators of crime whose function it is to enforce the law. Therefore, the Police Service asks the Committee to make recommendations, which not only provide police with adequate powers, but which ensure the rights of law abiding citizens are protected from criminals.*
>
> *...*
>
> *The Police Service does not consider that the proposals recommended by the Criminal Justice Commission amount to a viable option for investigative detention.*

In particular the Service objects to:

- *a fixed time detention period requiring extensions at four hours and twelve hours;*

- *the requirement for police officers to contact Magistrates or Supreme Court Judges in order to obtain extensions;*

- *the concept of Custody Officers;*

- *the need to caution suspects to be questioned in relation to simple offences; and*

- *the requirement to have a `reasonable' suspicion prior to detaining a suspect for questioning.*

As stated in the introduction to this submission, if the Police Service is to properly fulfil its function of detecting crime and apprehending offenders then there is no option but to provide it with adequate legislative authority.

...

Consistent with its recommendation for investigative detention made to the Criminal Justice Commission, the Service makes the following recommendation for reform:

1. *That in conjunction with the compulsory electronic recording of interviews for indictable offences, a police officer be empowered to detain a person at a police station or establishment for a reasonable time for the purpose of questioning in respect to an indictable offence. Detention should commence from the time when an officer `suspects' that a person has committed an indictable offence. The authority should extend to detaining and removing a person from custody for questioning where the person is in custody for another offence.*

2. *That the concept of detention for questioning may even be extended, where sufficient evidence is available, to include a person whom a police officer reasonably suspects is about to commit an indictable offence. Such an inclusion would allow police to act in a preventative role where evidence suggests that a person is about to commit a serious offence, e.g. a terrorist act or an armed hold-up.*

3. *It is recommended that a `reasonable time' provision be applied to detention rather than a fixed time period. In assessing whether the time taken for a particular interview was a `reasonable time' a court should take factors similar to the following into consideration:*

    (a) the time taken by a person in custody to communicate with a legal adviser, friend, independent person or relative;

    (b) the time taken by a legal adviser, friend, independent person or relative of the person in custody or an interpreter to arrive at the place where the questioning or the investigation is to take place;

    (c) the time during which the investigation or questioning of the person was suspended or delayed to allow the person to receive medical attention;

(d) the time during which the investigation or questioning of the person was suspended or delayed -

(i) to allow the person to rest or partake of meals; or

(ii) because of the person was adversely affected by liquor or a drug;

(e) the time taken for a police officer with knowledge of or responsibility for the matter to attend to interview the person;

(f) the number and complexity of matters to be investigated;

(g) the time taken to interview available witnesses;

(h) the need of police officers to assess relevant material in preparation for interviewing the person;

(i) the need to transport the person from the place of detention to a place where appropriate facilities are available to conduct an interview or other investigation;

(j) the number of people who need to be questioned during the period of detention in respect of any offence reasonably believed to have been committed by the person;

(k) the need to visit the place where any offence under investigation is believed to have been committed or any other place reasonably connected with the investigation of any such offence;

(l) the time taken in awaiting the completion of forensic investigations or procedures;

(m) the time taken for any medical examination of the person in accordance with the provisions of this Act;

(n) the time taken to arrange and conduct an identity parade.

4. Appropriate safeguards protecting the rights of those persons detained need to be carefully considered and adequately addressed. It is recommended that the following safeguards be developed:

- *compulsory electronic recording of interviews for indictable offences and an audio copy of the interview be provided to the suspect, irrespective of whether he/she is charged with an offence or not;*

- *a person detained for the purpose of questioning be entitled to have either a legal representative, a*

- *relative, a friend or an independent person of his or her choice present during the interview;*

- *a person detained be provided with a standard information sheet informing that person of his or her legal rights and obligations;*

- *where the person detained is considered a disadvantaged person*

either by race, age, ethnicity, language or mental capacity, special provisions apply whereby an appropriately qualified independent person is present during the interview, e.g., an interpreter in the case of a foreign national or a parent, guardian or child welfare officer in the case of a child.

- *if at any time during the interview, the police officer forms a belief that the person interviewed was not responsible for the offence, the police officer will immediately release the person from detention.*

- *a computerised register be used to enter details of the whereabouts of the person being questioned or detained. This will enable any person attempting to ascertain the present location of a detained person to make enquiries at any police station which has a computer terminal.*

The submission from the Legal Aid Office (Queensland) stated:

The re-vamped and re-defined present scheme which the Legal Aid Office would support would be characterised by the following features:-

(a) *The person in police custody (whether by arrest or the "voluntary attendee") must be told of his status from the initial contact with police.*

(b) *He must be warned before <u>any</u> questioning or conversation with police, that he is not obliged to answer any questions and informed of the consequences if he does waive the right to silence, and also informed if any concealed field tape is being used.*

(c) *If he is not under arrest he must be told that he does not have to accompany police anywhere if requested to do so.*

(d) *That he does not have to answer any questions, whether under arrest or not.*

(e) *That, right from the initial contact with police, he can contact a solicitor and receive legal advice, and, if he cannot afford his own solicitor, a Legal Aid solicitor can be contacted who will give advice free of charge.*

(f) *That, if he is arrested or agrees to accompany police, he can contact family or relatives and inform them of his whereabouts, and again, if his whereabouts change.*

It is the Legal Aid Office's suggestion that the all-important function of informing the suspect of these rights should not be left to a police officer but should be done by an independent person, such as a Justice of the Peace called in for the purpose, who both explains the suspect's rights to him (particularly the right to remain silent) and makes sure he understands the, and/or is able to understand them (for example, in cases of intoxication by alcohol or drugs, shock or emotional upset, disability, immaturity etc.) Police, in the past, have always had little difficulty in obtaining the services of a Justice of the Peace to obtain a warrant or to be an independent person during an interview; it should be no more difficult for this purpose. Furthermore, it is submitted that the suspect is more likely to think that the right to remain silent for example, is genuine when it comes from an independent person or a solicitor rather than from a police officer who is more interested in the suspect <u>not</u> remaining silent.

(g) *The above explanation of a suspect's rights should be recorded on tape, along with the suspect's acknowledgment of his understanding of those*

rights, and his informed consent to accompany police, or his informed refusal to answer questions, for example.

(h) The suspect, once arrested, should be taken before a justice as soon as practicable, so that he can have his bail considered.

(i) Any impediment for police to interrogate suspects in custody under arrest, as some see existing under Rule 3 of the Judges Rules 1912 should be removed, provided that the agreement to do so is based on an informed consent, preferably after receiving advice from his own or a Legal Aid solicitor.

(j) Interviews and approaches by police should be made, as far as is possible, during hours when solicitors are more likely to be available to give advice, not during the early hours of the morning or late at night.

If the present rules were re-vamped and modified in the ways suggested, it is submitted that any need for pre-charge detention does not arise, and both the rights of the individual and the ability of police to conduct their investigations and question suspects are catered for.

The Committee rejects the concept of a pre-charge detention scheme. If, however, it was to be accepted, arrest should be the necessary point of commencement. Pre-arrest detention for questioning is simply not a logical option.

The Committee believes that it is in the public interest to obtain confessions from fully informed volunteers (irrespective of whether it is pre or post arrest), and that the law should accommodate this situation.

It is apparent that undesirable police practices have developed in order to detain suspects for questioning, a situation assisted by the uncertainty in interpretation of the Judges' Rules. But, confessional evidence howsoever obtained is not automatically admissible. If it is proven to be voluntary, the judge still has a discretion to refuse to admit it into evidence. Recent cases have shown that this discretion will in fact be exercised in order to rule confessional evidence inadmissible.

Perhaps what can distinguish this report from some already written are the recent developments in electronic recording. The value of this as a tool in both taking the court back to the interview room, and protecting police from allegations of fabricating confessions has been very recently recognised by the High Court. It is an area that can only expand with the development of more sophisticated recording equipment.

Conclusion

The Committee concludes the following:

- **It is of central importance that any rules made in relation to police questioning of suspects, whether pre or post arrest, must recognise and entrench that questioning can only take place when the suspect consents to that questioning.**

- **There is no objection to police questioning suspects after arrest, providing that the suspect consents to that questioning and the subsequent delay in being taken before a Magistrate.**

- **Prior to questioning a suspect about his/her involvement in an offence, police must inform a suspect:**

    - **Whether or not they are under arrest.**

- **If the person is not under arrest, that they are free to leave.**

- **If they are under arrest, that they have an option to be taken before a magistrate or to participate in a record of interview.**

- **Of their right to silence in the following terms:**

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

- **The above caution should, where practicable, be recorded.**

- **Audio visual recording provides excellent protection for both police and the suspect. Therefore, interviewing of suspects (including the giving of all warnings) must be undertaken in accordance with the procedures set out in the *Electronic Recording of Interviews and Criminal Evidence Manual.***

- **A suspect should be defined as "a person who a police officer reasonably suspects was involved in the commission of an offence".**

- **Special rules are required for suspects who may be under a disability.**

Recommendation

The Committee recommends that:

- **The *Police Powers and Procedures Act* provide a definition of suspect as follows:**

  "a person who a police officer reasonably suspects was involved in the commission of an offence".

- **The *Police Powers and Procedures Act* provide that the rules of practice known as the Judges' Rules no longer apply in Queensland.**

- **The *Police Powers and Procedures Act* provide that the Commissioner of Police be required to issue rules in relation to the questioning of suspects.**

- **Such rules be tabled in the Parliament by the Minister within ten sitting days of being issued.**

- **The rules provide that prior to questioning a suspect about his/her involvement in an offence police must inform a suspect:**

  - **Whether or not they are under arrest.**

  - **If the person is not under arrest, that they are free to leave.**

  - **If they are under arrest, that they have an option to be taken before a magistrate or to participate in a record of interview.**

- **Of their right to silence in the following terms:**

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

- **The above cautioning should, where practicable, be recorded.**

- **That the rules provide that the interviewing of suspects (including the giving of all warnings) must be undertaken in accordance with the procedures set out in the *Electronic Recording of Interviews and Criminal Evidence Manual.***

- **That the rules provide special procedures for suspects who may be under a disability.**

The Committee recommends that the *Police Powers and Procedures Act* contains a provision that states:

It is an exception to s.552 of the *Criminal Code* and s.69 of the *Justices Act* (clause 297 and 199 of the *Criminal Code Bill 1994*) if the arrested person otherwise consents provided that:

(a) **he has been cautioned in accordance with the Police Commissioner's Directions;**

(b) **the giving of the caution, his acknowledgment of the caution and his decision to voluntarily answer questions posed to him and the subsequent interrogation are recorded in accordance with the Police Commissioner's Directions concerning electronic recording of interviews; and**

(c) **the delay in taking the arrested person before a magistrate not be unreasonable in all the circumstances.**

13. REFERENCES

Aboriginal & Torres Strait Islanders Corporation (QEA) for Legal Services, *Submission on a Report on a Review of the Criminal Justice Commission's Report (Police Powers in Queensland - Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention).*

ALRC. *See* Australian Law Reform Commission.

Australian Law Reform Commission 1975, *Criminal Investigation: Report No. 2 An Interim Report*, AGPS, Canberra.

Bridges, Lee and Mc Conville, Mike *Keeping Faith With Their Own Convictions: The Royal Commission on Criminal Justice* 57 M.L.R. 75.

Byrne D. and Heydon J.D. (editors) (1991) *Cross on Evidence*, Butterworths, Australia.

Cape, Ed *Police interrogation and interruption* New Law Journal January 1994 at 120.

Carter's Criminal Law of Queensland Service, Butterworths, Brisbane.

Coldrey Committee. *See* Consultative Committee on Police Powers of Investigation in Victoria.

Commission. *See* Criminal Justice Commission.

Consultative Committee on Police Powers of Investigation in Victoria 1986, *Report on Section 460 of the Crimes Act 1958: Custody and Investigation*, (Chairperson: Mr John Coldrey, QC), Government Printer, Melbourne.

Criminal Justice Commission, 1993, *Report on a Review of Police Powers in Queensland Volume III: Arrest Without Warrant, Demand Name and Address and Move-on Powers*.

Criminal Justice Commission (May 1994) *Report on a Review of Police Powers in Queensland - Volume IV: Suspects' rights, Police Questioning and Pre-charge Detention*, Goprint, Brisbane.

Criminal Justice Commission (May 1993) *Report on a Review of Police Powers in Queensland - Volume 1:An Overview*, Goprint, Brisbane.

Criminal Code Review Committee 1992, *Final Report of the Criminal Code Review Committee to the Attorney-General*, Government Printer, Queensland.

Cross, A.R.N. 1970-71, *The Right to Silence and the Presumption of Innocence*, J.S.P.T.L. 66,73.

Crown Prosecutors Association of Queensland, *Submission on a Report on a Review of the Criminal Justice Commission's Report (Police Powers in Queensland - Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention)*, 17 October 1994.

Department of Justice and Attorney-General, *Criminal Code Bill 1994 Draft for public consultation*, Government Printer, Queensland.

Director of Prosecutions, *Submission on a Report on a Review of the Criminal Justice Commission's Report (Police Powers in Queensland - Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention)*, 22 September 1994.

Dixon, David *Detention for questioning* Alternative Law Journal Vol 19 No 3 June 1994 at 144.

Fairall, Paul A. *Trial Without Counsel: Dietrich v The Queen* (1992) 4 BOND L R 235.

Forbes, J.R.S. (1992) *Evidence in Queensland*, The Law Book Company, Sydney.

Gibbs Committee. *See* Review of Commonwealth Criminal Law.

Harrison, Dr Rodney QC *The case against creating police powers of detention for questioning*, Lawtalk, 21 November 1994 at 426,8.

Jackson, J. 1989, *Recent Developments in Criminal Evidence*, 40 N.I.L.Q. 105, 105-118.

Law Reform Commissioner of Tasmania 1990, *Police Powers of Interrogation and Detention*, Report no. 64, Government Printer, Tasmania.

Legal Aid Office (Queensland), *Submission on a Report on a Review of the Criminal Justice Commission's Report (Police Powers in Queensland - Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention)*, 26 September 1994.

Lucas Committee. *See* Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland.

Lynch, John *Section 360A and the Dietrich dilemma*, Law Institute Journal 838.

Mackenzie, J. 1990, *Silence in Hampshire* 140 N.L.J. 696.

New Zealand Law Commission 1992, *Criminal Evidence: Police Questioning, A Discussion Paper*, Preliminary Paper no. 21, Wellington.

New Zealand Law Commission 1994, *Police Questioning*, Report No. 31, Wellington, New Zealand.

New South Wales Law Reform Commission 1990, *Police Powers of Detention and Investigation After Arrest: Criminal Procedure*, Report LRC 66, National Capital Printing, Canberra.

NSWLRC. *See* New South Wales Law Reform Commission.

NZLC. *See* New Zealand Law Commission.

Odgers, Stephen J. *Police Interrogation: A Decade of Legal Development*, (1990) 14 Crim. L.J. 220.

Parliamentary Criminal Justice Committee, 1994, *Review of the Criminal Justice Commission's Report on Police Powers in Queensland Volumes I-III*, Report No. 23B.

Philips Commission. *See* Royal Commission on Criminal Procedure.

QPS. *See* Queensland Police Service.

Queensland Police Service, *Submission on a Report on a Review of the Criminal Justice Commission's Report (Police Powers in Queensland - Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention)*, 30 September 1994.

Queensland Police Department, *Electronic Recording of Interviews and Evidence Manual* 1989, Commissioner of Police, Queensland.

Queensland Law Society Inc, *Submission on a Report on a Review of the Criminal Justice Commission's Report (Police Powers in Queensland - Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention)*, 19 September 1994.

Queensland Police Service, *Policies and Procedures Manual, Draft Chapter 6 'Special Needs'*, unpublished.

Queensland Council for Civil Liberties 1991, Submission on Police Powers in Queensland - Issues Paper, Minister for Police/Criminal Justice Commission 1991.

Queensland Law Society Inc, *Submission delivered to the Criminal Justice Commission in response to the Discussion Paper*, January 1993.

Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland 1977, Report, (Commissioner: The Hon. G.A.G. Lucas), Government Printer, Queensland.

Review of Commonwealth Criminal Law 1989, *Interim Report: Detention Before Charge*, (Chairperson: Sir Harry Gibbs), AGPS, Canberra.

Royal Commission on Criminal Procedure 1981, Report, (Chairperson: Sir Cyril Philips), HMSO, London.

Royal Commission on Criminal Justice 1993, Report, (Chairman: Viscount Runciman), HMSO, London.

Runciman Commission. *See* Royal Commission on Criminal Justice.

Sanders, R. 1989, *Crim L.R.* 763.

Schurr, Beverley *Detention for questioning Fixed v Reasonable time* 17 August 1993.

Schurr, Beverley *The legal rights of persons detained for questioning under the Commonwealth Crimes Act*, Law Society Journal August 1991 at 66.

Sibley, R.J. *Submission on a Report on a Review of the Criminal Justice Commission's Report (Police Powers in Queensland - Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention).*

Teh, G.L. *Detention for Interrogation*, Melbourne University Law Review Vol.9, May 1973.

Teh, G.L. 1972, An Examination of the Judges' Rules in Australia, in *Australian Law Journal*, vol. 46.

Transcript of Public Hearing on Police Powers - Review of Volume IV, 5 October 1994, Brisbane.

Wells, Belinda *Questioning suspects after arrest*, Reform, Winter 1991 No 62 at 62.

Whiddett, Adrien and Woltring, Herman *Is Four Hours Reasonable?* Australian Law News, August 1991 at 7

Williams, Glanville, 1987, *The Tactic of Silence* 137 N.L.J. 1107.

Williams, Glanville *When is an arrest?* (3 May 1991) 54 M.L.R.408.

Woods, R.S.M. 1990, *Police Interrogation*, Carswell, Toronto, Canada.

Zander, Michael, 1993, *Where the Critics Got it Wrong* 143 N.L.J. 1338.

APPENDIX I

1964 JUDGES' RULES

(a) That citizens have a duty to help a police officer to discover and apprehend offenders;

(b) That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;

(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a Solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so;

(d) That when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;

(e) That it is a fundamental condition of the admissibility in evidence against any person equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression.

"The principle set out in para (e) above is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

`You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

`Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.'

(b) It is only in exceptional cases that questions relating to the offence should be put to

the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

"Before any such questions are put the accused should be cautioned in these terms:

`I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.'

"Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark, to the following:

`I, ___, wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.'

(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

`I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.'

(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters; he shall not prompt him.

(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following Certificate at the end of the statement:

`I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will.'

(f) If the person who has made a statement refuses to read it or to write the abovementioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses

to read it, the officer who has taken i t down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

V. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by Rule III(a).

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules."