REPORT 4
STANDING COMMITTEE ON LEGISLATION
CRIMINAL INVESTIGATION BILL 2005,
CRIMINAL INVESTIGATION (CONSEQUENTIAL
PROVISIONS) BILL 2005 AND CRIMINAL AND
FOUND PROPERTY DISPOSAL BILL 2005

Presented by Hon Graham Giffard MLC (Chair)

September 2006
STANDING COMMITTEE ON LEGISLATION

Date first appointed: 17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

4.1 A Legislation Committee is established.
4.2 The Committee consists of 5 Members.
4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
4.4 Unless otherwise ordered -
(a) the policy of a Bill referred under subclause 4.3 may be considered by the Committee but only to the extent that the Committee is satisfied the provisions of the Bill, as referred, are consistent with that policy and that the legislative intent can be given practical effect;
(b) any amendment recommended by the Committee must be consistent with the policy of a Bill.

4.5 In this order “policy of a Bill” is its scope and purpose ascertained from the Bill’s provisions, but reference may be had to any document or statement or other information that may assist in clarifying the intended legislative effect or construing the application or interpretation of any provision.”

Members during this Inquiry:
Hon Graham Giffard MLC (Chair) Hon Peter Collier MLC
Hon Giz Watson MLC (Deputy Chair) Hon Sally Talbot MLC
Hon George Cash MLC (substitute member)

Staff during this Inquiry:
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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

CRIMINAL INVESTIGATION BILL 2005, CRIMINAL INVESTIGATION (CONSEQUENTIAL PROVISIONS) BILL 2005 AND CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005

EXECUTIVE SUMMARY

1 The Criminal Investigation Bill 2005 and the Criminal and Found Property Disposal Bill 2005 are final instalments of a criminal law reform package that commenced in 1994 under the Police Act 1892 reform project. This package enhances what the High Court of Australia refers to as the “armoury of law enforcement”\(^1\) and gives statutory expression to the overarching theme of the Kennedy Royal Commission that police officers have adequate powers to undertake investigations.

2 In the Committee’s view, the package provides a framework within which both police and prescribed public officers can exercise powers with certainty. This is an important feature given the Kennedy Royal Commission statement that “Uncertainty is corruptogenic- a breeding ground for corruption”.\(^2\) The Committee was also mindful of the need to maintain appropriate safeguards to protect the rights of citizens.

3 In this Report, the Committee focussed primarily on the Criminal Investigation Bill 2005 and made six statutory form recommendations and one narrative recommendation. The Committee also made one statutory form recommendation to each of the Criminal Investigation (Consequential Provisions) Bill 2005 and the Criminal and Found Property Disposal Bill 2005.

4 During the inquiry a number of issues were raised which resulted in proposed amendments which the Committee understands the Government will move in the name of the Parliamentary Secretary representing the Attorney General.

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\(^1\) Williams v R (1986) 161 CLR 278, per Gibbs CJ at para 17.

\(^2\) Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report, Volume I, January 2004, p11.
**Recommendations**

5 Recommendations are grouped as they appear in the text at the page number indicated. The recommendations which involve amendments to the Bills are presented in statutory form in Appendix 1:

<table>
<thead>
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<th>Page 12</th>
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<tr>
<td><strong>Recommendation 1:</strong> The Committee recommends that clause 13 of the Criminal Investigation Bill 2005 be deleted. This can be effected by voting against the clause in the following manner:</td>
</tr>
<tr>
<td>Page 11, lines 20 to 22 — To oppose the clause.</td>
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<td><strong>Recommendation 2:</strong> The Committee recommends that the Government consider a consequential amendment to the <em>Justices of the Peace Act 2004</em> to provide for record keeping in respect of search warrants.</td>
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<td><strong>Recommendation 3:</strong> The Committee recommends that clause 44 of the Criminal Investigation Bill 2005 be amended as follows:</td>
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<tr>
<td>Page 38, after line 6 — To insert —</td>
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<tr>
<td>(7) A person who is detained under subsection (2)(g)(iii) when he or she is not under arrest is to be taken to be in lawful custody.</td>
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Recommendation 4: The Committee recommends that clause 65 of the Criminal Investigation Bill 2005 be amended as follows:

Page 53, after line 26 — To insert —

“

(5) A person who is detained under subsection (2)(a) when he or she is not under arrest is to be taken to be in lawful custody.

”.

Recommendation 5: The Committee recommends that clause 82(5) of the Criminal Investigation Bill 2005 be deleted. This can be effected in the following manner:

Page 69, lines 17 to 19 — To delete the lines.

Recommendation 6: The Committee recommends that clause 88 of the Criminal Investigation Bill 2005 be amended as follows:

Page 75, after line 3 — To insert —

“

(4) When detaining a protected person under subsection (3), an officer must consider the best interests of the person.

”.

Recommendation 7: The Committee recommends that clause 127 of the Criminal Investigation Bill 2005 be amended in the following manner:

Page 108, lines 9 and 10 — To delete all the words after “life”.

Recommendation 8: The Committee recommends that Schedule 1 of the Criminal Investigation (Consequential Provisions) Bill 2005 be amended in the following manner:

Page 44, after clause 5 — To insert the following clause —

5A. **Guardianship and Administration Act 1990**

| 8. 97(1) | Delete “Advocate are — ” and insert instead —  
|          | “    Advocate are as follows —     ”.  
|          | Delete “and” after paragraph (g).  
|          | Delete the full stop after paragraph (h) and insert instead a semicolon.  
|          | After paragraph (h) insert the following paragraph —  
|          | “    (i) any other function conferred on the Public Advocate by a written law.  

Recommendation 9: The Committee recommends that clause 14 of the Criminal and Found Property Disposal Bill 2005 be amended in the following manner:

Page 12, lines 2 to 8 — To delete the lines and insert instead —

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14. Receipt of property

A person who gives possession of any found property to a prescribed agency must be given a receipt for the property from the chief officer of the agency as soon as reasonably practicable.
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"
REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

CRIMINAL INVESTIGATION BILL 2005, CRIMINAL INVESTIGATION (CONSEQUENTIAL PROVISIONS) BILL 2005 AND CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005

1 REFERENCE AND PROCEDURE

1.1 On 13 June 2006, on motion by Hon Sue Ellery MLC, Parliamentary Secretary representing the Attorney General, the Criminal Investigation Bill 2005, Criminal Investigation (Consequential Provisions) Bill 2005 and Criminal and Found Property Disposal Bill 2005 were referred to the Standing Committee on Legislation (Committee) for inquiry and report by 30 August 2006. The House granted an extension of reporting time to 20 September 2006.

1.2 In commencing its inquiry, the Committee sought written submissions from the general public by advertising in The West Australian on 24 June 2006 and placing details of the inquiry on the parliamentary website. The Committee also wrote to a number of stakeholders seeking their views on the bills. A list of those stakeholders is attached as Appendix 2.

1.3 A list of those who made submissions is attached at Appendix 3. The Committee conducted public hearings with officers representing the Office of the Attorney General and other stakeholders. A list of those who attended hearings is attached at Appendix 4.

1.4 Mr Barry King, Senior Assistant State Counsel, State Solicitor’s Office (SSO), provided a Summary Table comparing current police powers legislation on a clause by clause basis with the Criminal Investigation Bill 2005. The Summary Table also provided information as to whether a particular clause is a contraction, expansion or replacement of a current provision or a new provision. The Summary Table is attached at Appendix 7 and may assist Members of the Legislative Council during debate.

1.5 The Committee extends its appreciation to all witnesses for their evidence and information. The Committee also acknowledges the services of Hansard in the transcription of evidence.

3 At: www.parliament.wa.gov.au
2 BACKGROUND OF THE CRIMINAL INVESTIGATION BILL 2005

2.1 The Second Reading Speech describes the Criminal Investigation Bill 2005 and the Criminal and Found Property Disposal Bill 2005 as “final instalments” of a criminal law reform package that commenced in 1994 under the Police Act 1892 reform project. In particular, the Criminal Investigation Bill 2005 (Bill) is an:

> amalgamation of statutory police powers currently available to police by virtue of the Police Act and the Criminal Code; it also codifies the majority of police common law powers; and introduces new powers that reflect the needs of a contemporary police force.

2.2 The Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer (Kennedy Royal Commission) emphasised that:

> Legislation that creates a regulatory framework for policing that fails to ensure that officers have adequate powers to undertake investigations will not only frustrate the investigation of offenders, but may lead to otherwise ethical and competent officers engaging in actions that are in breach of the law.

2.3 In the Committee’s view, the Bill provides a framework within which both police and prescribed public officers can exercise powers with certainty. This is an important feature of the Bill given the Kennedy Royal Commission statement that “Uncertainty is corruptogenic- a breeding ground for corruption”.

2.4 At a policy level, the Committee noted the Bill is primarily drafted in what is known as a ‘black letter’ style. This means that with some exceptions, notably clauses 9(1)(b) and 127(1), the Bill is highly prescriptive in content, dealing exhaustively with every possible scenario.

2.5 The Bill contains 156 clauses within 14 Parts. The Committee provides the following information and commentary on the following clauses in the Bill to assist the House during debate.

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4 Hon Sue Ellery MLC, Parliamentary Secretary representing the Attorney General, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 11 May 2006, p2580.

5 Hon Sue Ellery MLC, Parliamentary Secretary representing the Attorney General, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 11 May 2006, p2580.

6 Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report, Volume II, January 2004, p305.

7 Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report, Volume I, January 2004, p11.
3 SPECIFIC CLAUSES IN THE CRIMINAL INVESTIGATION BILL 2005

Clause 3(1) - The definition of ‘officer’

3.1 This clause states:

“officer” means a police officer or a public officer or both, as the case requires.

3.2 The Committee noted that the Bill provides significant and extensive investigatory powers to persons other than police officers. These persons are “public officers”, defined in clause 3(1) as:

a person, other than a police officer, appointed under a written law to an office that is prescribed under section 9(1).

3.3 The Committee sought clarification from the SSO about the distinction between police and public officers. Mr Barry King, Senior Assistant State Counsel, SSO, said:

There is a purpose to having two sorts of officers in the bill; that is, police officers and other officers. Throughout the bill reference is made to not only police officers, but also to “officer” per se. The definition of “officer” includes police officers and public officers.

The reason for the distinction between the two is to allow for there to be public officers who are not police officers - for example, wildlife officers or health officers - to be prescribed to be public officers within the bill and to be provided with investigatory powers under the bill.

The purpose of that provision is to try to locate all those sorts of powers that apply to investigations within one piece of legislation and then to allow for different investigatory bodies or officers to be provided with those powers in due course. At this stage, they will be limited to police officers, as no other officers have been prescribed.

3.4 The Committee finds that the decision to provide as yet unspecified public officers with investigatory powers was for convenience rather than the alternative of “going through each Act that provides powers of investigation and have removed those powers from that legislation and placed them all into this bill”. Mr Barry King, Senior Assistant State Counsel, SSO, said:

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8 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p2.
9 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p2.
10 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p2.
The difficulty that arises is that some powers provided in different legislation will be different from those provided in this legislation.

3.5 The Committee also questioned the SSO about the potential for the definition of “public officer” to be so wide that that it might include officers who are not investigative officers. The SSO said that in order to remove doubt about the scope of the definition, the Government will move for an amendment to clause 9 to add clarity.11

3.6 Parliamentary Counsel provided the following Government proposed draft amendment which is underlined below. When added, clause 9(1)(a), reads as follows:

For the purposes of this Act and in particular the definition of “public officer” in section 3(1), another Act or the regulations made under this Act may prescribe—

(a) an office to which people are appointed under a written law for a public purpose and the functions of which are or include investigating or prosecuting offences; and

(b)...

3.7 The Committee is satisfied that the Government’s proposed amendment addresses the Committee’s concern in relation to the definition of “public officer” in clause 3(1).

Clause 5: “Thing relevant to an offence”, meaning of

3.8 A “thing relevant to an offence” is a new provision intended to convey the idea that the term is very broad in its application. The SSO explained that its breadth includes:12

things that are connected in any way to an offence or may provide evidence to an offence .... It extends to things that are non material or animate. In particular, we are looking at things that may afford evidence. When a person is being searched and a thing that may be relevant to an offence is found, it can be seized.

3.9 The Committee noted that a non-material or inanimate ‘thing’ might be the distance between two things or the visibility from a window. The SSO explained that:13

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11 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p2.
12 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p7.
13 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p7.
it is not unusual for police to want to get into a place either where an offence occurred or that is relevant to an offence, in order to look from a window to see whether things could be seen. That would be a thing relevant to an offence, which could be obtained under a warrant but it is not animate. It is not a thing as such in the normal terminology.

A ‘thing’ [for example] could involve taking a measurement...

3.10 The Aboriginal Legal Service Inc (ALSWA) has strong objections to the breadth of this clause, stating that the “practical effect that nearly every object or thing imaginable could be deemed a ‘relevant thing’ for the purposes of the Act.”

3.11 The decision to provide a wide interpretation of ‘thing’ in the definition of “things relevant to an offence”, including things that are non material or inanimate, is to include evidence which would not currently be considered evidence.

Clause 9(1) - The prescribing of public officers by regulations

3.12 The Committee noted that clause 9(1) provides for regulations to prescribe an office to which people are appointed under a written law for the purposes of the definition of ‘public officer’ in clause 3(1) and that regulations can prescribe “some or all of the powers” from the Bill that a holder of that office can exercise. That is, in the latter case, regulations may modify the Bill.

3.13 The Committee sought clarification from the SSO on why the Bill is constructed in a manner that obscures the identity of those public officers, given that the Bill provides such significant investigatory powers. Mr Barry King, Senior Assistant State Counsel, SSO, said:

"There are at least two reasons. The first is that this bill mirrors the Criminal Investigation (Identifying People) [sic] Bill, which is in the same form. The second reason is a number of different bodies of investigatory officers exist under their own legislation. In order to ensure that this bill was created in a form that was manageable during the time frame for the drafting for it to get through Parliament, it was determined to keep the definition at the level of police officers and other future investigatory officers as they arise."

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14 Submission No 5 from the ALSWA, 27 July 2006, p1.
15 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p2.
The idea of this legislation is that the powers of wildlife officers under the Environmental Protection Act [sic\(^{17}\)], for example, will remain. If it is considered necessary to provide other officers with powers that are provided for in the Criminal Investigation Bill, that can be done in the future.

3.14 The Committee confirmed that other Acts, for example the *Fish Resources Management Act 1994* expressly confers public officers with investigative powers\(^{18}\) and that those public officers will continue to exercise their own investigative powers under their own legislation regardless of the Bill. Mr Barry King, Senior Assistant State Counsel, SSO, said:\(^{19}\)

> in the future, those officers who are provided with their own powers under their own legislation could come within this legislation. For example, there are powers under this legislation that are not provided under other legislation. It may be that in the future it will be necessary for those other officers to have those powers. It is not only by regulation that those powers can be prescribed to public officers, but also prescribed by an Act.

3.15 The Committee prefers the Parliament be presented with the full intention of the Bill rather than substantive matters such as public officers’ investigatory powers (whether limited or unlimited) being prescribed in regulations.

3.16 The Committee draws to the attention of the House the fundamental legislative principle that both the prescribing of public officers by subsidiary means, that is, regulations, and the modifying of some or all of their powers by regulations may constitute an inappropriate delegation of legislative power from the Parliament to the Executive.

**Government proposed new clause 10**

3.17 The Committee supports the inclusion of a proposed new clause 10 into the Bill in the name of the Parliamentary Secretary representing the Attorney General. For an explanation, refer to paragraphs 3.140 to 3.142 concerning clause 101.

**Clause 13 - Detained people to be taken to be in lawful custody**

3.18 Clause 13 states:

\(^{17}\) Wildlife officers are appointed under section 45(1)(a) of the *Conservation and Land Management Act 1984*.

\(^{18}\) For example, fishery officers, honorary fishery officers and naval officers under Part 16 of the *Fish Resources Management Act 1994*. Section 11 of the *Fish Resources Management Act 1994* states that fishery officers are appointed under Part 3 of the *Public Sector Management Act 1994*.

\(^{19}\) Mr Barry King, Senior Assistant State Counsel, SSO, *Transcript of Evidence*, 19 July 2006, p2.
A person who is detained under this Act when he or she is not under arrest is to be taken to be in lawful custody.

3.19 Being 'detained' involves the "continuous holding of a person under some form of constraint." Lawful custody’ means the “legally authorised detention of a person”. Thus, if a detained person quit the place of detention, the effect of clause 13 is that the person would be subject to the powers of police to pursue that person for escaping lawful custody. The person would then be subject to any offences for escaping.

3.20 The Committee observed prescriptive rights for various categories of people in the following clauses in the Bill:

- Clause 28 provides rights for "persons”, who are not in lawful custody but are requested to accompany officers to assist in an investigation.
- Clause 31 provides “occupiers” with rights.
- Clause 136 provides rights for “arrested people”.
- Clause 137 provides rights for “arrested suspects”.

3.21 In comparison, the Committee observed that clause 13 affords no rights to detained persons. This deficiency was raised by the Law Society of Western Australia (Law Society), the ALSWA and the Inspector of Custodial Services as a matter of concern. The Committee is also concerned given the High Court of Australia’s (High Court) statement in *Trobridge v Hardy*, that to be free from interference with liberty is “the

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20 *Halsbury’s Laws of Australia*, paragraph [80-1065], current to 1 January 1998.
22 These are: to inform the person and be satisfied that the person understands that he or she is not under arrest, that he/she does not have to accompany the officer; and that if he or she does so accompany the officer, the person is free to leave at any time unless they are put under arrest.
23 These are that the officer must, before entering, identify him or herself to the occupier; if unoccupied, the officer must leave a notice stating the officer’s details and that the place had been entered, leave a copy of the search warrant (if any) and if entry is under some other statutory authority, leave the reason and the statutory authority for the entry.
24 Clause 136 refers to ‘entitlements’ a person who is arrested by an officer has, no matter under what authority or written law. These entitlements are: any necessary medical treatment, a reasonable degree of privacy from the media, a reasonable opportunity to communicate with a relative/friend to inform that person of his or her whereabouts and to be assisted by an interpreter.
25 In addition to the clause 136 entitlements, further entitlements are: to be informed of the offence which he or she has been arrested, to be cautioned, a reasonable opportunity to communicate with a lawyer, not to be interviewed without an interpreter and be informed of the rights under clause 136.
26 (1955) 94 CLR 147.
most elementary and important of all common law rights”\textsuperscript{27}. This was reinforced in \textit{Donaldson v Broomby}\textsuperscript{28} where Deane J in the Federal Court of Australia, said:

\begin{quotation}
It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant ... detain an individual should be strictly confined.
\end{quotation}

3.22 The former Standing Committee on Legislation in its 48\textsuperscript{th} Report drew a distinction between persons either in custody or under suspicion as opposed to persons in custody charged with an offence and the “requirement for greater procedural legislative safeguards with respect to the former”\textsuperscript{29}. In the absence of statutorily provided rights for detained people, the Committee noted that Australian case law has provided the following protections:

- Police officers are required to provide basic needs to a person in police custody.\textsuperscript{30}
- A person who is detained cannot be held simply for questioning about an offence which that person or another person may have committed.\textsuperscript{31}
- A person who is detained cannot be held simply for making further investigations to determine whether a charge should be laid against that or another person.\textsuperscript{32}
- Police officers are required to exercise reasonable care for the safety of a person in custody, even if a charge has not yet been laid.\textsuperscript{33}

3.23 Common law provides detained people with the right to remain silent when being questioned by a police officer prior to arrest.\textsuperscript{34}

3.24 Both the ALSWA and the Law Society argued that the rights of arrested suspects should extend to detained persons.\textsuperscript{35} The ALSWA said of clause 13: 36
It simply means that if the police decide, for whatever reason, to take someone into custody, that decision becomes lawful. The ALS experience is, especially in the context of people who are suspects in the commission of criminal offences and the police wish to interview them in relation to them, that more often than not the person is taken into custody without him having been arrested. Now, he may be taken into custody - this happens quite often as well - when he is completely unaware of his rights; that is, he is completely unaware of the fact that he does not have to go with the police if he chooses not to, given the fact that he has not been arrested. This clause would make his detention lawful.

I am very strongly of the view that that should not be the case, and that that, too, flies in the face of very long-established common law principle, and the High Court has made numerous pronouncements on that.

People should not be taken into the custody of the police and their detention deemed to be lawful under the Act, because that just leaves vulnerable people wide open to abuses by the police. That would mean that if a rogue policeman found somebody on the street and wanted to take him out into the bush to give him a hiding, this [Bill] would make that detention lawful.

3.25 Professor Richard Harding, the Inspector of Custodial Services explained to the Committee that:

whilst it is reasonably widely understood that there are applicable standards for the detention of people in prison custody, it is not so well understood that these standards are intended for all forms of detention and custody.

3.26 Professor Harding suggested that the United Nations’ Body of Principles for the Protection of all persons under any form of Detention or Imprisonment could be attached to the Bill to protect detained people. Amongst the instrument’s principles, the following are extracted:


Mr Peter Collins, Director of Legal Services, ALSWA, Transcript of Evidence, 2 August 2006, p5.

Submission No 4 from Professor Richard Harding, Inspector of Custodial Services, 6 July 2006, p1.

Legislation Committee

- Persons must be treated in a humane manner.39
- There is to be no derogation from any of the human rights of persons under detention or imprisonment.40
- Torture, cruel, inhuman or degrading treatment is prohibited.41
- Persons in detention are to be subject to treatment appropriate to their unconvicted status.42
- Persons are not to be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other official.43
- Detained persons are entitled to communicate and consult with legal counsel.44

3.27 The Committee sought clarification from the SSO about the absence of express rights for detained people. The SSO explained that a person detained under the Bill would “usually”45 first be arrested, thus giving rise to the rights listed in clauses 136 and 137. The SSO advised of two other clauses in the Bill which permit detention without prior arrest. These are:

- subclause 44(2)(g)(iii) which provides for a power to detain a person found at a place where a search warrant is being executed if the officer reasonably suspects it is necessary to do so in order to protect the safety of any person; and
- subclause 65(2)(a) which provides a power to detain for a reasonable period in order to conduct a basic search or strip search of a person.

3.28 The SSO said the person can be detained only for the purposes of the above searches and only for as long as is reasonably necessary.46 The SSO argued that the period of detention is so short in these two circumstances that:47

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39 Principle 1.
40 Principle 3.
41 Principle 6.
42 Principle 8.
43 Principle 11.
44 Principle 18(1).
45 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p6.
46 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 16 August 2006, p4.
47 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p6.
there is no reasonable need for people detained without prior arrest to be provided with the rights afforded to people under arrest.

3.29 The Committee is satisfied that the intention of clause 13 is to limit its effect to the two searches listed above but by being positioned at clause 13 in the Preliminary part of the Bill, has led both the Committee and other witnesses to a different interpretation. In isolation, clause 13 can be read as depriving a person of their liberty in circumstances other than arrest, despite the SSO’s Summary Table, which justifies clause 13 as “necessary to give effect to and legitimate citizen arrest and detention powers”.

3.30 The SSO explained that clause 13 is located:

in the [Preliminary] part of the Bill because it has general applicability of provisions for the whole Bill. Rather than being specific to a particular part, it applies across the board. For example, clause 44 is in part 5, division 3 and clause 65 is in part 8, division 1. As a matter of ... drafting convention because it applies to different parts, it should be found in the preliminary part rather than some other part. It saves repetition.

3.31 The Committee finds that by being positioned in the Preliminary part of the Bill, a wider interpretation than may have been originally intended for clause 13 has resulted. The Committee recommends clause 13 be opposed and that subclauses 44(2)(g)(iii) and 65(2)(a) be constrained in their operation by the following amendments:

- Clause 44 to be amended to include a proposed new subclause 44(7) to read: “A person who is detained under subsection (2)(g)(iii) when he or she is not under arrest is to be taken to be in lawful custody”.

- Clause 65 to be amended to include a proposed new subclause 65(5) to read: “A person who is detained under subsection (2)(a) when he or she is not under arrest is to be taken to be in lawful custody”.

3.32 The proposed amendments to clauses 44 and 65 may be viewed at paragraphs 3.98 and 3.111 respectively. With respect to clause 13, the Committee makes the following recommendation.

48 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 16 August 2006, p4.

49 The Committee noted that in the ‘Bar 1’ version of the Bill, clause 13 was located in Part 3 concerning citizens’ powers where it previously stated: “A person who is detained under this Part is to be taken as being in lawful custody”.

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Recommendation 1: The Committee recommends that clause 13 of the Criminal Investigation Bill 2005 be deleted. This can be effected by voting against the clause in the following manner:

Page 11, lines 20 to 22 — To oppose the clause.

Clause 24 - Citizens’ powers for preventing violence and offences

3.33 Essentially, clause 24 provides for a person, in the absence of a police officer, to use reasonable force to prevent violence, a breach of the peace or the commission of an offence. The Committee sought clarification from the SSO why an express indemnity is not included in this clause. An indemnity in this context would be in the form of legal protection against liabilities arising from a citizen’s actions.50

3.34 Mr Barry King, Senior Assistant State Counsel, SSO, explained that there are no indemnity provisions in the Bill but there are in The Criminal Code.51 Mr King said an indemnity is unnecessary in clause 24 because what the citizen is doing is lawful. Therefore, “a claim could not arise. In a sense, that would provide a defence … to any claim.”52

3.35 The Committee noted clause 15(5) and how it provides an indemnity in circumstances when a person is authorised by another person to exercise a power or is required to give assistance in the exercise of powers. Mr Barry King, Senior Assistant State Counsel, SSO, explained that the indemnity there:53

provides protection when there is no other enactment that provides protection. The lawfulness of clause 24 would not arise in circumstances of clause 15 or vice versa. If someone were asked to assist a police officer and did so, that person would be protected in the same way that a police officer would be protected under the Police Act for any act.

3.36 The Committee finds that the exclusion of indemnity provisions either in clause 24 or in the remainder of the Bill is a policy decision of the Government. Nevertheless, the Committee draws to the attention of the House, the absence of an express indemnity

50 In other forms, an indemnity might be security against loss or injury. It may be a sum of money to compensate a person for liability loss or expense incurred by the person.
51 For example, The Criminal Code, established by Appendix B, section 2 of the Criminal Code Act 1913 provides in section 5 of Appendix B that “When, by the Code, any act is declared to be lawful, no action can be brought in respect thereof.”
52 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p9.
53 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p9.
provision in clause 24, particularly in view of the fact that clause 15(5) extends an
express ‘protection from liability’ provision to both the person and the State in
situations when a person is required to give assistance in the exercise of powers.

**Clause 25(6) - Citizen’s arrest and the detaining of a suspect**

3.37 A citizen’s arrest is the lawful taking of another into custody by a person who is not a
law enforcement official.\(^54\) The Committee sought clarification of clause 25(6) which
provides that a person may “detain” a suspect until the police officer attends or the
suspect is taken to a police officer. The Committee questioned whether the suspect is
detained or arrested, given that the term “arrest” has a particular meaning in the Bill,
that is, arrested on a particular offence.

3.38 The Committee noted there are three categories of detained people (not otherwise
under arrest) in the Bill:

- “persons” detained under clause 44(2)(g)(iii);
- “people” detained under clause 65(2)(a); and
- “suspects” detained under clause 25(6).

3.39 The Committee observed that no rights are available to a suspect detained under
clause 25(6) when a citizen performs an arrest. Rights arise under clauses 136 and
137 when the police officer arrives to take over the detention and arrest.

3.40 The SSO confirmed that the only right a detained suspect has, at the point of arrest by
a citizen, arises by implication under clause 25(5); that is, the citizen must make
arrangements for a police officer to attend as soon as practicable.

3.41 The SSO said that in order to clarify that, in taking over the arrest, the police officer is
arresting the suspect under the police officer’s own powers of arrest and thereby
bringing clauses 136 and 137 into operation:\(^55\)

> the Government will move an amendment to clause 25(7) to delete the
> reference to “taking over” the arrest and to refer instead to arresting
> the suspect.

3.42 The proposed amendments, underlined below, will result in clause 25(7) reading as
follows:

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\(^55\) Letter from SSO, 22 August 2006, p2.
When a police officer attends or the suspect is taken to a police officer —

(a) the officer may take over the arrest and detention of arrest the suspect if, under section 127 or an arrest warrant, the officer is authorised to arrest the suspect; but

(b) if the officer does not take over the arrest and detention of arrest the suspect, the suspect ceases to be under arrest.

3.43 The Committee does not consider the Government’s proposed amendments address the Committee’s concerns at a lack of rights for detained suspects and draws this to the attention of the House.

Clause 26 - Person in command of vehicle, powers of

3.44 This clause provides for a person in charge of a vehicle, (defined widely in clause 3\(^56\)) to request a passenger to produce items or to submit to a search for items that may be used to commit an “endangering offence” on the vehicle.

3.45 The Committee considered that it would be useful to include a delegate of the “person in charge of the vehicle” within the clause because, as the Law Society said:\(^57\)

> With aeroplanes and trains, for example, one could envisage a situation where a pilot or driver may not be in a position personally to make the request under subsection (2) of the passenger, let alone, personally restrain, arrest or detain the [passenger].

3.46 The Committee noted that clause 11 of the Bill provides an “officer” with a power to delegate but a power of delegation is absent in respect of a “person” in clause 26. The SSO Summary Table quotes section 565A of The Criminal Code which will be replaced by clause 26, yet it refers to a person in command of an aircraft or vessel, or any person authorised by him, [emphasis added] being able to undertake various functions.

3.47 The Committee sought and the SSO provided the following Government proposed draft amendment which reads as follows:

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\(^56\) Clause 3 states: “vehicle” means: “(a) any thing capable of transporting people or things by air, road, rail or water, irrespective of whether the thing is permanently or semi-permanently stationary, other than a mobile home; or (b) a mobile home that is reasonably suspected not to be permanently or semi-permanently stationary in a single location, and it does not matter how the thing or mobile home is moved or propelled.”

(6) Without limiting section 15, the person in charge of a vehicle may authorise another person to exercise any of the powers that the person in charge has under this section.

3.48 The Committee is satisfied that the Government’s proposed amendment addresses the Committee’s concern at the absence of a power of delegation in clause 26.

Clause 27- Suspects and others may be ordered to move on

3.49 On 31 May 2005, move on orders came into operation, following an amendment to the Police Act 1892 under the Criminal Law Amendment (Simple Offences) Bill 2004 which abolished the offences of “loitering”, “being suspected of having committed an offence” and “evil designs”. The Second Reading Speech of the Criminal Law Amendment (Simple Offences) Bill 2004 stated:

*Essentially, the “move on” power will allow a police officer to order a person who is in a public place to leave it, if the officer reasonably suspects that the person is doing or is just about to do an act that involves the use of violence against a person, is breaching the peace, is hindering, obstructing or preventing any lawful activity, or is committing an offence. The order to move on must be in writing. A person who, without reasonable excuse, does not comply with such an order could be imprisoned for 12 months and incur a fine of $12 000.*

*The Western Australia Police Service has indicated that an offence of this nature will allow it to adequately deal with loitering and suspicious behaviour, and inhibit unlawful activities, such as peeping toms, and persons seemingly lying in wait to commit a burglary but not having yet committed the substantive offence.*

3.50 According to the SSO Summary Table, clause 27 will replace the move on orders located in section 50 of the Police Act 1892. The current move on orders enable police officers to order individuals to move on from a specified area by issuing a written notice. The ALSWA’s view is that:

*in terms of policing practice, the laws have been used as part of zero tolerance policing processes to target the most vulnerable in the community, many of whom are Aboriginal, who occupy public space. I am referring here to the homeless, the mentally ill and those with substance abuse issues. In addition to that ... Aboriginal people,*
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historically and culturally, occupy public space. That is where people
gather together to meet, to converse and to socialise.

3.51 The ALSWA listed the following problems with the existing move on orders legislation:

• “That every single move-on order issued against a client of the ALS has been for the maximum 24-hour period”.61

• “The legislation also permits broad police discretion in terms of the area prohibited”.62

• “Very often the behaviour that justifies the issuing of the move-on order in the first place is conduct of a trivial nature”.63

• “The people who are subjected to them are the most vulnerable and disadvantaged in the community. ... Some have substance abuse issues and many are illiterate and homeless. Some are mentally ill. Many do not know the names of the streets. They do not have any comprehension of the area they are prohibited from entering. Many have no means of getting out of the prohibited area - they have no money and it might require a walk of several kilometres if they know where the area is to get out of it. We have found that people have been prosecuted within 20 minutes of getting a move-on notice for breaching it and not getting out of the area. Many do not own a watch so they do not have any conception of the time limits imposed in the notice. These people have no meaningful prospect of being able to properly understand the notice or being able to comply with it”.64

• “Since this legislation came in, [no-one] has been issued with a summons. People get locked up for it, invariably overnight. The advice is that there is some defect in the order such that a person should plead guilty. The problem is that if the matter is remanded, these people, by virtue of their social circumstance, do not come to court. They are then charged with a breach of

61 This is permitted under section 50(2)(b) of the Police Act 1892. The Committee noted that section 50(2)(b) provides the officer with a discretion to set a time period.

62 For example, if someone is given a move-on notice in Forrest Place, it is completely at the discretion of the individual police officer as to the area he forbids the person from entering. We have experienced that if someone is misbehaving in Forrest Place, he will be prevented from entering the entire CBD area, extending down to the river and beyond Royal Perth Hospital and the railway station in Wellington Street and William Street. It is a huge area. Mr Peter Collins, Director of Legal Services, ALSWA, Transcript of Evidence, 2 August 2006, p6.

63 Such as disorderly conduct, swearing and drinking in public.

64 Mr Peter Collins, Director of Legal Services, ALSWA, Transcript of Evidence, 2 August 2006, p6.
bail, which also carries a sentence of imprisonment. The problems are compounded further down the line”.

- “That people who look different are getting move-on notices. People of gothic dress code are moved on because they do not look like the norm”.

- “We need to acknowledge literacy and numeracy levels and move-on notices being issued to people who are affected by substance or alcohol abuse and do not comprehend the notice”.

3.52 The Committee noted recent media coverage of the move on orders, including a radio interview where the Attorney General publicly stated:

in my view, they [move on orders] have worked overwhelmingly well in enabling the police to intervene early in order to stop violence or criminality escalating and in particular, things like Schoolies Week and Skyworks.

All that I have been concerned about are examples given to me from both criminal lawyers and the Aboriginal Legal Service where police seem to have used their discretion wrongly in respect of some Aboriginal people and some people with mental illnesses where perhaps a wiser head might have applied the law differently and as we all know, discretion is of the essence of good policing.

3.53 During a hearing with Western Australia Police to explore the ALSWA’s objections to move on orders, Deputy Commissioner Lampard said:

The vast majority of cases cited in the ALS submission were for disorderly conduct, street drinking, obstructing pedestrians, refusing to leave nightclubs and fighting. All those matters fall within the empowerment of the legislation for us to issue move-on notices.

I suggest to the committee that there are times when officers could have arrested or charged people but have used their discretion, particularly for disorderly conduct. Street drinking is an offence against the Liquor Licensing Act, as Members know. The responsible

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65 Mr Peter Collins, Director of Legal Services, ALSWA, Transcript of Evidence, 2 August 2006, p6.
66 Mr Dennis Eggington, Chief Executive Officer, ALSWA, Transcript of Evidence, 2 August 2006, p8.
67 Mr Dennis Eggington, Chief Executive Officer, ALSWA, Transcript of Evidence, 2 August 2006, p8.
68 Two articles from The West Australian dated 8 and 10 May 2006.
69 Radio Interview between the Attorney General and 6PR 8 May 2006.
70 Mr Murray Lampard, Deputy Commissioner (Operations), Western Australia Police, Transcript of Evidence, 23 August 2006, p11.
issuing of move-on notices for those matters and for refusing to leave nightclubs and fighting can avoid a person being taken into custody and can generally avoid what could potentially be a much more serious incident.

3.54 Inspector Charlie Carver, Inspector in Charge, Perth Police Station said that of 6,800 move-on notices issued since inception, 600 persons have been charged with a breach and:

that tells me that 90 per cent of the time people obeyed the move-on notice. So 90 per cent of people abide by the move-on notice and only 10 per cent are actually charged, and that 10 per cent obviously is over-represented by the indigenous population. That is obviously an issue we need to explore further. I have taken those points on board and we need to look at that. However, if 90 per cent of the time people are abiding by those move-on notices, I would suggest it is actually working.

3.55 The Committee provides the following Western Australia Police response to two specific objections ALSWA raised at paragraph 3.51 in relation to move on orders.

(1) The Maximum 24 hour period in every move on notice

3.56 The Committee noted that 95% of move on notices are issued for the maximum 24 hour period. Western Australia Police acknowledged that the maximum period results from police officers prejudging, for example, that a person behaving antisocially on a Friday night in Northbridge will return on Saturday night and behave in the same manner. The issuing of a maximum 24 hour period keeps that person out of the precinct for both nights. Miss Karen Jones, Legal and Policy Officer, Western Australia Police, said:

Having listened to the Aboriginal Legal Services’ concerns in this regard, it was certainly brought to our attention that this automatic issuing of a 24-hour move-on notice was not an appropriate exercise

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72 Additional information from the Police Commissioner on this issue to the Committee dated 7 September 2006 is attached at Appendix 5.
74 Miss Karen Jones, Legal and Policy Officer, Western Australia Police, Transcript of Evidence, 23 August 2006, p16.
of the discretion. That is certainly something that will have to be incorporated more carefully into training, because it may well be that the periods could be shorter.

3.57 Mr Matthew Samson, Acting Senior Legislation Officer, Western Australia Police, said: 75

We do need to impress on officers that the purpose of the order dictates the area and time, and the area and time are directly related. If it is a small area, it may be reasonable to put 24 hours on the order. If it is a large area, it may be appropriate to exclude people for only half an hour because of the particular circumstances in that area. We can convey that to the staff through our commissioner’s order.

3.58 The Committee is encouraged by Deputy Commissioner Lampard’s statement that: 76

We can give you a commitment that we clearly get the message and will ask people to be more thoughtful about their interpretation of issuing these notices.

3.59 Following the hearing with Western Australia Police, the SSO provided the following Government proposed draft amendment which, when added to clause 27(2)(b), will require police officers to impose a “reasonable” period in the move on notice. The proposed amendment is underlined below and reads as follows:

A police officer giving an order under subsection (1) may in addition do either or both of the following -

(a)...

(b) order the person to obey the order or orders for a reasonable period set by the officer; but the period must not be longer than 24 hours.

3.60 The Committee concurs with the Government’s proposed amendment.

(2) Boundaries of the area prohibited in the move on notice

3.61 Deputy Commissioner Lampard justified the specifying of the entire central business district in a move on notice in the following way: 77

75 Mr Matthew Samson, Acting Senior Legislation Officer, Legal Services, Western Australia Police, Transcript of Evidence, 23 August 2006, p17.
76 Mr Murray Lampard, Deputy Commissioner (Operations), Western Australia Police, Transcript of Evidence, 23 August 2006, p17.
If we define an area within Northbridge, they move to the train station, and we are then called to the train station, or they move to the Murray Street Mall, and we are called in because there is a continuation of the kind of behaviour that first realised the move-on notice from the Northbridge area.

3.62 Sergeant Graeme Macey, Officer in Charge, Wiluna Police Station and former Police Academy Trainer, stated:\(^78\)

During the training phase\(^79\), it is clearly pointed out to the police officers undergoing training that if these people are making positive steps to leave the area, they are complying with the move-on notice. Regardless of whether the train station, the bus station and taxi ranks are within that zone, if they are showing positive steps to comply with that order, they are not in breach of that order. Obviously, if they have to leave the area by train, and the train does not come until one o’clock and it is 12.40am, we cannot just say that because they are still in the area, we will lock them up. Provided that they are showing that positive obedience of the move-on notice, they are not in breach of the notice.

Committee Comment

3.63 The Committee finds that the original purpose of move on orders was to provide an alternative to dealing with matters related to public order. A majority of the Committee comprising Hons Graham Giffard, Peter Collier, George Cash and Sally Talbot MLCs agree with the concerns of the Attorney General that, although the move on orders are working well, there have been instances of move on notices being misapplied.

3.64 A minority of the Committee comprising Hon Giz Watson MLC concluded that the evidence provided to the Committee has demonstrated that the move on orders have disproportionately impacted on Aboriginal people and other highly visible minorities. Hon Giz Watson recommends that move on orders be limited in their application to the shortest time necessary, to be more limited in area; and that the penalty for a breach of a move on order not exceed the penalty for the offence the person was suspected of.

\(^77\) Mr Murray Lampard, Deputy Commissioner (Operations), Western Australia Police, Transcript of Evidence, 23 August 2006, p7.

\(^78\) Sergeant Graeme Macey, Officer in Charge, Wiluna Police Station and former Police Academy Trainer, Western Australia Police, Transcript of Evidence, 23 August 2006, p9.

\(^79\) Mr Macey stated at page 6 of his evidence that training in move on notices comprises two 40 minute sessions.
Clause 31(6)

3.65 This clause provides that a copy of a search warrant may omit the name of the judicial officer who issued it. The Committee sought justification for its omission. Mr Barry King, Senior Assistant State Counsel, SSO, explained that this reflects current police practice and protects judicial officers from any repercussions that might arise from the issuing of search warrants.

3.66 The Committee is satisfied with this explanation but given that the clause states the judicial officer’s name “may” be omitted, suggested to the SSO that the Bill could be clarified to reflect that the relevant judicial officer has the final say. Mr King stated that the intention of the clause is:80

merely to give the power to omit the name. The question of whether the judicial officer would have discretion to include the name on a warrant was not considered. Warrants must be signed but copies that are provided may not have the name on them. A warrant that contained the name of the judicial officer would remain with the court but a copy provided to the person who was the subject of a search may or may not have the name.

3.67 In a later submission, Mr King concurred with the Committee’s view that the use of the word “may” in clause 31(6) provides a discretion to include the name of the judicial officer but is unclear as to who holds that discretion.81 Mr King said the Government has now decided to omit the discretion and will move an amendment to that effect in the House. Mr King further advised that officers will no longer have to consider whether a judicial officer wished to have his or her name on the copies of the warrant and there will be less likelihood of error.82 The Committee concurred with this course of action.

3.68 Parliamentary Counsel provided a draft, Government proposed amendment to delete the word “may” from clause 31(6) and insert the word “must” instead. Thus, clause 31(6), with the proposed amendment underlined below will read as follows:

The copy of a search warrant given under subsection (2)(c) or (3)(b) or left under subsection (5)(b) must omit the name of the judicial officer who issued it.

3.69 The Committee is satisfied that the Government’s proposed amendment addresses the Committee’s concern.

80 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p9.
81 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p4.
82 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p4.
Clause 41(2)

3.70 This clause provides that an application for a search warrant must be made to a Justice of the Peace (JP) in accordance with a prescriptive procedure in clause 12. The Committee sought clarification of clause 41(2) given that the *Kennedy Royal Commission* recommended applications for search warrants be made to “Magistrates and other designated persons, rather than all JPs”.83

3.71 The *Kennedy Royal Commission* cited instances of search warrants being forged, obtained on false or misleading information and blank warrants signed by obliging JPs.84 The *Kennedy Royal Commission* described JPs as:85

> invariably lay persons with no particular legal skill, [who] often seem to achieve a state of inappropriate familiarity with police officers with whom they deal regularly.

3.72 Ms Judith Fordham, Law Society Councillor, said:86

> Concerns have been sometimes expressed even about the absolute independence of certain justices of the peace because they are physically located at police headquarters and, I guess, co-exist.87

3.73 In 2004, Mr Steven Heath, Chief Magistrate, Magistrates Court of Western Australia, addressing a visiting, Victorian parliamentary committee conducting its own *Inquiry into Warrant Powers and Procedures*, said:88

> The concern is, particularly in country towns but not necessarily restricted to that, there is a close relationship between the local police force and the [JPs].

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83 Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian police officer, Final Report, Volume II, January 2004, p311.
84 Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian police officer, Final Report, Volume II, January 2004, p308.
85 Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian police officer, Final Report, Volume II, January 2004, p309.
87 Mr Matthew Samson, Research and Legislation Officer, Legal Services, Western Australia Police, confirmed that: *There is a JP Office at Central Police Station at 60 Beaufort Street, Perth. The Office is normally attended between 9am and 4pm each weekday. There is also a JP located at the Perth Watch House. Generally a JP comes in on Thursday and Friday evening and Saturday 9am to 4pm. Outside of these hours Police contact the JP and ask them to attend. There is a list of local JP at every Police Station.* E mail advice to the Committee, 7 August 2006.
3.74 Mr Barry King, Senior Assistant State Counsel, SSO, said the Kennedy Royal Commission recommendation, if adopted, would lead to practical difficulties. For example, it would require a magistrate to be on call 24 hours a day. Mr King said:89

_We have put in a provision that applications can be made by remote communication. Nonetheless, it would still be necessary to have a magistrate available somewhere in this state 24 hours a day, seven days a week. Therefore, it was determined that, as a matter of policy, that would be impracticable._

3.75 The Committee noted that the Chief Magistrate of the Magistrates Court is required to authorise such magistrates as he thinks fit to hear telephone applications for violence restraining orders and is to:90

_ensure that, as far as practicable, there is at least one such authorised magistrate available at all times._

3.76 Under sections 19(b) and (c) of the Restraining Orders Act 1997 an application may be made by telephone, facsimile, radio, video conference, electronic mail or another similar method, or any combination of such methods and need not be in a particular form.

3.77 The Committee noted that historically, very low numbers of telephone violence restraining orders have been issued by magistrates and in fact, this was the impetus for the Acts Amendment (Domestic Violence) Bill 2004 which introduced Police Orders into the Restraining Orders Act 1997. In the Second Reading Speech of the Acts Amendment (Domestic Violence) Bill 2004, Hon Nick Griffiths MLC said:91

_These new powers [the police order] will overcome the problems experienced with the existing system of telephone restraining orders, which, in many cases, have proved time consuming and unwieldy. The telephone system requires police at the scene to contact police operations at Midland. A senior officer from Midland must then contact a magistrate to try to arrange the temporary order. This can take hours and, not surprisingly, police and victims of crime struggle to see the value of this process. This is borne out by the fact that last_

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89 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p10.
90 Section 17(1)(b) of the Restraining Orders Act 1997.
91 Hon Nick Griffiths MLC, Parliamentary Secretary representing the Attorney General, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 17 August 2004, p4899.
year just 13 telephone applications were made and just seven were ultimately granted. 92

3.78 The Committee sought information from Western Australia Police about the number of search warrants applied for and issued per year. Western Australia Police said:93

the number of Criminal Code warrants that have been recorded as executed between 1/7/05 to 30/06/06 is 2019.

the number of warrants issued for the same period of time under the Misuse of Drugs Act (s24) is 1846.

3.79 The Committee noted that per annum, this number averages to approximately 10 per day.

3.80 The Committee sought clarification from the Law Society about the practicality of magistrates issuing search warrants, given the problems of servicing rural and remote areas of Western Australia. Ms Judith Fordham, Law Society Councillor, said: 94

Gone are the days when one had to send carrier pigeons to get messages through. It need not necessarily be done by written submission. We have the capacity to seek warrants by telephone. It is almost inconceivable that a situation would arise in which it is not possible to communicate in one way or another. Of course, there are provisions in circumstances of emergencies if there is a concern about someone’s life being in danger to enter premises in those sorts of circumstances. I do not see that that is a real issue in this day.

3.81 In 2004, Mr Steven Heath, Chief Magistrate, Magistrates Court of Western Australia, said:95

The size of our state and the isolation of some of our areas is often put up as the reason for the police practice of going to JPs to obtain search warrants and whilst that may well have been the case in the days when technology was not what it is today, I think it is significant that the royal commission into police conduct in this state included in

92 According to Mr Michael Ovane, Manager, Domestic Violence Unit, Legal Aid Commission Western Australia, in first month of operation 500 Police Orders were issued in Western Australia. This has now settled to 450 per month.
93 Email to the Committee from Mr Matthew Samson, Acting Senior Legislation Officer, Legal Services, Western Australia Police, 26 July 2006, p1.
94 Ms Judith Fordham, Law Society Councillor, Transcript of Evidence, 2 August, p3.
95 Mr Steven Heath, Chief Magistrate, Magistrates Court of Western Australia, Transcript of Public Hearings, Victorian Parliament Law Reform Committee, Inquiry into Warrant Powers and Procedures, 3 September 2004, p137.
the final report a recommendation that search warrants should no longer be issued by justices but by magistrates.

It is very rare for the police to come to a magistrate for a search warrant as opposed to members of the Federal Police and commonwealth prosecuting agencies, who only come to magistrates. The standard of the documentation of the case that they present is much higher and more comprehensive. Most of it is only hearsay and is from cases I have heard discussed about what has happened in front of justices where an affidavit is not presented. It is quite often given just on a policeman’s statement, the justice taking a few notes and then granting the warrant. It is a clear contrast to that.

The only police warrants we see on a regular basis are from the police internal inquiries branch. They make a practice of coming to a magistrate and supporting their applications for warrants with affidavits. While I would say they are not quite to the standard of the federal applications, they are getting there. The only other ones we tend to see are where they are making an application for a covert warrant.

3.82 The Committee noted that subclauses 41(3)(a) to (i) of the Bill addresses the concerns of both the Kennedy Royal Commission and the Chief Magistrate with respect to deficiencies in documentation supporting applications for search warrants to a JP. Clause 42 then provides that a JP can only issue the warrant “if satisfied, that in respect of each of the matters in clause 41(3) that the applicant suspects, there are reasonable grounds for the applicant to have that suspicion”. This places an onus on the police or public officer to ensure that the requisite information is provided so that the JP can responsibly make an assessment of whether or not to issue the warrant. Under clause 42(4), if a JP refuses to issue a search warrant, the JP must record on that application the fact of, the date and time of, and the reasons for the refusal.

3.83 The Committee further noted that clause 12, under which a clause 41(2) search warrant application is made, is prescriptive of the application process. Generally, unless the application is by remote communication, it must be made in person; in writing and on oath. However, the Committee observed that there is no requirement for JPs to keep records of the application process. Although clause 42(3) refers to how “a search warrant must be in the prescribed form”, neither Form 1 in Schedule 1 of the Criminal Code (General) Regulations 2005, (the template search warrant application form) nor Form 2 (the template search warrant form) require duplicates to be retained by the issuing JP.
In 2004, Mr Steven Heath, Chief Magistrate, Magistrates Court of Western Australia, said:

> there is no record keeping in terms of any register. We have tried to encourage [JPs] to make sure they keep a record of the evidence that they receive on which to base the warrant. The difficulty with [JPs] is there is really no control over them. ... They are volunteers, there is no payment.

The *Justices of the Peace Act 2004* is silent on the subject matter of JPs keeping records and the Governor has not yet made any regulations under that Act. Given the *Kennedy Royal Commission’s* assessment of JPs, it is a matter of concern to the Committee that JPs have no accountability mechanism within either their own empowering Act or regulations to maintain records in respect of the evidence submitted to support a search warrant. For this reason a majority of the Committee comprising Hons Graham Giffard, Peter Collier, George Cash and Sally Talbot, MLCs recommend the Government consider a consequential amendment to the *Justices of the Peace Act 2004* to provide for record keeping in respect of search warrants. Regulations may then prescribe record keeping procedures in detail.

This recommendation will add another element of accountability in the application process for a search warrant and minimise what the *Kennedy Royal Commission* referred to as corruption opportunity to the extent of JPs and those public or police officers who apply for warrants. The recommendation may be effected in the following way.

**Recommendation 2: The Committee recommends that the Government consider a consequential amendment to the *Justices of the Peace Act 2004* to provide for record keeping in respect of search warrants.**

**Committee Conclusion**

The Committee draws to the attention of the House that retaining the current practice of JPs issuing search warrants rather than magistrates, fails to give statutory effect to the recommendation of the *Kennedy Royal Commission* and clearly does not meet the standard set by that Commission (see paragraph 3.71). However, the Committee understands that this is a policy decision of the Government.

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97 Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Volume II, January 2004, p152.
3.88 The Committee further draws to the attention of the House that in addition to police officers, prescribed public officers will also be able to apply to a JP for the issuing of a search warrant under clause 41(1) of this Bill.

3.89 A majority of the Committee comprising Hons Peter Collier, Giz Watson and George Cash, MLCs remain concerned with the policy decision to retain JPs issuing search warrants despite the recommendation of the Kennedy Royal Commission and the views of the Chief Magistrate. However, this is a matter the majority of the Committee accept as being precluded from further inquiry.

3.90 Hon Giz Watson MLC recommends:

• that magistrates rather than JPs issue search warrants;

or if this recommendation is not accepted;

• JPs be required to maintain adequate records when issuing search warrants.

Clause 44(3)

3.91 Part 5 Division 3 contains clauses 41 to 45 and is titled “Powers with a search warrant”. The Law Society raised a concern with clause 44(2) which gives ancillary powers to an officer while the search warrant is being executed. For example, that officer may enter but not search a “place near the target place if the officer reasonably suspects it is necessary to do so…”98 The Law Society is of the view that the safeguard for the ancillary powers available to an officer in clause 44(2), that is, the written approval of a senior officer who is “not involved in the investigation”99 under clause 44(3) may be misused. The Law Society believes that this form of approval is insufficient “given the personal liberties potentially being affected”100.

3.92 Ms Judith Fordham, Law Society Councillor, said that with respect to the written approval to exercise these ancillary powers in clause 44(3):101

it would at least be preferable to have, say, a justice of the peace or someone of that ilk making those determinations. Justices of the peace are very easy to find.

3.93 Ms Fordham said, in the context of police officers, that JPs are “one step better than the fox looking after the henhouse”102 because, they are “at least ... at arm’s length to

98 Others include: to photograph or make a record of a target thing that is in the target place; to make reasonable use of any equipment, facilities or services in the target place, to seize and retain any thing.
99 Clause 44(3).
100 Submission No 5 from the Law Society, 6 July 2006, p2.
101 Ms Judith Fordham, Law Society Councillor, Transcript of Evidence, 2 August, p2.
102 Ms Judith Fordham, Law Society Councillor, Transcript of Evidence, 2 August, p2.
some extent.” However, the Law Society “would vastly prefer a Magistrate [give authority] to exercise those powers” in clause 44(3).

3.94 Alternatively, the Committee considered that the neutrality of the uninvolved senior officer may be a positive feature of clause 44(3). That senior officer may be able to make an objective, knowledgeable assessment of the circumstances requiring the exercise of ancillary powers under the search warrant.

3.95 The Committee draws to the attention of the House the Committee’s previous comments at paragraphs 3.87 to 3.90 that it is preferable to have magistrates rather than JPs issuing search warrants. Therefore, any ancillary powers that are needed during the execution of the warrant should ideally be approved by a magistrate, rather than the “uninvolved” senior police officer in clause 44(3).

Committee Conclusion

3.96 The Committee finds that the provision of power to an “uninvolved” senior officer to give written approval for an officer to exercise ancillary powers rather than a JP is a policy decision of the Government. The Committee draws to the attention of the House that in addition to police officers, prescribed public officers will also be able to apply to a prescribed senior officer in their own agency for approval to exercise the ancillary powers in clause 44(2).

3.97 A majority of the Committee comprising Hons Collier, Watson and Cash remain concerned with the policy decision to retain JPs issuing search warrants with an “uninvolved” senior officer then giving written approval for an officer to exercise ancillary powers. However, this is a matter that the Committee accepts as being precluded from further inquiry.

Proposed new clause 44(7)

3.98 For the reasons set out at paragraphs 3.27 to 3.32, the Committee recommends the insertion of a proposed new clause 44(7).
Recommendation 3: The Committee recommends that clause 44 of the Criminal Investigation Bill 2005 be amended as follows:

Page 38, after line 6 — To insert —

“(7) A person who is detained under subsection (2)(g)(iii) when he or she is not under arrest is to be taken to be in lawful custody.

”.}

Clause 61 - Data access order, effect of

3.99 Clause 61(2) states:

A person who is served with a data access order and who, without reasonable excuse (the onus of proving which is on the person), does not obey it commits a crime.

3.100 For example, if a computer is password protected, a data access order could require the person to supply the password and if this is refused, then that in itself constitutes a crime, (incidentally, the only ‘crime’\(^{105}\) in the Bill).

3.101 The Committee draws to the attention of the House a reversal of the onus of proof in clause 61(2) in relation to any reasonable excuse the person might proffer for refusing to disclose, for example, a protected password.

3.102 In criminal proceedings it is for the Crown to prove all facts beyond reasonable doubt. An accused is not required to prove anything. All persons charged can avail themselves of the Chapter V excuses (defences) in The Criminal Code. A person cannot be guilty of the defined offence unless the Crown negates the application of any Chapter V excuse which has been raised on the evidence.\(^{106}\) Clause 61(2) reverses this so that the person is given all the effort of proving that his or her excuse for not complying with the data access order (in this example, refusing to provide a password) was reasonable.

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\(^{105}\) A crime is a wrong punishable by the State, involving both a guilty action and a guilty mind. Section 67(1a) of the Interpretation Act 1984, states “An offence designated as a crime ... is an indictable offence.” An indictable offence means it is triable before a judge and jury. However, in Western Australia, the crime in clause 61(2) has the alternative penalty of being tried summarily.

\(^{106}\) The exception is the defence of insanity where the accused has the onus of proof. See RG Kenny, An Introduction to Criminal Law in Queensland and Western Australia, Sixth Edition, Butterworths, Sydney, (2004), p114.
Arguably, a reversal of the onus of proof in primary legislation is undesirable. However, justification sometimes occurs in situations where the subject matter of proof by the person is peculiarly within that person’s knowledge and would be extremely difficult or expensive for the Crown to prove. For example, the relevant fact must be something inherently impractical to test by alternative evidentiary means and the person would be particularly well positioned to disprove guilt. The SSO confirmed that this is the case with clause 61(2):107

\[\text{It is not normally possible for the prosecution to know why a person has not obeyed an order or to be able to prove the absence of a reasonable excuse. For that reason the onus must be on the person to prove that defence”}\.

The Committee further noted the severity of this crime, the penalty for which is imprisonment for five years or a summary conviction penalty of a $24,000 fine and imprisonment for two years. The significance of the penalty reflects the Government’s policy position that non-compliance with a data access order should have serious consequences.

The Committee noted that the seriousness of this crime is also reflected in clause 61(3) which removes an important criminal law defence to a charge of not obeying a data access order. This defence is the privilege against self-incrimination. The Criminal Lawyers’ Association said:108

\[\text{we are strongly of the view that a person should never be required to incriminate him or herself by providing hard or electronic copies of material to police.}\]

The privilege against self-incrimination is considered one of the fundamental common law principles safeguarding against the infringement of individual rights.109 The privilege states that a natural person is not bound to answer any questions or produce any document if the answer or the document would have the tendency to expose that person to a conviction for a crime.110

The privilege against self-incrimination reflects the principle that those who allege the commission of a crime or the incurring of a penalty, should prove it themselves and

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107 Letter from Mr Barry King, Senior Assistant State Counsel, SSO, Responses to Questions, 14 August 2006, p.8.


109 Some of the other fundamental rights are the right to liberty, the right to freedom from taxes or penalties in the absence of express statutory authority and legal professional privilege.

110 Sections 11 and 24 of the Evidence Act 1906; Markovina v R (No 2) (1997) 19 WAR 119, and R v Golightly Unreported WA Supreme Court, BC9700416, 3/2/1997, per Owen J.
The common law privilege can be modified or excluded by legislation and this is often done to facilitate investigative activities. The public benefit from a negation of the privilege should usually outweigh the resultant harm from its removal.

The Committee sought justification for removing this privilege. The SSO said that the clause does “partially erode the privilege against self incrimination in relation to electronic data”. The SSO said:

There has not been a need for such an erosion in relation to data on hard copies in the past because, under the authority of a search warrant, police could break into a safe .... in order to gain access to those copies in the absence of assistance from the accused. Due to modern encryption methods, police may not be able to gain access to the data stored in computers without a decryption code known only to the suspect.

The Committee considers that clauses 61(2) and (3) represent a justifiable compromise to reversing the onus of proof and abrogating the privilege against self incrimination

Proposed new clause 65(5))

For the reasons explained at paragraphs 3.27 to 3.32, the Committee recommends the insertion of a proposed new clause 65(5).


112 That was the former Standing Committee on Legislation’s Fifteenth Report tabled on 9 May 2002. The former Standing Committee on the Public Administration and Finance Committee also considered the abrogation in its Third Report tabled on 30 May 2003 in relation to the Economic Regulation Authority Bill 2002.


114 Letter from Mr Barry King, Senior Assistant State Counsel, SSO, Responses to Questions, 14 August 2006, p9.
Recommendation 4: The Committee recommends that clause 65 of the Criminal Investigation Bill 2005 be amended as follows:

Page 53, after line 26 — To insert —

“(5) A person who is detained under subsection (2)(a) when he or she is not under arrest is to be taken to be in lawful custody.”

Clauses 74(2)(e), 75(2)(d), 76(2)(d) in Part 9, Division 1 and the absence of penalties

3.112 The Committee noted that each of clauses 74(2)(e), 75(2)(d) and 76(2)(d) refer to how authorised persons performing either a ‘non intimate’, ‘intimate’ or ‘internal’ forensic procedure may, in each case, “photograph any relevant thing in the position it is found...”.

3.113 The Committee is concerned at the absence of a penalty for misusing forensic information, particularly in light of the State Coroner’s (Coroner) view that “there should be a significant penalty available in the event that forensic information is deliberately misused”.115

3.114 The Coroner explained how forensic information could include photographs that have the potential to be published for inappropriate purposes or placed on the internet. The Coroner cited a recent case where police officers photographed the bodies of two deceased persons for the purposes of a coronial investigation but then:116

those photographs were forwarded by email by police officers to other police officers and members of the public and a number of images were posted on a macabre internet website. In my view, with increased use of the internet enabling publication of private material in a range if inappropriate locations, it is particularly important that there should be suitable penalty provisions to deter those who are minded to make inappropriate use of such material.

3.115 With regard to this behaviour, the Coroner said that Western Australia Police did not consider any offence had been committed and treated it as a matter of internal

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115 Submission No 2 from the Coroner, 6 July 2006, p2.
116 Submission No 2 from the Coroner , 6 July 2006, p3.
disciplinary procedure. The SSO also confirmed that there is no ‘offence’ for the misuse of information of this nature and that the SSO had:

\textit{not given a great deal of thought to whether it ought to be an offence or simply remain within the police department to be dealt with by way of disciplinary sanctions.}

3.116 The Committee further noted that each of clauses 74(2)(e), 75(2)(d) and 76(2)(d) refer to an authorised “person” performing various forensic procedures, that is, these clauses apply to people other than police officers who may also “\textit{photograph any relevant thing in the position it is found…”}. For example, staff from the Coroner’s office, the Department of Health and other medical people may be in possession of these photographs and misuse that forensic information. The SSO argued that:

\textit{they would be subject to sanctions under other legislation or by their professional bodies. Certainly the Public Sector Management Act provisions would apply.}

3.117 The Committee noted the Corruption and Crime Commission’s Annual Report 2004-2005 which lists “\textit{Improper use of computer system}” as a misconduct category the Corruption and Crime Commission investigated in that reporting period. The Corruption and Crime Commission listed 82 allegations of such misconduct comprising 3.4% of all allegations. In the Committee’s view, the high number of allegations confirms the Coroner’s view that there should be a penalty for deliberately misusing forensic information, particularly through computer systems given the ease with which this type of misconduct can occur.

3.118 The Committee noted that the purpose of the Bill is to consolidate various laws and bring them into one piece of legislation. Therefore, it is convenient to also have sanctions and penalties in the same bill rather than being required to go to other legislation to discover whether action can be taken against an authorised person. The SSO said:

\textit{From a policy perspective I can see no reason why there should not be some sanction for the misuse of information of this nature. That could apply to all information that was obtained. That is, information}

\begin{footnotesize}
\begin{itemize}
\item[117] Mr Barry King, Senior Assistant State Counsel, SSO, \textit{Transcript of Evidence}, 19 July 2006, p12.
\item[118] Mr Barry King, Senior Assistant State Counsel, SSO, \textit{Transcript of Evidence}, 19 July 2006, p12.
\item[119] And pornographic images.
\item[120] Western Australia Police comprised 67% or 1,580 allegations compared with other agencies in that reporting period although the high proportion of matters involving police officers is partly due to the specific reporting requirement of section 21A of the \textit{Corruption and Crime Commission Act 2003}. Under that section, the Western Australia Police has to report more minor allegations than other parts of the public sector.
\item[121] Mr Barry King, Senior Assistant State Counsel, SSO, \textit{Transcript of Evidence}, 19 July 2006, p12.
\end{itemize}
\end{footnotesize}
should be used only for the purposes specified under the legislation, and no wider, whether it be a photograph or a hair follicle. There are some drafting issues in terms of narrowing the scope of any offence-creating provision in relation to any information obtained through a forensic procedure.

3.119 The Government proposes a new clause 113 titled “Publication of photographs restricted”. This states that a person must not publish a photograph taken under Part 8 or 9 and a penalty of $12,000 or imprisonment for 12 months is imposed. The proposed amendment, underlined below, reads as follows:

113. Publication of photographs restricted

(1) In this section —

“publish” a photograph, includes to supply it to another person.

(2) A person must not publish a photograph taken under Part 8 or 9 of a person or of any part of a person.

Penalty: a fine of $12,000 or imprisonment for 12 months.

(3) It is a defence to a charge of an offence under subsection (2) to prove —

(a) the accused person published the photograph for a purpose reasonably connected with investigating or prosecuting an offence; or

(b) the accused person —

(i) published the photograph in a way that made identification of the photographed person unlikely; and

(ii) did not also publish the identity of the person photographed.

3.120 The Committee considers that the Government’s proposed new clause addresses the Committee’s concern.
Clause 82(5)

3.121 Clause 82 enables the Coroner to authorise forensic procedures on deceased people for the purpose permitted by clause 77(1)\(^{122}\) and make any orders necessary to enable the procedure to be done. Clause 82(5) then states:

> An authorisation given under this section cannot authorise a forensic procedure on a deceased person for the purpose of obtaining an identifying particular of the person.

3.122 The Coroner is of the view that clause 82(5) is “not necessary ... unhelpful”\(^{123}\) and “to the detriment of prompt identification of unidentified deceased persons.”\(^{124}\) The Coroner argued that “if a forensic procedure is to incidentally assist with the identification of an unidentified body, that would be to everyone’s advantage.”\(^{125}\)

3.123 Mr Barry King, Senior Assistant State Counsel, SSO, said the clause does not restrict the Coroner’s powers in any way.\(^ {126}\) Mr King advised that although the Coroner is not entitled to use this Bill to authorise a forensic procedure to obtain an identifying particular, he can do so under section 21(1) of the Criminal Investigation (Identifying People) Act 2002 which states:

> The State Coroner may authorise the taking of identifying particulars from deceased people, whether or not their deaths are reportable deaths within the meaning of the Coroners Act 1996, for or in connection with forensic purposes.

3.124 The Committee noted that Mr King’s advice clarifies the purpose behind clause 82(5) as:\(^ {127}\)

> merely to draw a line between the powers under this legislation and the powers under other legislation. It is made clear that any power to obtain identifying particulars comes under this legislation. If changes are made to that legislation, it will affect the Coroner’s power to authorise the obtaining of identifying particulars.

3.125 The Committee considers that if the Coroner’s powers are unaffected then clause 82(5) does not serve any purpose and could be excluded from the Bill.

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\(^{122}\) Clause 77(1) concerns how a forensic procedure must not be done under Part 9 on a person except for the purpose of searching for a thing or evidence of a thing. It prohibits the doing of a forensic procedure under the Part for the purpose of obtaining an identifying particular of the person.

\(^{123}\) Submission No 2 from the Coroner, 6 July 2006, p1.

\(^{124}\) Letter from Mr Alistair Hope, State Coroner, 27 July 2006, p2.

\(^{125}\) Submission No 2 from the Coroner, 6 July 2006, p2.

\(^{126}\) Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p13.
Committee Conclusion

3.126 The Committee finds that the case for including clause 82(5) is not made out and recommends the clause be deleted from the Bill.

Recommendation 5: The Committee recommends that clause 82(5) of the Criminal Investigation Bill 2005 be deleted. This can be effected in the following manner:

Page 69, lines 17 to 19 — To delete the lines.

Clause 88(3)

3.127 This clause states:

(3) If an officer reasonably suspects that in the time it will take —

(a) to apply for an FP\textsuperscript{128} warrant (involved person); and

(b) for the application to be decided,

the relevant thing to be searched for may be disturbed or lost, the officer may, without a warrant —

(c) arrest the involved person;

(d) detain the person for a reasonable time to allow for the application to be made and decided; and

(e) while the person is so detained, take reasonable measures to prevent the thing or evidence of it from being disturbed or lost.

Clarification of Interpretation

3.128 The Committee raised a matter of statutory interpretation about the operation of clause 88(3) and particularly clauses 88(3)(c)(d) and (e) with the SSO. The Committee was concerned whether subclause (d) is intended to mean that an “involved person who is a protected person”, for example a child, must first be arrested under subclause (c) before the child can be detained given that there is no word “and” after that subclause.

\textsuperscript{127} Mr Barry King, Senior Assistant State Counsel, SSO, \textit{Transcript of Evidence}, 19 July 2006, p12.

\textsuperscript{128} ‘Forensic procedure’.
3.129 The SSO referred to Pearce and Geddes’ authoritative text book, Statutory Interpretation in Australia, which states:\textsuperscript{129}

\begin{quote}
Where a series of paragraphs within a section are either all cumulative or all alternatives, the conjunction: ‘and’ may be included only at the end of the penultimate paragraph.
\end{quote}

3.130 The SSO said this interpretation confirms that “\textit{in order to detain a person under these provisions in Part 9, the person must first be arrested.”}\textsuperscript{130} However, the Government will move an amendment in order to remove any uncertainty.\textsuperscript{131} Parliamentary Counsel provided a draft, Government proposed amendment to clause 88 which addresses the Committee’s concern.

\textit{Arresting and Detaining \textquotedblleft Protected Persons\textquotedblright}

3.131 The Department for Community Development (DCD) drew the Committee’s attention to clause 88(3)(d). This enables a police officer to arrest and detain an “\textit{involved person who is a protected person}”, for example a non suspect child, for a reasonable time in order to make an application and prevent the disturbance or loss of evidence, without necessarily having regard to the best interests of the child.\textsuperscript{132}

3.132 DCD requested either an amendment to the clause or a clear requirement in police standing procedures that such detention should not occur if it would have the effect of further detrimentally affecting the wellbeing of an already traumatised child.\textsuperscript{133}

3.133 The SSO argued:\textsuperscript{134}

\begin{quote}
\textit{One has to recall that these are exceptional powers. The police are there, especially in circumstances like this, really for the benefit of the child. The police are not going to abuse their powers where it will be to the detriment of the child whom they are trying to protect.}\n\end{quote}

3.134 The Committee noted that although certain rights automatically attach to children under clauses 136 or 137, the Committee prefers the insertion of an express clause that reinforces to officers that they must consider the “\textit{best interests of the child}” when deciding to detain a child under clause 88(3)(d).

\begin{itemize}
\item[\textsuperscript{129}] DC Pearce and RS Geddes, Statutory Interpretation in Australia, Fifth edition, Butterworths, Sydney, 2001, p296.
\item[\textsuperscript{130}] Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p16.
\item[\textsuperscript{131}] Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p7.
\item[\textsuperscript{132}] Submission No 3 from the Department for Community Development, 1 July 2006, p2.
\item[\textsuperscript{133}] Submission No 3 from the Department for Community Development, 1 July 2006, p2.
\item[\textsuperscript{134}] Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p15.
\end{itemize}
The Committee therefore makes the following recommendation.

Recommendation 6: The Committee recommends that clause 88 of the Criminal Investigation Bill 2005 be amended as follows:

Page 75, after line 3 — To insert —

“(4) When detaining a protected person under subsection (3), an officer must consider the best interests of the person.

Clause 100(4)

This clause concerns the application for a forensic procedure (suspect) warrant in respect of an incapable person. The Public Advocate said that there are no provisions in the Guardianship and Administration Act 1990 for the Public Advocate to undertake any functions in relation to the application of a forensic procedure warrant. The Public Advocate previously confirmed this with the SSO in relation to an identical provision in the Criminal Investigation (Identifying People) Act. 2002.

The SSO explained that the intention of the clause is to expand the Public Advocate’s functions to enable the Public Advocate to provide a magistrate with input about an incapable person and that:

there is no requirement that those functions be specified in one Act rather than another.

Despite this reassurance, the Public Advocate remains concerned about how she is to operate under clause 100(4). The Committee considers a consequential amendment to the Guardianship and Administration Act 1990 will put beyond doubt, the power of the Public Advocate to undertake any functions in relation to the application for a forensic procedure (involved person) under clause 90(5) warrant and a forensic procedure (suspect) warrant under clause 100(4).

135 Submission No 1 from Ms Michelle Scott, Public Advocate, 29 June 2007, p1.
136 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p5.
137 And also clause 90(5).
3.139 Parliamentary Counsel provided the Committee with a proposed amendment to the Guardianship and Administration Act 1990 within the Criminal Investigation (Consequential Provisions) Bill 2005 rather than amending clauses 90(5) and 100(4) in this Bill. The amendment provides the Public Advocate with power to undertake “any other function conferred on the Public Advocate by a written law”. This satisfies the Committee’s concerns and will provide clarity and certainty to the Public Advocate. The amendment may be viewed at paragraph 4.2.

Clause 101

3.140 Clause 101 in Part 9, Division 5 deals with the general requirements for the carrying out of forensic procedures on a person, whether a volunteer, victim, witness or suspect. The Committee noted the absence of a right to access an interpreter when forensic procedures are being undertaken and considered this right to be essential in order to explain the process to people from non English speaking backgrounds.

3.141 Parliamentary Counsel provided the Committee with a Government proposed new clause 10, titled “Informing people who do not understand English”. It states:

If under this Act an officer is required to inform a person about any matter and the person is for any reason unable to understand or communicate in spoken English sufficiently, the officer must, if it is practicable to do so in the circumstances, use an interpreter or other qualified person or other means to inform the person about the matter.

3.142 Proposed new clause 10 seeks to address the Committee’s concern with the undertaking of various forensic procedures when a person is from a non English speaking background.

Clause 112(3)

3.143 Clause 112(3) refers to how the destruction of forensic information under Parts 8 and 9 of the Bill is to be approved by the Commissioner of Police. The Coroner is of the view that he “should be able to give approval” for the destruction of forensic information because he authorises forensic procedures on deceased people.138 The SSO said:

the Government will move an amendment to require the State Coroner’s authorisation to destroy any forensic information obtained under Part 8 and 9 from a deceased person or in relation to an investigation into the death of a person.

138 Submission No 2, from the Coroner 6 July 2006, p2.
139 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p14.
Parliamentary Counsel provided the Committee with a draft of the Government’s proposed amendment to clause 112 which inserts a new subsection (4) and addresses the Committee’s concern. Proposed new amendment clause 112(4), which is underlined below, states:

Subject to section 151, any forensic information obtained under Part 8 or 9 in relation to the investigation of the death of a person, or under Part 9 from a deceased person, must not be destroyed except with the approval of the Coroner.

Penalty: a fine of $12,000 or imprisonment for 12 months.

Clause 127(1)(b)

Clause 127(1)(b) raises the same legal principle discussed at paragraphs 3.12 to 3.16. It permits the prescribing of “serious” offences by regulation. This could be as wide as any offence that is not already a serious offence. The Committee is concerned at the width of this clause and sought clarification from the SSO about the need for it. The SSO said:

Clause 127 is the statutory embodiment of a policy that the police have adopted for some time. It is also found in other legislation in Australia. The purpose of it is to try to reduce the use of arrest, as far as possible, to specific instances where arrest is required rather than simply done as a matter of course. In this sense it provides for the power of arrest for any offence, which is not the case today. It puts parameters over whether that power can be exercised in relation to any offence. There are circumstances in subclause (3)(b). If, for example, an officer cannot identify who a person is and it is then necessary to arrest the person because he will not give the officer his name and address, the officer has the power to arrest him for that purpose. Those sorts of purposes that are prerequisites for arrest also include a serious offence. For example, if a person is reasonably suspected of a sexual assault of a child, it would not be necessary for the police officer to go through these sorts of thought processes and ask, “Will the person give me his name?” “Okay, he will.” “Will the person continue or repeat the offence?” “In the circumstances I do not have evidence to suggest that; therefore, I cannot arrest him.” These things do not have to arise before the police officer has the power to arrest for a serious offence.

A serious offence is anything attracting a penalty of more than five years’ imprisonment, which means that most offences of a serious

140 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, pp3-4.
nature that we can think of come within that category. The reason behind having the serious offence being sufficient to allow a police officer to arrest is that in circumstances like that it is seen, as a matter of policy, to be preferable for the courts to have a role in determining the person’s liberty after arrest and whether to grant bail. At this stage, we have limited it to a serious offence attracting a penalty of five years or more. The reason for the prescription clause is to allow for offences, which at this stage are unforeseen, that may not come within that definition of ‘serious offence’ but would be of such a nature that it would be appropriate for police to arrest, without having to come within all the other prerequisites.

3.146 The SSO explained that the reason for prescribing future serious offences by regulations rather than returning to the Parliament for an amendment to the principal Act is “because it is much slower to get an amendment to an Act than it is to get a regulation prescribed”. Mr King referred to how clause 127(1)(b) is a convenient way to enable future prescription of an unconditional arrest power should there be a perceived need to do so with respect to particular offences carrying less than 5 years imprisonment.

3.147 Mr King further stated that the Parliament does have control over regulations and the Committee acknowledges that regulations can be recommended for disallowance by the Joint Standing Committee on Delegated Legislation or any Member of the Parliament in their own right. Mr King said that although clause 127(1)(b) refers to something defined as a serious offence within this legislation: we must recall that it is within the clause relevant to the issue of power to arrest; it does not result in anything further than giving the police the power to arrest a person in circumstances where they reasonably suspect that the person has committed an offence. They can currently do that - apart from simple offences - in any circumstances now.

3.148 The SSO further argued that the term “prevalent offence” could have been used so that prevalence rather than seriousness is the consideration. However, the Committee is required to scrutinise the term expressed in the Bill, that is, the term “serious offence” not ‘prevalent offence’.

141 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p4.
142 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p3.
143 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p4.
The Committee understands the rationale for the clause but questions whether it should be that all other offences are able to be prescribed as serious offences, even in the limited context of the power to arrest. The Committee noted that, for example, clauses 69(1)(a) and (b) provide for regulations and declarations (both forms of subsidiary legislation) to respectively prescribe or declare public places where searches can take place. Clauses 69(1)(a) and (b) can be justified on grounds of practicality and in emergencies.

In the Committee’s view, although speed and convenience were cited as reasons for clause 127(1)(b), these are insufficient for removing the creation of serious offences from the realm of the Parliament to the Executive.

In the previous, 36th Parliament, the former Standing Committee on Legislation took evidence from Mr Greg Calcutt, Parliamentary Counsel, Parliamentary Counsel’s Office, in relation to the Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemical (Western Australian) Amendment Bill 2001 Inquiry. In 2001, and in that context at that time, Mr Calcutt said, “Any delegation of power to create serious offences is inappropriate.”

The Committee draws to the attention of the House the fundamental legislative principle that the prescribing of serious offences by regulations is an inappropriate delegation of legislative power from the Parliament to the Executive. It is the Committee’s view that serious offences should remain within the purview of the Parliament and to do otherwise, is to diminish the role of the Parliament.

In a later submission, the SSO disclosed that clause 127(1)(b) is “not critical to the effectiveness of the Bill” but it does “provide a useful means to allow the Executive under Parliamentary control to adapt readily to changing circumstances.” A majority of the Committee comprising Hons Peter Collier, Giz Watson and George Cash MLCs, do not agree and recommend clause 127(1)(b) be deleted.

Recommendation 7: The Committee recommends that clause 127 of the Criminal Investigation Bill 2005 be amended in the following manner:

Page 108, lines 9 and 10 — To delete all the words after “life”.

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145 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p3.

146 Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p3.
Clause 137(2) - The rights of arrested suspects

3.154 Clause 137(2) contains four express rights that an “arrested suspect” has in addition to the rights\textsuperscript{147} a “person” has under clause 136. The four rights are:

- to be informed of the offence for which he or she has been arrested and any other offences that he or she is suspected of having committed;
- to be cautioned before being interviewed as a suspect;
- to a reasonable opportunity to communicate or to attempt to communicate with a lawyer; and
- if he or she is for any reason unable to understand or communicate in spoken English sufficiently, not to be interviewed until the services of an interpreter or other qualified person are available.

3.155 Ms Judith Fordham, Law Society Councillor, said:\textsuperscript{148}

_The [Law] Society considers that the requirement to allow suspects to obtain legal advice is a step forward. Indeed, most suspects tend to think they have the right to speak to a lawyer. However, at this stage they certainly do not…._

3.156 The ALSWA suggested the inclusion of an additional right in clause 137(2) that an officer taking an Aboriginal or Torres Strait Islander (TSI) person into custody must notify the ALSWA.\textsuperscript{149} The ALSWA said such a right would accord with Recommendation 224 of the 1991 _Royal Commission into Aboriginal Deaths in Custody_ which states the following:

_In jurisdictions where legislation or standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than for such arrests for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required._

3.157 The ALSWA argued that officers being mandated to contact the ALSWA would “provide a number of benefits and protections to the Western Australian Aboriginal and TSI community”.\textsuperscript{150}

\textsuperscript{147} Called an ‘entitlement’ in clause 136.

\textsuperscript{148} Ms Judith Fordham, Law Society Councillor, _Transcript of Evidence_, 2 August, p3.

\textsuperscript{149} Submission No 5 from the ALSWA, 27 July 2006, p4.

\textsuperscript{150} Submission No 5 from ALSWA, 27 July 2006, p5.
3.158 The Committee sought information from the ALSWA about current initiatives or practices between Western Australia Police and the ALSWA when Aboriginal or TSI persons are in custody. The ALSWA said that there is currently no formal or informal arrangement or contact by police immediately following the detention in police custody of an Aboriginal or TSI person.151

3.159 Western Australia Police confirmed that:152

*There is no policy that places an obligation on police to advise ALS prior to arrest, however this may occur in isolated circumstances for serious offences. In most cases it is not going to be practical.*

*It is WAPOL policy to advise ALS upon arrest as per AD-1.4 and LP-2.1*...153

3.160 The ALSWA claim compliance with LP-2.1:154

*is rare in the Perth metropolitan areas and is very much on an ad hoc basis in regional Western Australia. The limitation with [LP 2.1] is that even if the advice form is forwarded to ALS that occurs after the client has been detained, usually interviewed and then charged. However, the need for the ALS to speak to and advise clients arises as soon as a client is detained. It is only then that appropriate advice can be provided in relation to matters such as whether or not the client should participate with police in an interview.*

3.161 The Committee notes that clause 137(2)(c) which states that an arrested suspect “is entitled to a reasonable opportunity to communicate or to attempt to communicate with a lawyer”, covers that part of Recommendation 224 of the 1991 Royal Commission into Aboriginal Deaths in Custody which refers to arrest.

Clause 140

3.162 Clause 140 lists 19 factors when determining what is a “reasonable” period of detention for a suspect who is arrested and detained under clause 139(2)(b). This overcomes a current deficiency in the law whereby persons arrested and charged with an offence, even those charged with simple offences, must be brought before a magistrate “as soon as practicable” for a bail hearing.155

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151 Further Submission in Response to Questions from the Committee to the ALSWA, 9 August 2006, p1.
152 E mail from Mr Matthew Samson, Research and Legislation Officer, Legal Services, Western Australia Police, 7 August 2006.
153 Aboriginal Legal Service Detainee Advice.
154 Further Submission in Response to Questions from the Committee to the ALSWA, 9 August 2006, p1.
155 Section 6 of the *Bail Act 1982*. 
The Kennedy Royal Commission identified the words “as soon as practicable” in section 6 of the Bail Act 1982 as a significant constraint on the Western Australia Police when conducting investigations. This is because in 1986, the High Court in Williams v R took a narrow interpretation of those particular words. The High Court said:

The words 'as soon as practicable' refer to the time required to bring the person arrested before a justice and not to the time ... which the police may choose to take after arrest to make further enquiries or conduct further investigations. The [words are] designed to safeguard persons in custody after arrest from being held by the police for questioning or further investigations or otherwise.

This narrow interpretation followed an earlier decision in Cleland v The Queen, where the High Court 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.

Thus, the High Court held that 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. Gibbs CJ in Williams v R said:

The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences....the balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck ... but the striking of a different balance is a function for the legislature, not the courts. The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law’s protection of personal liberty in order to enhance the armoury of law enforcement.

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156 Under section 3 of the Bail Act 1982, the words: “as soon as is practicable” are defined as meaning “as soon as is reasonably practicable”. Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Volume II, January 2004, p306-7.

157 (1986) 161 CLR 278.


160 (1982) 151 CLR 1 at 26, per Deane J.

It should be clearly understood that what is in issue is not the authority of law enforcement agencies to question suspects, but their authority to detain them in custody for the purpose of interrogation.

If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody.

3.166 It is the Committee’s view that the Parliament has, with certainty in the Bill, “enhanced the armoury of law enforcement” referred to above but at the same time, responsibly provided clear safeguards for those arrested. For example, clause 139 states that the detention period cannot exceed six hours from arrest unless a further period has been authorised by a senior officer and then that is limited to a further six hours. A magistrate can detain for a further period of eight hours beyond that timeframe.

Clauses 153 and 154

3.167 Clause 153 provides that any evidence derived from a ‘thing’\textsuperscript{162} that is seized or obtained in contravention of a requirement of the Bill, is inadmissible against a person in court unless:

- that person does not object to its admission;
- the court is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence; or
- the court is of the opinion that the evidence was obtained from a protected person out of a mistaken but reasonable belief that the person was not a protected person (that is, a child or an incapable person).

3.168 Clause 154 then states:

\begin{enumerate}
\item This section applies if under another section a court may make a decision under this section in relation to evidence that is not admissible in proceedings in the court.
\item The court may nevertheless decide to admit the evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.
\end{enumerate}

\textsuperscript{162} A ‘thing’ is extensively defined in clause 5.
(3) In making a decision under subsection (2) the court must take into account —

(a) any objection to the evidence being admitted by the person against whom the evidence may be given;

(b) the seriousness of the offence in respect of which the evidence is relevant;

(c) the seriousness of any contravention of this Act in obtaining the evidence;

(d) whether any contravention of this Act in obtaining the evidence —

(i) was intentional or reckless; or

(ii) arose from an honest and reasonable mistake of fact;

(e) the probative value of the evidence;

(f) any other matter the court thinks fit.

(4) The probative value of the evidence does not by itself justify its admission.

3.169 The Law Society explained that the statutory discretion to admit evidence in clause 154 is known as the *Bunning v Cross* discretion which, 28 years ago, was conferred on courts in the furtherance of public policy, even though the law should not be seen as condoning or encouraging unlawful conduct of those whose task it is to enforce it.163

3.170 The discretion was first identified in cases concerning “real evidence”164, for example, photographs taken against the will of an accused165 and the results of a breathalyser test administered in contravention of statutory requirements.166 Over time, the discretion was applied to confessional evidence obtained in circumstances of illegality and impropriety, the most recent case being in 1998 when in *R v Swaffield and Pavic*167 the High Court held that admissions elicited by an undercover police officer

164 *Collins v The Queen* (1980) 31 ALR 257 per Brennan J at 317.
166 This case was *Bunning v Cross* (1978) 141 CLR 54, from which the discretion derives its name.
were a clear breach of the respondent’s right to choose whether or not to speak. The High Court said:

the chief object of the public policy discretion is the constraining of law enforcement authorities so as to prevent their engaging in illegal or improper conduct, although the securing of fairness to an accused is a relevant factor in the exercise of the discretion.

3.171 The Law Society argued:

provisions that suggest that a contravention of the legislation may nevertheless result in the obtaining of useful evidence have an obvious tendency to encourage that contravening behaviour. This could only be desirable if the offences prosecuted as a result were of real gravity.

3.172 The Committee concurs with the Law Society’s view. Clause 153 is potentially (in the words of the Kennedy Royal Commission) corruptogenic. However, the Committee finds that a number of safeguards are provided for in clause 154(3) whilst clause 154(4) reminds a court that the probative value of the evidence does not “by itself” justify admission.

3.173 Clause 154(1) provides that clause 154 only applies if, under “another” clause in the Bill, a court may make a decision in relation to evidence that is not admissible in proceedings in the court. Those other clauses in the Bill are:

- clause 48(5). This provides that if a protected forensic area is established at a place; but an application for a search warrant is not made within 6 hours, the area is to be taken to be disestablished after the 6 hour period and evidence of any thing relevant to an offence found there at any time (including any time when the protected forensic area is still established) is inadmissible unless the court decides otherwise under clause 154.

- clause 117(3)(b)(ii). This concerns spoken words or acts in serious cases that have not been audio-visually recorded. They are not admissible unless a court decides otherwise under clause 154; and

- clause 153(2) (quoted above at paragraph 3.167) concerning evidence obtained via the purported exercise of a power conferred by the Bill or via warrants and orders. Evidence derived from these is not admissible unless a court decides otherwise under clause 154.

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3.174 The Law Society is unsure whether clause 154 is intended to apply to the arrest and interview provisions in Part 12, Division 5. The Law Society said that if it is intended to apply and the Law Society “would like to see the retention of those discretions, particularly in relation to the interviewing of suspects and arrested persons”, then this should be made abundantly clear.

3.175 The SSO confirmed that clause 154 does not apply to the rights and requirements in Part 12. The SSO argued against the application of clause 154 and that any ramifications from not applying clause 154 should be determined by the courts on a case by case basis. The SSO said:

It would be unreasonable if any failure to afford rights or to comply with the requirements in Part 12 would lead to a prima facie position that any evidence obtained following that failure was inadmissible. This is so because it is possible to envisage countless scenarios in which a requirement is not met but where issues of admissibility of evidence should not reasonably arise. For example, in processing an arrested suspect in order to have the suspect considered for bail, an officer may neglect to inform the suspect of the right to communicate with a lawyer. The suspect may, in the course of being finger printed, say that the police should look at certain premises. Upon looking at those premises, the police find evidence linking the suspect to the offence. It would not be reasonable if either the fact of the suspect’s suggestion to look at the premises or the evidence found there should be prima facie inadmissible.

3.176 ALSWA also expressed concern that clause 154 does not necessarily contemplate admissibility arguments in relation to voluntariness of a confession. ALSWA explained that:

There may be a raft of reasons why an Aboriginal accused has made admissions, which would make it unfair to admit those admissions in evidence against the person. They might understand the caution, but they might be affected by alcohol. They might have an interview friend sit with them who does not know what his role is and is imploring them to answer questions, contrary to their right to silence. I could provide a number of examples. We say that clause 154 needs to be expanded to make specific provision for exclusion based on questions of voluntariness and fairness and that it should not be

170 Ms Judith Fordham, Law Society Councillor, Transcript of Evidence, 2 August, p3.
171 Letter from the SSO, 14 August 2006, p7.
172 Letter from the SSO, 14 August 2006, p7.
173 Mr Peter Collins, Director of Legal Services, ALSWA, Transcript of Evidence, 2 August 2006, p11.
confined to this balancing up of public policy considerations. To expand the clause to reflect that would mean no more than codifying the common law articulated in the case of Swaffield and Pavic.

3.177 The ALSWA suggested clause 117(3) “pick up”\textsuperscript{174} what is contained in section 570D(2)(c) of The Criminal Code, which states:

On the trial of an accused person for a serious offence, evidence of any admission by the accused person shall not be admissible unless -

(c) the court is satisfied that there are exceptional circumstances which, in the interests of justice, justified the admission of the evidence.

3.178 The Committee raised the concerns of the Law Society and the ASLWA with the SSO. Mr Barry King, Senior Assistant Counsel, SSO, said: \textsuperscript{175}

The interests of bringing the person to justice are more important than protecting him from the illegal action of the police. Police have acted improperly; the evidence is inadmissible, but it can be ruled admissible on this kind of balance. That is one area. The ALS is suggesting that that area applies to another area of admissibility generally referred to in the general tag of voluntariness or involuntariness.

If a person is in police custody and is beaten and confesses, that confession is inadmissible and there is no question of balancing the public interest consideration. Clauses 153 and 154 do not apply to that scenario. That is why we think the ALS may have misconceived the nature of these provisions. It is made clear, firstly, under the heading “Evidence obtained improperly” in clause 153 and it all relates to the purported exercise of a power conferred by this legislation.

Subclause (2) reads: ‘If in the purported exercise of a power conferred by this Act or by an authorisation issued or purportedly issued in this Act’. Where the legislation provides power and that purported exercise is done improperly, anything that is relevant to the defence - if you recall that is very broad - is inadmissible unless a person objects or it can be ruled admissible by a court. Clauses 153 or 154 contain a codification of the so-called Bunning v Cross

\textsuperscript{174} Mr Peter Collins, Director of Legal Services, ALSWA, \textit{Transcript of Evidence}, 2 August 2006, p11.

\textsuperscript{175} Mr Barry King, Senior Assistant Counsel, SSO, \textit{Transcript of Evidence}, 16 August 2006, p8.
principle for illegally obtained evidence. It has no bearing on this other area of admissibility relating to voluntariness.

3.179 The Committee finds that clauses 153 and 154 remain contentious for the ALSWA and the Law Society. Other than to acknowledge these concerns, the Committee makes no further comment or recommendation in relation to either clause.

4 THE CRIMINAL INVESTIGATION (CONSEQUENTIAL PROVISIONS) BILL 2005

4.1 This Bill is self explanatory. As a result of the numerous provisions in the Criminal Investigation Bill 2005, many amendments are now required to be made to other principal Acts of the Parliament. The Committee makes one recommendation in relation to this Bill.

New clause 5A in Schedule 1

4.2 The Committee recommends the insertion of a new clause 5A into the Criminal Investigation (Consequential Provisions) Bill 2005 to address the concerns of the Public Advocate in relation to her functions under the Bill. For an explanation of the reason for its insertion, refer to paragraphs 3.136 to 3.139.

Recommendation 8: The Committee recommends that Schedule 1 of the Criminal Investigation (Consequential Provisions) Bill 2005 be amended in the following manner:

Page 44, after clause 5 — To insert the following clause —

5A. Guardianship and Administration Act 1990

<table>
<thead>
<tr>
<th>5A</th>
<th>Guardianship and Administration Act 1990</th>
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<tbody>
<tr>
<td>s. 97(1)</td>
<td>Delete “Advocate are — ” and insert instead —</td>
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<td>“ Advocate are as follows — ”.</td>
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<td>Delete “and” after paragraph (g).</td>
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<td>Delete the full stop after paragraph (h) and insert instead a semicolon.</td>
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<td>After paragraph (h) insert the following paragraph —</td>
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<td>“ (i) any other function conferred on the Public Advocate by a written law. ”</td>
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BACKGROUND OF THE CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005

5.1 The Second Reading Speech refers to the inadequacy of sections 75 and 76 of the Police Act 1892 for police officers to sell and dispose of property. The Bill codifies the policies and procedures currently followed under the Police Commissioner’s Orders and Procedures Manual that developed over time because of that inadequacy.

SPECIFIC CLAUSES IN THE CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005

Clause 10 - The amount of the penalty

6.1 This clause provides for a fine of $5,000 for unauthorised dealing with seized property. The Committee queried the amount of the penalty and whether it is sufficient to deter corrupt conduct. The SSO explained that the clause is intended to apply to a person who deals with property that the person knows is seized property under, for example, an embargo notice imposed under clause 146 of the Criminal Investigation Bill 2005.\textsuperscript{176}

6.2 The SSO took the view that the penalty is insufficient and would prefer the amount to be consistent with other, more modern provisions, such as section 150 of The Criminal Code which provides a summary conviction penalty of 12 months imprisonment and a $12,000 fine for the crime of removing property under a lawful seizure.

6.3 The SSO said the Government will move an amendment to increase the penalty to “$12,000 and imprisonment for 12 months”.\textsuperscript{177} The Committee concurs with an increase in the penalty. The underlined amendment is reproduced below.

10. Unauthorised dealing with seized property prohibited

(1) A person who deals with property that the person knows is seized property commits an offence unless the dealing is authorised by —

(a) an order made under section 13; or

(b) a written authorisation given under subsection (3).

Penalty: a fine of $5,000 \textsuperscript{176} $12,000 and imprisonment for 12 months.

Clause 14 - Finder of property, entitlements of

6.4 Clause 14 states:

\textsuperscript{176} Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p18.

\textsuperscript{177} Submission No 8 from Mr Barry King, Senior Assistant State Counsel, SSO, 28 July 2006, p8.
(1) A person who gives possession of any found property to a prescribed agency is entitled to a receipt for the property from the chief officer of the agency.

(2) The chief officer of a prescribed agency must ensure that a person who gives possession of any found property to the agency is advised of the entitlement under subsection (1).

6.5 The Committee sought clarification from the SSO as to why this clause does not simply state that the chief officer must give a receipt to a finder of property, rather than being advised of an entitlement to a receipt. The SSO said:178

If there was a requirement for police to give a receipt in every instance, it would result in impracticalities. A policeman is not always in a position to issue a receipt. For example, if you take something to a police officer you see on the street and say, “I just found this”, the police officer will say, “You are entitled to a receipt” but he may not have a receipt book or something of that nature that he can provide.

Often people bring things into police stations and say, “I’ve found this thing.” A police officer can say, “Would you like a receipt for it?” and the person could say, “No, I’m not interested; see you later” and that is the end of it. A person can be told that they have an entitlement to it and are obliged to be told that they have the entitlement. We see it as going too far to require the police officer to provide a receipt in every instance.

6.6 The SSO further explained that there is already a requirement within Western Australia Police to keep a record within its accounting system:179

When something is brought into a police station, the police officer who receives it has to place that notification on the property system and a receipt is generated as a matter of course but there is no requirement to provide it to the person if they do not want it.

6.7 The Committee is of the view that, although the Police Commissioner’s operational directives might require certain procedures to be undertaken by the police officer, this does not necessarily give any comfort to the finder of the property if that is not known to the finder. All that the finder is told is that he or she is “entitled” to a receipt.

178 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p19.
179 Mr Barry King, Senior Assistant State Counsel, SSO, Transcript of Evidence, 19 July 2006, p19.
6.8 An 'entitlement' is the “giving to a person of a right or claim to something”\(^\text{180}\) but the person does not have to take up that right or claim. Clause 14(1) places the onus on the finder to request a receipt, rather than placing the onus on the chief officer to provide a receipt. In the Committee’s view, there is a subtle difference and this is important given the Kennedy Royal Commission’s statement that:\(^\text{181}\)

*A recognised strategy for reducing corruption is to eliminate as many situations as possible that expose police to corruption opportunities.*

6.9 The Committee noted with interest that, although Western Australia Police and other prescribed agencies do not ‘deal’, that is, trade in property, Part 3, Division 1 of the *Pawnbrokers and Second-hand Dealers Act 1994*\(^\text{182}\) places significant requirements on pawnbrokers regarding the receipt and management of property; yet the Bill does not appear to apply the same stringent requirements to police officers and other prescribed agencies.

6.10 The Committee also noted the Corruption and Crime Commission’s Annual Report 2004-2005 which lists “Stealing” and “Financial impropriety” as misconduct categories the Corruption and Crime Commission investigated in that reporting period. The Corruption and Crime Commission listed:

- 72 allegations of stealing misconduct comprising 3% of all allegations; and
- 136 allegations of financial impropriety comprising 5.6% of all allegations.\(^\text{183}\)

6.11 The *Kennedy Royal Commission* also found that the theft of money and drugs is one of the more common types of misconduct in other jurisdictions and that “Western Australia is typical in this regard”,\(^\text{184}\) despite integrity testing.\(^\text{185}\)

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\(^{181}\) Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report, Volume II, January 2004, p152.

\(^{182}\) Especially sections 44 and 45 which provide for receipts to be issued.

\(^{183}\) Western Australia Police comprised 67% or 1,580 allegations compared with other agencies in that reporting period although the high proportion of matters involving police officers is partly due to the specific reporting requirement of section 21A of the *Corruption and Crime Commission Act 2003*. Under that section, Western Australia Police has to report more minor allegations than other parts of the public sector. The highest misconduct category was “Assault/ Excessive Use of force” comprising 407 allegations or 16.9% in the 2004-2005 reporting period.

\(^{184}\) Report of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer Final Report, Volume II, January 2004, p153.

\(^{185}\) Integrity testing is authorised under section 123 of the *Corruption and Crime Commission Act*. It provides for scenarios to test the integrity of public officers under strict controls. The knowledge of such tests can deter corrupt conduct.

`All property accepted or taken into the possession of police should be recorded at the earliest opportunity to ensure an appropriate level of accountability over the items of property received and to minimise any opportunity for misappropriation.`

6.13 The Committee finds that the focus of the SSO’s argument is on how impractical it will be for police officers to issue receipts. In contrast, the Committee’s focus is on reducing corruption opportunity identified by the *Kennedy Royal Commission* as problematic for police officers. This focus may also be extended to other officers in prescribed agencies who will be receiving found property under delegation from the chief officer.

6.14 The number of allegations of stealing and financial impropriety dealt with by the Corruption and Crime Commission confirms the Committee’s view that there should be an express requirement for the chief officer to provide a receipt for found property in order to reduce corruption opportunity.

6.15 The mandatory issuing of a receipt will assist the instilling of public confidence in Western Australia Police and those prescribed agencies. In the Committee’s view, this will give substance to Recommendation 3 of the *Report of the Corruption and Crime Commission and the Western Australia Police Joint Inquiry into ‘Western Australia Police Property Management Practices’* that “Western Australia Police should improve the existing property receipting process”.

6.16 The Committee recommends clause 14 be deleted and a new proposed clause 14 inserted instead.

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Recommendation 9: The Committee recommends that clause 14 of the Criminal and Found Property Disposal Bill 2005 be amended in the following manner:

Page 12, lines 2 to 8 — To delete the lines and insert instead —

“14. Receipt of property

A person who gives possession of any found property to a prescribed agency must be given a receipt for the property from the chief officer of the agency as soon as reasonably practicable.

”.

Hon Graham Giffard MLC
Chair

Date: 20 September 2006
APPENDIX 1
THE COMMITTEE’S RECOMMENDED AMENDMENTS IN STATUTORY FORM
APPENDIX 1

THE COMMITTEE’S RECOMMENDED AMENDMENTS IN
STATUTORY FORM

1

The following amendments are recommended by the Committee to the Criminal
Investigation Bill 2005:

Clause 13

Page 11, lines 20 to 22 — To oppose the clause.

Clause 44

Page 38, after line 6 — To insert —

“

(7) A person who is detained under subsection (2)(g)(iii) when he or she
is not under arrest is to be taken to be in lawful custody.

”.

Clause 65

Page 53, after line 26 — To insert —

“

(5) A person who is detained under subsection (2)(a) when he or she is
not under arrest is to be taken to be in lawful custody.

”.

Clause 82

Page 69, lines 17 to 19 — To delete the lines.

Clause 88

Page 75, after line 3 — To insert —

“

(4) When detaining a protected person under subsection (3), an officer
must consider the best interests of the person.

”.
Clause 127

Page 108, lines 9 and 10 — To delete all the words after “life”.

[Note to Clerks: delete paragraph nomination “(a)” and insert full stop after “life”.

2 The following amendment is recommended by the Committee to the Criminal Investigation (Consequential Provisions) Bill 2005:

Schedule 1

Page 44, after clause 5 — To insert the following clause —

5A. Guardianship and Administration Act 1990

| s. 97(1)       | Delete “Advocate are — ” and insert instead — “ Advocate are as follows — ”. Delete “and” after paragraph (g). Delete the full stop after paragraph (h) and insert instead a semicolon. After paragraph (h) insert the following paragraph — “ (i) any other function conferred on the Public Advocate by a written law. |

3 The following amendment is recommended by the Committee to the Criminal and Found Property Disposal Bill 2005:

Clause 14

Page 12, lines 2 to 8 — To delete the lines and insert instead —

“ 14. Receipt of property

A person who gives possession of any found property to a prescribed agency must be given a receipt for the property from the chief officer of the agency as soon as reasonably practicable.

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APPENDIX 2

STAKEHOLDERS TO WHOM THE COMMITTEE WROTE
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<tr>
<th>NAME</th>
<th>ORGANISATION</th>
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<tr>
<td>The Honourable Chief Justice Wayne Martin QC</td>
<td>Supreme Court of Western Australia</td>
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<td>Chief Justice of Western Australia</td>
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<tr>
<td>Her Honour Judge Antoinette Kennedy Chief Judge</td>
<td>District Court of Western Australia</td>
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<tr>
<td>Mr Karl O'Callaghan APM Commissioner</td>
<td>Western Australia Police</td>
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<td>Ms Maria Saraceni President</td>
<td>The Law Society of Western Australia</td>
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<td>Mr Ken Martin QC President</td>
<td>Western Australian Bar Association</td>
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<tr>
<td>Ms Belinda Lonsdale President</td>
<td>Criminal Lawyers’ Association of Western Australia</td>
</tr>
<tr>
<td>Mr Michael Dean General President</td>
<td>Western Australian Police Union of Workers</td>
</tr>
<tr>
<td>Ms Maxine Murray Commissioner</td>
<td>Office of the Public Sector Standards Commissioner</td>
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<tr>
<td>Mr Frank Morgan Director</td>
<td>Crime Research Centre</td>
</tr>
<tr>
<td>Ms Jane Brazier Director General</td>
<td>University of Western Australia</td>
</tr>
<tr>
<td>Mr Dennis Eggington Chief Executive Officer</td>
<td>Aboriginal Legal Service of Western Australia</td>
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<tr>
<td>Mr Peter Weygers President</td>
<td>Civil Liberties Council of Western Australia</td>
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<tr>
<td>Ms Michelle Scott Public Advocate</td>
<td>Office of the Public Advocate</td>
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<tr>
<td>Professor Richard Harding Inspector of Custodial Services</td>
<td>Office of the Inspector of Custodial Services</td>
</tr>
<tr>
<td>Mr Peter Sirr Executive Director</td>
<td>Outcare</td>
</tr>
<tr>
<td>Dr Dorothy Goulding</td>
<td>Prison Reform Group of Western Australia</td>
</tr>
<tr>
<td>Mr Cliff Spencer</td>
<td>Deaths in Custody Watch Committee (WA) Inc</td>
</tr>
<tr>
<td>Mr Theo MacKaay Executive Officer</td>
<td>Anglican Social Responsibilities Commission</td>
</tr>
<tr>
<td>Name</td>
<td>Organisation</td>
</tr>
<tr>
<td>-------------------------------------------</td>
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<tr>
<td>Mr Alistair Hope</td>
<td>Office of the State Coroner</td>
</tr>
<tr>
<td>State Coroner</td>
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</tr>
<tr>
<td>Adjunct Associate Professor Margaret Watson</td>
<td>Nurses’ Board of Western Australia</td>
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<tr>
<td>Chief Executive Officer</td>
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<tr>
<td>Mr Wayne Clarke</td>
<td>Dental Board of Western Australia</td>
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<tr>
<td>Registrar</td>
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<tr>
<td>Mr Paul Skerritt</td>
<td>The Australian Medical Association (WA)</td>
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<tr>
<td>President</td>
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</tr>
<tr>
<td>Mr Bill Hewitt</td>
<td>Fire and Emergency Services Authority</td>
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<tr>
<td>Acting Chief Executive Officer</td>
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</tr>
<tr>
<td>Ms Gillian Braddock SC</td>
<td>Law Reform Commission of Western Australia</td>
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<tr>
<td>Chair</td>
<td></td>
</tr>
<tr>
<td>Mr John Langoulant</td>
<td>Chamber of Commerce and Industry</td>
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<tr>
<td>Chief Executive</td>
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<tr>
<td>Associate Professor Ian Dadour Director</td>
<td>Centre for Forensic Science, University of Western Australia</td>
</tr>
<tr>
<td>Ms Ricky Burges</td>
<td>Western Australian Local Government Association</td>
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<tr>
<td>Chief Executive Officer</td>
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<tr>
<td>Commissioner Kevin Hammond</td>
<td>Corruption and Crime Commission</td>
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# APPENDIX 3
## WRITTEN SUBMISSIONS RECEIVED

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<tr>
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<td>1</td>
<td>Ms Michelle Scott Public Advocate</td>
<td>Office of the Public Advocate</td>
</tr>
<tr>
<td>2</td>
<td>Mr Alastair Hope State Coroner</td>
<td>Office of the State Coroner</td>
</tr>
<tr>
<td>3</td>
<td>Ms Jane Brazier Director General</td>
<td>Department for Community Development</td>
</tr>
<tr>
<td>4</td>
<td>Professor Richard Harding Inspector of Custodial Services</td>
<td>Office of the Inspector of Custodial Services</td>
</tr>
<tr>
<td>5</td>
<td>Ms Maria Saraceni President</td>
<td>The Law Society of Western Australia</td>
</tr>
<tr>
<td>6</td>
<td>Mr Dennis Eggington Chief Executive Officer</td>
<td>Aboriginal Legal Service of Western Australia Inc</td>
</tr>
<tr>
<td>7</td>
<td>Ms Belinda Lonsdale President</td>
<td>Criminal Lawyers’ Association of Western Australia</td>
</tr>
<tr>
<td>8</td>
<td>Mr Barry King Senior Assistant State Counsel</td>
<td>State Solicitor’s Office of Western Australia</td>
</tr>
<tr>
<td>9</td>
<td>Adjunct Associate Professor Margaret Watson Chief Executive Officer</td>
<td>Nurses’ Board of Western Australia</td>
</tr>
</tbody>
</table>
APPENDIX 4

WITNESSES WHO APPEARED BEFORE THE COMMITTEE
# APPENDIX 4

## WITNESSES WHO APPEARED BEFORE THE COMMITTEE

<table>
<thead>
<tr>
<th>NAME</th>
<th>ORGANISATION</th>
<th>DATE</th>
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<tbody>
<tr>
<td>Mr Barry King</td>
<td>Senior Assistant State Counsel</td>
<td>19 July 2006</td>
</tr>
<tr>
<td>State Solicitor’s Office of Western Australia</td>
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<td></td>
</tr>
<tr>
<td>Mr Matthew Samson</td>
<td>Acting Senior Legislation Officer</td>
<td>19 July 2006</td>
</tr>
<tr>
<td>Legal Services</td>
<td>Western Australia Police</td>
<td></td>
</tr>
<tr>
<td>Mr Steve Oswald</td>
<td>Research and Legislation Officer</td>
<td>19 July 2006</td>
</tr>
<tr>
<td>Legal Services</td>
<td>Western Australia Police</td>
<td></td>
</tr>
<tr>
<td>Mr Dennis Eggington</td>
<td>Chief Executive Officer</td>
<td>2 August 2006</td>
</tr>
<tr>
<td>Aboriginal Legal Service of Western Australia Inc</td>
<td></td>
<td></td>
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<tr>
<td>Mr Peter Collins</td>
<td>Director Legal Services</td>
<td>2 August 2006</td>
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<tr>
<td>Aboriginal Legal Service of Western Australia Inc</td>
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<tr>
<td>Ms Judith Fordham</td>
<td>Law Society Councillor</td>
<td>2 August 2006</td>
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<tr>
<td>The Law Society of Western Australia</td>
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<tr>
<td>Mr Barry King</td>
<td>Senior Assistant State Counsel</td>
<td>16 August 2006</td>
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<tr>
<td>State Solicitor’s Office of Western Australia</td>
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<tr>
<td>Mr Patrick Tremlett</td>
<td>Assistant Parliamentary Counsel</td>
<td>16 August 2006</td>
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<tr>
<td>Parliamentary Counsel’s Office of Western Australia</td>
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<tr>
<td>Mr Matthew Samson</td>
<td>Acting Senior Legislation Officer</td>
<td>16 August 2006</td>
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<tr>
<td>Legal Services</td>
<td>Western Australia Police</td>
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<tr>
<td>Mr Steve Oswald</td>
<td>Research and Legislation Officer</td>
<td>16 August 2006</td>
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<tr>
<td>Legal Services</td>
<td>Western Australia Police</td>
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<tr>
<td>Mr Murray Lampard</td>
<td>Deputy Commissioner (Operations)</td>
<td>23 August 2006</td>
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<tr>
<td>Western Australia Police</td>
<td></td>
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</tr>
<tr>
<td>Miss Karen Jones</td>
<td>Legal and Policy Officer</td>
<td>23 August 2006</td>
</tr>
<tr>
<td>Western Australia Police</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mr Matthew Samson</td>
<td>Acting Senior Legislation Officer</td>
<td>23 August 2006</td>
</tr>
<tr>
<td>Legal Services</td>
<td>Western Australia Police</td>
<td></td>
</tr>
<tr>
<td>Inspector Charlie Carver</td>
<td>Inspector in Charge</td>
<td>23 August 2006</td>
</tr>
<tr>
<td>Perth Police Station</td>
<td>Western Australia Police</td>
<td></td>
</tr>
<tr>
<td>Sergeant Graeme Macey</td>
<td>Officer in Charge</td>
<td>23 August 2006</td>
</tr>
<tr>
<td>Wiluna Police Station</td>
<td>Western Australia Police</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX 5
ADDITIONAL INFORMATION FROM THE POLICE COMMISSIONER TO THE COMMITTEE

WESTERN AUSTRALIA POLICE

OFFICE OF THE COMMISSIONER
POLICE HEADQUARTERS
6TH FLOOR
2 ADELAIDE TERRACE, EAST PERTH
WESTERN AUSTRALIA 6004
TELEPHONE : (08) 9222 1334
FACSIMILE : (08) 9222 1366

Hon Graham Giffard MLC
Chair
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr Giffard,

Inquiry into the Criminal Investigation Bill 2005

Thank you for extending an invitation to the Western Australia Police (WA Police) to attend at a hearing to discuss clause 27 of the Criminal Investigation Bill 2005 (the Bill), the proposed 'move on' laws, on 23 August 2006.

Subsequent to the hearing on 23 August 2006, I have had the opportunity to discuss 'move on' laws with the Minister for Police and Emergency Services, the Hon. John Kobelke MLA and have reviewed further correspondence received from the Attorney-General, the Hon Jim McGinity MLA, dated 17 July 2006 where he sets out two recommendations around the practice of applying these laws to Aboriginal people. Taken together with correspondence received from the Department of the Attorney General, dated 28 March 2006, a commonality of issues has clearly emerged around the use of 'move on' laws, particularly in relation to Aboriginal people.

I would like to take this opportunity to address these recurring issues so as to provide a consolidated response from WA Police, to be read together with the testimony of the members of this agency before the Committee Members at the hearing, and my response of 6 June 2006 to the original letter from the Attorney-General, dated 28 March 2006.

Length of 'move on' notices

Information relayed by the Aboriginal Legal Service of Western Australia suggests that police officers issue 'move on' notices for 24 hours as a matter of course where section 27(2)(b) of the Bill provides the officer with a discretion to issue a notice for up to 24 hours.
I acknowledge that it is imperative that we emphasise in our training that officers must consider the appropriate length of the notice in each individual case. While there will be some circumstances in which a 24 hour order may be justified, in the vast majority of cases it is likely that the intention of the legislation can be achieved by issuing the order for a shorter period.

The Department of the Attorney General has suggested that move on notice forms could be altered to provide a number of 'tickable boxes' to prompt officers to a range of alternative time periods. This is one of a number of ideas that will be considered by the Deputy Commissioner (Operations) in reforming training in relation to 'move on' notices.

The legislation permits broad police discretion in terms of the area prohibited in the notice

The Committee raised a number of concerns about the wide areas prescribed by police in 'move on' notices including 'the entire CBD' or 'Northbridge'. I understand my representatives at the hearing explained why WA Police has adopted such an approach and the pressures on Police from Government and business owners to 'clean up anti-social behaviour Northbridge'. 'Move on' notices are an effective measure in such a campaign because they are an effective way of intervening in the behaviour of persons whose conduct suggests that more serious offences are likely to occur, should the person remain in the same area. There are therefore sometimes sound operational reasons for prescribing a broad area in the notice.

Nevertheless, I appreciate that there were specific case examples raised by the ALSWA and put to WA Police by the Attorney General's Department and the Committee where, ostensibly, the area prohibited by the notice was too broad in the particular circumstances. Particular attention was paid to notices that included transport facilities and, in one case, the recipient's home address. Quite clearly, the latter example suggests a lack of clear communication on the part of Police in the particular case and I trust it was a one-off incident. Common sense dictates that notices should not include the home address of recipients or any location that is important they have access to within the notice period (such as schools).

With respect to notices that include public transport facilities, the Committee will appreciate that, on the one hand, to specifically exclude such areas creates an issue as to whether the recipients of the notice will simply move to train stations or other facilities to engage in the same anti-social behaviour, (rather than using the station to leave the area altogether).

In these circumstances, there is clearly merit in including train stations in the area cover by the Notice and simply leaving it up to individual officers who are patrolling these areas to exercise their discretion to charge an individual with a breach of the order if they are displaying no intention to leave the area. However, as the Hon George Cash noted, this means that it is up to the discretion of the individual police officers as to whether to charge on a
potential breach. This is certainly an issue that needs further examination by this agency and will be forwarded to the Deputy Commissioner (Operations) for consideration of a pragmatic way to address these competing issues and how to accommodate transport facilities in the notices.

**Often the behaviour that justifies the issuing of the move-on order in the first place is conduct of a trivial nature**

It is certainly the case that several instances of behaviour cited by the Aboriginal Legal Services in its correspondence and evidence referred to conduct that is ostensibly "trivial" (such as the use of a ging). I am advised by the officer who issued the notices in that instance that he did so because of the youths' history of committing the offences of trespass and use of a ging and that the notice was issued to prevent the recurrence of the same behaviour and subsequent arrest of those youths. While I have no particular comment to make in relation to this particular instance, it is the case that WA Police relies on the experience and judgement of its officers in assessing whether the legislative requirements for issuing a notice have been met with respect to the nature of the behaviour that would justify a notice being issued.

As a general comment, I endorse Mr Lampard's view in his evidence before the Committee that, in the vast majority of cases cited by the ALSWA in its submission to the Committee and overview of clients charged with breaching a notice to December 2005, I do not agree that the offences were necessarily of a "trivial nature" where such behaviour included disorderly conduct, street drinking and obstructing pedestrians. Again, I rely on the experience and judgement of my officers in determining whether the legislative requirements have been met and in assessing the potential for such behaviour to escalate.

**Issues concerning some Aboriginal persons' understanding the nature of 'move-on' notices due to "cultural factors"**

It has been suggested to WA Police that the reason Aboriginal communities represent a disproportionate level of non-compliance with 'move on' orders is that many Aboriginal people do not understand the consequences of such orders and do not even know the names of streets they are being banned from. The experience of WA Police is that this is not an accurate depiction of the reasons for non-compliance, at least in the metropolitan area. I refer to Deputy Commissioner (Operations) Mr Lampard's evidence before the Committee in this respect.

Having said that, it is well established that cross-cultural training must be incorporated into police officers' training and the practical aspects of operational policing. In this respect, WA Police will continue to work to improve the application of 'move on' notices and continue to utilise Aboriginal Liaison Officers in the field, wherever it is practicable to do so, to minimise the impact of these cultural differences.
I trust this addresses the majority of the Committee’s concerns and I reiterate that Mr Lampard will be tasked with implementing the various improvements and recommendations within this agency.

Yours sincerely,

KARL O’CALLAGHAN APM
COMMISSIONER OF POLICE

September 2006
APPENDIX 6

WESTERN AUSTRALIA POLICE RESPONSE TO THE ATTORNEY GENERAL
APPENDIX 6
WESTERN AUSTRALIA POLICE RESPONSE TO THE ATTORNEY GENERAL

Mr Colin Murphy
Acting Director General
Department of the Attorney General
Office of the Director General
Level 16, 141 St Georges Terrace
PERTH WA 6000

Dear Mr Murphy

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA: SECTION 50 OF POLICE ACT 1892 - 'MOVE ON' LAWS AND ABORIGINAL AND TORRES STRAIT ISLANDERS PEOPLES

Thank you for your letter dated 28 March 2008 concerning issues raised by Mr Dennis Egginton, Chief Executive Officer of the Aboriginal Legal Service (ALS), in relation to 'Move On' Laws and Aboriginal and Torres Strait Islander Peoples. I provide you with the following response to these issues.

Using an official caution or warning as an alternative measure to an arrest after the issue of a MoN

Mr Egginton suggests that an unintended consequence of the Move on Notice (MoN) is that an individual who does not have a criminal record may acquire one if they are arrested for breaching a MoN, whereas, had they been officially cautioned or warned, they would remain outside the criminal justice system.

In considering Mr Egginton's comments, it is important to note that the MoN itself provides a type of warning or caution against an arrest by giving police officers the power to write a MoN where they reasonably suspect that an individual has committed an offence or is likely to commit an offence, in a public place.

Through the MoN, that individual is provided with an opportunity to desist in the behaviour that is causing the suspicion and 'move on'. If the situation escalates thereafter, leading to the individual's arrest, it is as a result of that individual's choice to disobey the terms of the order.

In these circumstances, WA Police is of the view that it is unreasonable for an individual to expect two warnings (in the form of a caution prior to the issue of a MoN) before consequences attach to their behaviour.

To the extent that the breach of a Notice is an unintended action, rather than deliberate disobedience to law on the part of an individual, this is more a question of whether the
methods of outlining the terms of the MoN are made sufficiently clear to recipients of the Notice. This is a separate issue that is addressed in other parts of this advice.

Whether MoNs are being breached because individuals are not being given enough time to leave an area

The boundaries prescribed in a MoN are set by the issuing officer having regard to notions of reasonableness in the context of the circumstances giving rise to the need for a MoN.

I am advised that, in the case of the Perth Central Business District and Northbridge, the boundaries are usually one or two city blocks.

Within the Central Metropolitan Region, I am advised that some officers have attempted to address the language and English literacy issues identified by Mr Eggington by providing individuals with a photocopy of a map depicting the exclusion zone. WA Police will continue to encourage officers to adopt this practice where such issues are present.

However, in response to the suggestion that offenders are being arrested because they have not had a sufficient amount of time to leave an exclusion zone, I am advised that, generally speaking, no such time restrictions are upon the amount of time given to leave the area. The time is simply that which is reasonable in the circumstances.

In the majority of cases cited by Mr Eggington, the individual was arrested not because they did not immediately comply with the MoN but, rather, because they were found ‘wandering’ in the exclusion zone and not demonstrating any intention to leave. In these circumstances, arrest was considered by the individual officer to have been appropriate.

If it is the case that notices are being issued in the vicinity of a train station, usually common sense would dictate that the person must be allowed to remain in the area until the next train. However, given that one of the purposes of the MoN is to prevent an offence being committed, it may be that it is necessary for an individual to be removed from the area entirely.

Whether MoNs be issued with an expiry time of 24 hours

Mr Eggington suggests that police officers should not be issuing MoNs that last for the maximum period prescribed in the legislation, of 24 hours. In support of his argument, he says a number of clients are breaching orders because they “did not realise the move-on notice was for twenty-four hours”.

I do not have the details of the exact circumstances in which was arrested and I am therefore unable to comment on the appropriateness of the police action in that case. However, I do endorse the principal that orders should generally be enforced in line with their terms and that “not realising” the length of a particular order is no excuse for not complying with its terms. It is difficult to see why MoNs should be treated any differently to any other form of legal order whereby the onus is on the offender to behave in accordance with the terms of the order.

Mr Eggington also referred to a case where, he says, “had the length of the notice been shorter, [the three clients] would have been able to attend school”. On this issue I have received the following advice:

- The first event was on Thursday 18 August 2005 and related to and and are not
registered with any school in Northam. are registered at Northam
Senior High School which is located on the north-west side of the Avon River. The
Northam CBD is located on the south-east side of the Avon River. There are no
schools contained within the exclusion area subject of the MoN.

- The second event was on Friday evening 19 August 2005 and related to
  and Schools did not operate
during the exclusion period (1915 hrs Friday 19 August 2005 to 1915 hrs Saturday 20
August 2005) and were not located in the exclusion zone.

**Issue as the scope of the discretion to issue MoNs**

I have considered Mr Eggington’s views outlined on page 3 of his letter as to what he
describes as “police abuse” of the discretion to issue MoNs to people of Aboriginal and
Torres Strait Islander descent and the potential for such notices to be used “as a form of
social control” and can only reassure Mr Eggington that WA Police officers remain
cognisant of the scope of their discretion to issue MoNs. Should any officer act beyond
this scope, I trust it will be brought to the attention of WA Police.

**Comments on suggestion that section 50 of the Police Act should be repealed**

Notwithstanding the issues raised by Mr Eggington on behalf of the ALS, it is our view
that MoNs should not be repealed where the reasons for the introduction of MoNs have
not changed.

MoNs were implemented in response to complaints about antisocial behaviour received
from local government authorities, traders, residents living in the vicinity of parks, tourists
and members of the public. MoNe are given to provide a warning to people rather than
them being arrested or summoned for minor offences. Generally, people are moved on
to facilities providing food, shelter and/or detoxification or back to their normal place of
residence.

While I note that Mr Eggington says that MoNs are not necessary in light of the other
laws that deal with “public space issues”, the important difference between the MoN and
these other laws appears to have been overlooked by Mr Eggington. Through a MoN, a
matter can be dealt with by police without initially resorting to detaining the individual
through arrest or preferring a charge. It is a chance for an individual to modify their
behaviour and remove the risk both to the individual and the public. It is difficult to see
how this is not advantageous to most people, other than those who are reasonably
suspected of intending to commit and offence rather than having actually committed one.

Should you require clarification of any aspect of this response, please contact Inspector
Mary Brown of the Office of the Commissioner on 9222 1054.

Yours sincerely,

[Signature]

KAREL O’CALLAGHAN APM
COMMISSIONER OF POLICE

June 2006
SECTION 50 OF POLICE ACT - MOVE-ON LAWS AND ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Mr Dennis Eggington of the Aboriginal Legal Service of Western Australia (ALSWA) wrote to me on 2 March and 26 May 2006 regarding concerns over the use of the move-on provisions of Section 50 of the Police Act. I requested advice from the Western Australia Police (WAPOL) on this matter, and was advised on 19 June 2006. As a result of this advice from WAPOL, I undertook to write to you making two recommendations on the application of these provisions.

I should note that I support the intention of the Section 50 provisions to enable police to take action against anti-social behaviour without the need to resort to arresting or charging a person. There appear to be issues around the practice of applying these notices, particularly involving Aboriginal people.

There are two points in particular which seem to have significant unintended consequences for Aboriginal people:

1. Police apparently routinely issue the notice for the full 24 hour period. While this is within the bounds of the legislation, it has unintended consequences through preventing people from re-entering a prohibited area even after they have modified their behaviour. In some reported cases, people have been arrested for breaching a move-on notice just prior to expiry when they have re-entered the area going about their lawful business. It has been suggested by the Department of the Attorney General (DotAG) that the move-on notice forms could be altered to provide a number of tickable boxes to prompt officers, for example, 8am or 12noon. In this way the intention of the provision would still be met, to have a person move-on and modify their behaviour, without the unintended consequence of criminalising that person's actions.

2. There appears to be a gap in understanding around the cross-cultural concepts of time and location with respect to the notices. It has been suggested by DotAG that particular cross-cultural training could be beneficial. This training could explore a range of different strategies in which police discretion can be applied. These strategies are to include differences in cross cultural communication skills that incorporate Aboriginal English and alternative ways in which concepts of time can be articulated (eg until after 8am tomorrow) and cross cultural differences in conceptualising boundaries (all of the Perth and Northbridge area).
. . . as you will understand, the imperative of DotAG is to reduce over-representation of Aboriginal people in the justice system. In reducing the potential for the non-criminal acts for which move-on notices are issued to become criminalised through breach of a notice, our departments can work together to address the issue of over-representation, and to ensure fair outcomes for all citizens, particularly Aboriginal people, in Western Australia.

JIM McGINTY MLA
ATTORNEY GENERAL

17 JUL 2006
APPENDIX 7

CRIMINAL INVESTIGATION BILL 2005: CLAUSE BY CLAUSE COMPARISON OF EXISTING POLICE POWERS
# APPENDIX 7
## CRIMINAL INVESTIGATION BILL 2005: CLAUSE BY CLAUSE COMPARISON OF EXISTING POLICE POWERS

<table>
<thead>
<tr>
<th>Clause</th>
<th>Power/Responsibility/Offence etc <em>Criminal Investigation Bill</em></th>
<th>Current Legislation</th>
<th>Contraction/Expansion/Replacement of Current Provision or New Provision</th>
<th>Explanation or Rationale for Expansion or Contraction</th>
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<tbody>
<tr>
<td>4</td>
<td>“Reasonably suspects”, meaning of Common law definition – reasonable suspicion¹</td>
<td>Replacement</td>
<td>Codifying a common law term to provide consistent interpretation.</td>
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<td>5</td>
<td>“Things relevant to an offence”, meaning of New concept.</td>
<td>New provision</td>
<td>Provides consistent interpretation and gives effect to other provisions throughout the Bill.</td>
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<td>6</td>
<td>Other written laws, this Act’s relationship with Nil</td>
<td>New provision</td>
<td>Required to ensure other legislation continues to operate, in particular Chapter XXVI of the Criminal Code.</td>
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<td>7</td>
<td>Common Law, this Act’s relationship with Nil</td>
<td>New provision</td>
<td>This clause is required to ensure that this legislation takes precedence over any relevant common law that may be currently in</td>
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### Legislation Committee

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<tr>
<td><strong>8</strong></td>
<td>Police powers as an individual not affected</td>
<td>Nil</td>
<td>New provision</td>
</tr>
<tr>
<td><strong>9</strong></td>
<td>Public officers may be authorized to exercise powers</td>
<td>This provision mirrors section 5 of the <em>Criminal Investigation (Identifying People) Act 2002</em> (CIIPA). Apart from the CIIPA, powers of investigation are currently given to other public officers via specific provisions contained with Acts to which they are responsible. Usually by creating a reference to an ‘authorized person’, the definition of which usually includes police officers.</td>
<td>New provision</td>
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<td><strong>10</strong></td>
<td>Officers’ duty to identify themselves</td>
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<td>New provision</td>
</tr>
<tr>
<td><strong>11</strong></td>
<td>Delegation by officers</td>
<td>Nil</td>
<td>New provision</td>
</tr>
<tr>
<td><strong>12</strong></td>
<td>Warrants and orders, applying for</td>
<td>Replaces the aspect of section 711 of the <em>Criminal Code</em> (CC) that relates to</td>
<td>Expansion</td>
</tr>
</tbody>
</table>
applying for, and approving warrants. Allows for oral applications, un-sworn applications and applications made by remote communication. Also specifically provides that a copy of the warrant/order has the same effect as the original.

Due to the specific nature of the provision the expansions are necessary to ensure operational effectiveness and ensure that warrants/orders are able to be obtained in remote areas of the state.

<p>| 13 | Detained people to be taken to be in lawful custody | Nil | New provision | Necessary to give effect to and legitimate citizen arrest and detention powers. |
| 14 | When powers may be exercised | Nil | New provision | Provides clarity |</p>
<table>
<thead>
<tr>
<th></th>
<th>Assistance when exercising powers</th>
<th>Is an amalgamation of various parts of specific provisions that provide police with a power or responsibility. For example section 231 CC (Use of Force) provides power to a person who is lawfully executing any sentence process or warrant, or making an arrest; and extends that power to any person lawfully assisting the first person. Other examples of this are sections 233 CC ‘Preventing escape from arrest’ and section 564 CC ‘Arrest without warrant generally’. Section 176 CC provides an offence for a person failing to provide assistance to a police officer when he is given reasonable notice that he is required.</th>
<th>Replacement</th>
<th>Provides uniformity to this area of law in that it applies to all powers provided within this Bill. It simplifies and provides specificity to how assistance may be provided.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Force, use of when exercising powers</td>
<td>This clause replaces section 231 CC ‘Force used in executing a process or in arrest’.</td>
<td>Replacement</td>
<td>This clause modernises section 231 in its terminology making it more prescriptive and therefore less ambiguous than the previous provision.</td>
</tr>
<tr>
<td></td>
<td>Animals, use of by officers exercising powers</td>
<td>Nil</td>
<td>New provision</td>
<td>Modernisation - Provides clarity to area of law that is currently silent.</td>
</tr>
<tr>
<td></td>
<td>Roadblocks, use of to stop vehicles</td>
<td>There is currently no specific</td>
<td>New provision</td>
<td>Whilst currently police</td>
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<td></td>
<td>Legislation that allows police to conduct road blocks. However, police currently have the power to stop vehicles to search for stolen or unlawfully obtained property (Section 49 Police Act) and have a general implied power to call upon a vehicle to stop (Section 53 of the Road Traffic Act). powers are considered broad enough to conduct road blocks in certain circumstances, this section modernises those provisions and places appropriate safeguards and accountabilities for any officer exercising the power.</td>
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<tr>
<td>19</td>
<td>Stopping vehicles, powers in connection with</td>
<td>Nil</td>
<td>New provision</td>
<td></td>
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<td></td>
<td>Provides for the means by which vehicles may be stopped and provides an ancillary power to detain and move vehicles.</td>
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<tr>
<td>20</td>
<td>Power to enter includes power to enter some other places</td>
<td>Currently only provided as a implied power to search warrants or other powers of entry without warrant.</td>
<td>New provision</td>
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<td></td>
<td>Modernises police entry powers by specifically providing a power for police to enter other places in order to gain entry to the place to which the power may be exercised. Provides clarity to an area of law that is currently silent.</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Forensic examination of a thing relevant to an offence</td>
<td>Common law power to investigate offences.</td>
<td>New provision</td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td>Modernisation – Codifies common law powers.</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Gender of a person, ascertaining</td>
<td>Mirrors section 55(7) of the Criminal Investigation Identifying People) Act 2002 (CIIPA).</td>
<td>New provision - to apply to powers in this Bill.</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Provides clarity.</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Consent to search etc., presumption against and withdrawal of</td>
<td>Mirrors section 7 of the CIHA</td>
<td>New provision to apply to powers in this Bill.</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Provides clarity.</td>
<td></td>
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<tr>
<td>24</td>
<td>Prevention of offences and violence</td>
<td>Section 237 CC ‘Preventing a breach</td>
<td>Expansion – Broadens</td>
<td></td>
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<td>Provides clarity to the</td>
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<td></td>
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<td>of the peace’.14</td>
<td>circumstances where force may be used by citizens to prevent violence. Includes breaches of the peace but is expanded to include preventing any act that a citizen reasonably suspects will be done in the course of committing an offence. Also provides a power of entry for any citizen to enter premises for the purposes of preventing an unlawful killing.</td>
<td>definition of ‘Breach of the Peace’ and recognizes the need for citizens to assist police in the prevention of offences, in particular offences involving violence.</td>
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<tr>
<td>25</td>
<td>Citizens arrest</td>
<td>Section 564 CC (Arrestable offences)15 Section 4916 Police Act (Simple Offences – Owner of Property arrest power).</td>
<td><strong>Expansion</strong> – Includes a power of arrest for persons entitled to prevent an act in accordance with clause 23.</td>
<td>This clause gives effect to clause 23 and replaces existing citizen arrest powers.</td>
</tr>
<tr>
<td>26</td>
<td>Person in command of vehicle, powers of</td>
<td>Section 565A CC ‘Arrest of persons offending on aircraft or vessel’17 Section 568 CC ‘Arrest during flight’.18</td>
<td><strong>Expansion</strong> – Currently powers are only extended to persons in command of an aircraft or vessel and are only powers of detention, removal or arrest. This new clause extends to all vehicles which will include aircraft, trains, buses and cars. The clause is also extended to provide a power to request a person to produce items, or submit to a search for items, .Recognises the modern day need for citizens to assist police in the prevention of offences, in particular, offences involving violence.</td>
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<tr>
<td>#</td>
<td>Description</td>
<td>Current Law</td>
<td>New Law or Change</td>
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<tr>
<td>27</td>
<td>Suspects and others may be ordered to move on</td>
<td>Section 50 Police Act ‘Suspects and others may be ordered to move on’.</td>
<td>Replacement</td>
<td>Recently passed by the Criminal Law Amendment (Simple Offences) Act 2004.</td>
</tr>
<tr>
<td>28</td>
<td>Persons accompanying officers to be informed of rights</td>
<td>Nil</td>
<td>New provision</td>
<td>Requires officers to ensure that persons asked to accompany officers without being arrested are aware of their rights. Important corollary to clause 138.</td>
</tr>
<tr>
<td>29</td>
<td>Places with two or more occupants, interpretation</td>
<td>Nil</td>
<td>New provision</td>
<td>Required to give effect to other provisions in the Bill that refer to an occupier.</td>
</tr>
<tr>
<td>30</td>
<td>Entry and search with occupier’s consent</td>
<td>A lawful practice not currently provided for in legislation.</td>
<td>New provision</td>
<td>Recognises that a search warrant is not necessary when the occupier of the premises consents to the search. Provides a legislative framework for searching premises by consent. Stems from the British Police and Criminal Evidence Act 1984 (PACE) Code of Practice.</td>
</tr>
<tr>
<td>31</td>
<td>Occupiers’ Rights</td>
<td>Section 711 CC</td>
<td>Contraction – Provides a legislative onus upon police to Stems from the PACE Code of Practice.</td>
<td></td>
</tr>
</tbody>
</table>

187 Endangering offence is a new concept and is defined as: “…an offence that, if committed on board the vehicle, may endanger the life, health or safety of any person on board the vehicle.”
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</thead>
<tbody>
<tr>
<td><strong>32</strong></td>
<td>Warrant not required</td>
<td>Nil</td>
<td><strong>New provision</strong></td>
</tr>
<tr>
<td><strong>33</strong></td>
<td>Public open area, search powers in</td>
<td>Common law</td>
<td><strong>New provision</strong> – Slight contraction of powers in requiring police to seek the informed consent of the person having management or control of the premises being searched where property or vegetation will be damaged, or ground dug up.</td>
</tr>
<tr>
<td><strong>34</strong></td>
<td>Public place, entry to keep order</td>
<td>Section 42 Police Act ‘Police may enter places of public entertainment; removal of disorderly people’</td>
<td><strong>Replacement</strong></td>
</tr>
<tr>
<td><strong>35</strong></td>
<td>Place or vehicle, entry to prevent violence</td>
<td>In some circumstances entry would be excused by common law or the application of section 25 CC ‘Extraordinary emergencies’</td>
<td><strong>Expansion</strong> – Provides police with a defined power of entry for specified circumstances which is broadened by the inclusion of “any other breach of the peace”. Provides statutory basis for the “chance discovery principle.”</td>
</tr>
<tr>
<td><strong>36</strong></td>
<td>Place or Vehicle, entry of to attend to dead or seriously injured person</td>
<td>Entry would be excused by common law or the application of section 25 CC ‘Extraordinary emergencies’</td>
<td><strong>Definition</strong> – Limits the power to police officers and other specified public officers when, depending on the circumstances, common law or other sources of law may be applicable.</td>
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would permit any person to enter to assist a seriously ill or dying person. Does not affect the operation of section 25 of the Criminal Code “Extraordinary Emergencies.”

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<tbody>
<tr>
<td>37</td>
<td>Place or vehicle, entry to investigate serious event</td>
<td>Nil</td>
<td>New provision</td>
</tr>
<tr>
<td></td>
<td>Provides a power for police to enter a place to attend to, or prevent a serious event. Clarifies what may be the common law. Significantly strengthens the ability of police to prevent acts of terrorism where intelligence exists of an incident occurring.</td>
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<tbody>
<tr>
<td>38</td>
<td>Vehicle Searches to prevent offences etc.</td>
<td>Nil</td>
<td>New provision</td>
</tr>
<tr>
<td></td>
<td>Provides police with power to stop search and detain vehicles to ensure safety. In certain circumstances this practice may be excused by the use of section 53 of the Road Traffic Act; however, this only applies to vehicles on roads. This clause extends to all vehicles including aircraft, public transport etc so is particularly useful in detecting and preventing acts of terrorism.</td>
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</thead>
<tbody>
<tr>
<td>39</td>
<td>Vehicle, search of for things relevant to offence</td>
<td>Section 49 Police Act ‘Police and Expansion – Section 49 is</td>
<td></td>
</tr>
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<td></td>
<td>This clause gives effect to</td>
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property owners may apprehend offenders; police may search vehicles and people for stolen property.\(^{24}\) restricted to searching for anything reasonably suspected to be stolen or unlawfully obtained. The new clause is much broader and includes anything relevant to an offence, with a specific power to search for victims of offences.

Recommendation 18.6 of the Law Reform Commission’s report 85 on Police Act Offences (LRC Report 85). It has been separated from the other powers in section 49 and rewritten in contemporary language. The expansion of the power to ‘anything connected with an offence’ is consistent with modern day legislation and will cover situations where an offence has occurred that doesn’t involve the stealing or unlawful possession of property.

It is arguable that common law combined with a police officer’s ability to stop motor vehicles under the Road Traffic Act (Section 53) would excuse the stopping of vehicle for the purpose of releasing unlawfully detained persons; however this is unclear. This clause clarifies this area of law.

40 46  Protected Forensic Areas – establishment in case of serious offence  Nil  New provisions – Provide police with a power to declare protected forensic areas Codify and clarify common law in respect to
47 | 48 | 49 | a protected forensic area. Once declared, these provisions provide various powers to enable police to protect the area by cordoning off and controlling access pending the issue of a search warrant or consent being obtained from the occupier or person in control of that place. In the case of a “public open area” police need not gain consent or a warrant to commence searching and examining the place unless an officer wishes to damage or destroy property or dig up the ground, in which case the office must seek consent in accordance with clause 32. Provides offences for unauthorized persons who enter or disturb a restricted crime scene and provides appropriate safeguards to occupiers in that a warrant is required within 6 hours of declaring the “restricted crime scene” to enable it to continue in a place that is not a public open area, and any aggrieved person may apply to a magistrate to have the matter reviewed by a magistrate. The police investigation of offences.

Due to the lack of legislation in this area, crime scenes are usually established by consent and if that is not possible a 711 Warrant may be used to enter a place and conduct inquiries; however the powers associated with a 711 warrant are limited to searching and seizing things connected with an offence. There is no legislative basis for prolonged investigation and forensic examination. These clauses also remove the risk of evidence being tampered with or disturbed before a warrant is obtained.
Magistrate will then consider whether there are grounds for the continued establishment of the scene.

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<tr>
<th>41</th>
<th>42</th>
<th>43</th>
<th>44</th>
<th>45</th>
</tr>
</thead>
</table>
| Search Warrants | Section 711 CC ‘Search warrant’
| Replaces Section 711 CC, and expands powers to – |
| • Allow for approvals to be done via remote communication – refer clause 12. |
| • Specifically allow for a warrant to be used to locate and release persons unlawfully detained. |
| • Provide a specific power for searching and detaining persons at the place at which the warrant is executed. |
| • Provide power for police to order persons to do certain things to facilitate the execution of the warrant. |

Also contains powers, subject to Senior Officer approval, that will enable police to enter other places in order to protect evidence, guard against the offender fleeing the scene, or

Modernisation – provides clarity and increases powers and accountabilities for officers exercising those powers.
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<th>protect the safety of any person.</th>
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<tr>
<td>68</td>
<td>Searching People for evidence or contraband</td>
<td>Various provisions within current legislation including section 49(^{30}) of the Police Act 1892 and sections 23(^{31}) of the Misuse of Drugs Act 1981 provide police with a power of search. However, with the exclusion of section 23(^{32}) MDA, these powers give very little direction on what kind of search can be done and how that search must be carried out. These issues have been previously accounted for in police policy.</td>
</tr>
<tr>
<td>68</td>
<td>People in public places, search for security purposes</td>
<td>Nil</td>
</tr>
</tbody>
</table>
|    |    |    | This resulted from the coronial inquiry of Daniel English and Colin Irvine which it was found that there was a lack of statutory power for police to:  
- restrain, search and detain persons in premises subject to a |
<table>
<thead>
<tr>
<th>73 to 108</th>
<th>Part 9 - Forensic Procedures on People</th>
<th>Section 236 CC(^3)</th>
<th>Expansion</th>
</tr>
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<tbody>
<tr>
<td></td>
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<td>This Part provides powers to conduct 'forensic procedures' on persons for investigative purposes. ‘Forensic procedures’ is a new term but the power to do them has always existed in section 236 of the Criminal Code. The new provisions are an expansion of the previous powers, in that police can now do them on suspects, who are not in custody and 'involved persons' but these new powers are accompanied by significantly increased accountabilities and safeguards. This Part follows a similar format to the CIIPA in that it allows for procedures to be done by consent, and depending on the circumstances, without consent with the</td>
</tr>
<tr>
<td>109 to 113</td>
<td>Part 10 – Provisions about searches and forensic procedures on people</td>
<td>Nil</td>
<td>New provisions</td>
</tr>
<tr>
<td>114 to 123</td>
<td>Part 11 – Interviewing Suspects</td>
<td>Section 570 CC(^{34})</td>
<td>Replacement</td>
</tr>
<tr>
<td>124 125 126 127</td>
<td>Arrest</td>
<td>Several provisions provide police with the power to arrest persons suspected of committing offences; however, the main sections used by</td>
<td>Expansion – Specifically provide a power of arrest for ‘public officers’.</td>
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<td>police are: Section 43 Police Act - Arrest Generally</td>
<td>Section 49 Police Act - Arrest (Summary Offences Only)</td>
<td>Section 564 CC - Arrest for 'arrestable offences' and power of entry to effect arrest.</td>
<td>Contraction – Limits the circumstances where an officer may arrest a person for an offence that is not a serious offence.</td>
</tr>
<tr>
<td>128 Warrant not required</td>
<td>Nil</td>
<td>New provision</td>
<td>Required to give effect to this Division.</td>
</tr>
<tr>
<td>129 Occupier’s rights if a place is entered</td>
<td>Nil</td>
<td>New provision</td>
<td>Codifying common law and Police policy.</td>
</tr>
<tr>
<td>130 Powers exercisable on a search under this division</td>
<td>Nil</td>
<td>New provision</td>
<td>Required to give effect to, and ensures consistent application of, this division. Ensures that the same ancillary powers to a search warrant (searching persons, use of equipment, establish a restricted crime scene etc) are available to officers searching without a warrant under this division.</td>
</tr>
<tr>
<td>131 Places may be entered and vehicles may be stopped</td>
<td>Section 564(5) CC</td>
<td>Expansion – Provides power to enter a place for purpose of arrest and power to stop search and detain vehicles for the purpose of arrest. Now applies</td>
<td>Ancillary to arrest powers in other provisions. Provides consistency.</td>
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<tr>
<td>Legislation Committee</td>
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<tr>
<td><strong>132</strong></td>
<td>Places and vehicles of certain arrested suspects may be searched for evidence</td>
<td>Section 68 Police Act</td>
<td><strong>Contraction</strong> – This clause only allows police to search for a thing relating to the serious offence for which the person has been arrested, or for a thing relevant to a similar or connected serious offence; whereas section 68 allowed for a search in broad terms. This clause is now also subject to approval by a senior police officer (sergeant and above).</td>
</tr>
<tr>
<td><strong>133</strong></td>
<td>Escapees, additional powers to aid recapture</td>
<td>Nil</td>
<td><strong>New provision</strong></td>
</tr>
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</table>
warrants have been used for this purpose; however that was ruled an abuse of that process. In recent times police have relied on the provisions of section 564(5) CC to enter and arrest a person in relation to a charge of ‘escaping lawful custody’.

The new clause clears this up by providing a power to search for anything in relation to relevant offences (escaping legal custody or any other indictable offence reasonably suspected to have been committed by the escapee while at large), or search for and arrest the escapee.

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<tbody>
<tr>
<td>134</td>
<td>Certain people in custody may be searched</td>
<td>Common law.</td>
<td><strong>New provision</strong></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Codifies common law and expands to enable evidence to be seized in prescribed circumstances.</td>
</tr>
<tr>
<td>135</td>
<td>Dealing with arrested people</td>
<td>Nil</td>
<td><strong>New provision</strong> – Provides a power for police to detain suspects for the purposes of questioning, searching premises or investigating offences in accordance with a recommendation of the</td>
</tr>
<tr>
<td>to 140</td>
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<td></td>
<td>Currently police have no legal authority to detain a person for questioning, searching or investigating offences. This causes great difficulty as any questioning or</td>
</tr>
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<td>Kennedy Royal Commission Report. Rights of arrested persons accord with current Police practice. investment has to be done prior to arresting the suspect, or with the suspects consent. These provisions are loosely based on the PACE model with detention for more than the initial 6 hour period period requiring approval of a senior officer and then a magistrate.</td>
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<tr>
<td>141</td>
<td>Arrested suspects, charging and releasing</td>
<td>Nil</td>
<td>New provision This removes a current anomaly whereby all persons arrested and charged with an offence, even those charged with simple offences, must be dealt with under the Bail Act 1982 before being released.</td>
</tr>
<tr>
<td>142</td>
<td>Other arrested people</td>
<td>Nil</td>
<td>New provision Ensures that persons arrested under a warrant or other process are dealt with according to that process.</td>
</tr>
<tr>
<td>143</td>
<td>Possession of warrant at time of arrest not necessary</td>
<td>Section 232 Criminal Code(^9)</td>
<td>Expansion – a warrant is no longer required to be in the possession of the officer at the time of arrest – It is sufficient to reasonably suspect a warrant is in existence. This is a necessary change to accommodate the fact that police store warrants at a central location and notification of those warrants is made available to all officers. It is</td>
</tr>
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reasonable to expect an officer will be able to have the warrant in his possession in every case. Section 232 did not prohibit; however, the new provision clarifies the situation.

<table>
<thead>
<tr>
<th>144</th>
<th>Application</th>
<th>Nil</th>
<th>New provision</th>
<th>Applies this Part to seizures under the Act.</th>
</tr>
</thead>
<tbody>
<tr>
<td>145</td>
<td>Things relevant to an offence, grounds for seizing</td>
<td>Common law</td>
<td>New provision</td>
<td>Codifies common law.</td>
</tr>
<tr>
<td>146</td>
<td>Seizing things, ancillary powers</td>
<td>This is a new provision, however it is similar in effect to section 90B embargo notices; forfeiture of the Police Act.</td>
<td>Expansion – Gives police the power to issue a notice placing an embargo on property that has been seized by police, but because of its size or location can not be physically seized.</td>
<td>Due to the complexities of section 90B and 90C of the Police Act, power to place embargo notices on property has remained largely unused. The new clause is simpler and follows the concept that if a police officer has the ability to seize an item, then he should also have the ability to place an embargo on it if it cannot physically be seized.</td>
</tr>
<tr>
<td>147</td>
<td>Records relevant to an offence</td>
<td>Nil</td>
<td>New provision – Facilitates the seizing and copying of electronic data.</td>
<td>Required to accommodate the seizing of electronic information or records. Police regularly seize entire computer systems so as to extract certain</td>
</tr>
<tr>
<td>Number</td>
<td>Description</td>
<td>Current Status</td>
<td>Change Type</td>
<td>Description</td>
</tr>
<tr>
<td>--------</td>
<td>------------------------------------------------------------------------------</td>
<td>----------------</td>
<td>-----------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>148</td>
<td>Records, powers to facilitate seizing</td>
<td>Nil</td>
<td>New provision</td>
<td>Clarifies powers in respect to seizing equipment or a device that contains a thing relevant to an offence and further provides a power to order any person to assist police in accessing such a power. This power is necessary to deal with encrypted computers or protected records with passwords which would prevent police from gaining access to relevant records such as child pornography images.</td>
</tr>
<tr>
<td>149</td>
<td>Seized things, list to be supplied on request</td>
<td>Nil – Currently covered in Police policy – OP-39.7 Search Warrants (Execution)</td>
<td>Replacement</td>
<td>Codifies Police policy.</td>
</tr>
<tr>
<td>150</td>
<td>Privileged material, procedure on seizure of</td>
<td>Nil</td>
<td>New provision</td>
<td>Provides legislative framework for dealing with property (documents) to which the common law principles of ‘public interest immunity’ and ‘legal professional privilege’ may apply.</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>New provision</td>
<td>Notes</td>
<td></td>
</tr>
<tr>
<td>---------</td>
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<td></td>
</tr>
<tr>
<td>151</td>
<td><em>Criminal and Found Property Disposal Act 2004 applies</em></td>
<td>Nil</td>
<td>New provision</td>
<td>Provides clarity to an area of law that is currently unclear and dealt with via police standard operation procedures.</td>
</tr>
<tr>
<td>152</td>
<td>Order by a police officer, offence to not obey</td>
<td>Nil</td>
<td>New provision</td>
<td>Provides a link between this legislation and the proposed <em>Criminal and Found Property Disposal Act</em> so that anything seized under this legislation is appropriately disposed of.</td>
</tr>
<tr>
<td>153</td>
<td>Evidence obtained improperly</td>
<td>Nil</td>
<td>New provision</td>
<td>Is required to enforce other provisions of the CIB that allow police to order persons to do an act.</td>
</tr>
<tr>
<td>155</td>
<td>Regulations</td>
<td>N/A</td>
<td>New provision</td>
<td>Regulation making power.</td>
</tr>
<tr>
<td>154</td>
<td>Review of the Act</td>
<td>N/A</td>
<td>New provision</td>
<td>Provides that the Act must be reviewed with 5 years of commencement.</td>
</tr>
</tbody>
</table>
¹ Reasonable suspicion

Criminal law. A suspicion based on facts which, objectively seen, are sufficient to give rise to an apprehension of the suspected matter: *R v Chan* (1992) 28 NSWLR 421 at 437; 63 A Crim R 242. Suspicion carries less conviction than belief: *Tuchs v Manley* (1985) 62 ALR 460. To say that a suspicion is reasonable does not necessarily imply that it is well-founded or that the grounds for suspicion must be factually correct: *Tuchs v Manley*. Also there may be different impressions produced from a single set of circumstances which can all be said to be reasonable: *R v Chan* at 438. However the facts must do more than merely give rise to conflicting inferences of equal or even lesser degree of probability where the choice between them is no more than a mere matter of idle speculation or mere imagination: *R v Chan* at 437.

² 5. Public officers may be authorised to exercise powers

(1) For the purposes of this Act and in particular the definition of “public officer” in section 3, another Act or the regulations made under this Act may —

(a) prescribe an office to which people are appointed under a written law for a public purpose and a function of which is the investigation of offences; and

(b) in respect of that office, specify those of the powers in this Act that a holder of that office may exercise, being powers that this Act provides may be exercised by a public officer.

(2) A public officer may only exercise a power under this Act in relation to an offence if —

(a) the office held by the public officer has been prescribed under subsection (1)(a);

(b) the power is one that has been specified under subsection (1)(b) as one that the officer may exercise; and

(c) the offence is one that the officer, by virtue of being such an officer, is authorised to investigate or prosecute.

³ 711. Search warrant

If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place —

(a) Anything with respect to which any offence has been or is suspected, on reasonable grounds, to have been committed; or
(b) Anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any
offence; or
(c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any
offence;

he may issue his warrant directing a police officer or police officers named therein, or all police officers, to search such house, vessel, vehicle, aircraft,
or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.

Any such warrant is to be executed by day, unless the justice, by the warrant, specially authorises it to be executed by night, in which case it may be so
executed.

Where it appears on the complaint that an offence involving the safety of an aircraft has been, is being or may be committed on board or in relation to
the aircraft, the justice may direct in his warrant that any person on board the aircraft or any person who is about to board the aircraft may be searched.

A female person shall not be searched under the authority of a warrant issued under this section, except by a female person.

4 231. Force used in executing process or in arrest

It is lawful for a person who is engaged in the lawful execution of any sentence, process, or warrant, or in making any arrest, and for any person
lawfully assisting him, to use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest.

5 233. Preventing escape from arrest

(1) When any person is proceeding lawfully to arrest, with or without warrant, another person, and the person sought to be arrested takes to
flight, or appears to be about to take to flight, in order to avoid arrest, it is lawful for the person seeking to make the arrest, and for any
person lawfully assisting that person, to use such force as may be reasonably necessary to prevent the escape of the person sought to be
arrested.

(2) Subsection (1) does not authorise the use of force that is intended or is likely to cause death or grievous bodily harm unless —
(a) the person who uses that force is a police officer or a person assisting a police officer;
(b) the person sought to be arrested is reasonably suspected of having committed an offence punishable with imprisonment for life; and  
(c) the person sought to be arrested is called on to surrender before that force is used.

6 564. Arrest without warrant generally  
(1) In this section “arrestable offence” means an offence punishable with imprisonment, with or without any other punishment.  
(2) It is lawful for any person to arrest without warrant any person who is, or whom he suspects, on reasonable grounds, to be, in the course of committing an arrestable offence.  
(3) Where an arrestable offence has been committed, it is lawful for any person to arrest without warrant any person who has committed the offence or whom he suspects, on reasonable grounds, to have committed the offence.  
(4) Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, it is lawful for the police officer to arrest without warrant any person whom the police officer suspects, on reasonable grounds, to have committed the offence.  
(5) Where it is lawful under this section for a police officer to arrest a person, it is lawful for the police officer, for the purpose of effecting the arrest, to enter upon any place where the person is or where the police officer suspects, on reasonable grounds, the person may be.  
(6) Where any person is called upon by a person whom he believes, on reasonable grounds, to be a police officer to assist in effecting the arrest under this section of a third person, it is lawful for the first person to assist the second person in effecting the arrest unless the first person knows —  
   (a) that the third person has not committed an arrestable offence; or  
   (b) that there are no reasonable grounds for suspecting that the third person has committed an arrestable offence.

7 176. Neglect to aid in arresting offenders  
Any person who, having reasonable notice that he is required to assist any sheriff, under sheriff, justice, mayor, or police officer, in arresting any person, or in preserving the peace, without reasonable excuse omits to do so, is guilty of a misdemeanour, and is liable to imprisonment for one year.

8 231. Force used in executing process or in arrest
It is lawful for a person who is engaged in the lawful execution of any sentence, process, or warrant, or in making any arrest, and for any person lawfully assisting him, to use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest.

949. Police and property owners may apprehend offenders; police may search vehicles and people for stolen property
Any person found committing any offence punishable in a summary manner may be taken into custody without a warrant by any officer or constable of the Police Force, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every police officer or constable may also stop, search, and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property or liquor shall be offered to be sold, pawned, or delivered (if he shall have reasonable cause to suspect that any offence has been committed with respect to such property or liquor, or that the same, or any part thereof, has been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any such property or liquor as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property or liquor, to be dealt with according to law; and every person taken into custody without warrant for any offence against the provisions of this Act, or for any offence punishable in a summary manner, shall be detained in custody until he can be brought before a Justice to be dealt with according to law or until he shall have given bail for his appearance before a Justice in manner hereinbefore provided.

1053. Driver failing to give name and address to member of the Police Force, failing to stop, etc.
(1) Any driver of a vehicle who —
   (a) when required by a member of the Police Force to state his name and place of abode refuses to do so, or states a false name or place of abode; or
   (b) refuses or fails to stop his vehicle when called upon to do so by a member of the Police Force, commits an offence.

Penalty: For a first offence, 6 PU.
For a subsequent offence, 12 PU.
(2) Any driver of a vehicle who, when required by any member of the Police Force, does not produce his driver’s licence on demand, commits an offence against this Act and shall be liable to a penalty not exceeding 4 PU, but it shall not be an offence if the driver subsequently produces the licence, within a reasonable time after demand, to the Director General or to the officer-in-charge of any police station.

(3) Any person who was present at the scene of any accident in which a vehicle was involved, and who, in the opinion of a member of the Police Force, may be able to give information or evidence in relation to the accident, shall, if requested so to do by the member of the Police Force, furnish to him particulars of his name and place of abode, and if the person refuses to furnish any of those particulars when requested so to do, or furnishes particulars of his name or place of abode which are false or untrue in any respect he shall be guilty of an offence.

Penalty: 4 PU.

(4) Where a member of the Police Force has reasonable grounds for believing that a person has committed an offence against this Act, he may require that person to furnish him with particulars of his name and place of abode, and a person who, when so required, refuses to furnish those particulars or furnishes particulars which are false or untrue in any respect commits an offence.

Penalty: For a first offence, 6 PU.

For a subsequent offence, 12 PU.

II 711. Search warrant

If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place —

(a) Anything with respect to which any offence has been or is suspected, on reasonable grounds, to have been committed; or

(b) Anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence; or

(c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence;

he may issue his warrant directing a police officer or police officers named therein, or all police officers, to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.
Any such warrant is to be executed by day, unless the justice, by the warrant, specially authorises it to be executed by night, in which case it may be so executed.

Where it appears on the complaint that an offence involving the safety of an aircraft has been, is being or may be committed on board or in relation to the aircraft, the justice may direct in his warrant that any person on board the aircraft or any person who is about to board the aircraft may be searched.

A female person shall not be searched under the authority of a warrant issued under this section, except by a female person.

12 55. Sex of people doing procedures
   (1) A person who does a non-intimate identifying procedure on a person may be of either sex.
   (2) A person who does an intimate identifying procedure on a person must be of the same sex as that person unless the person who does it is —
       (a) a doctor;
       (b) a dentist;
       (c) a nurse; or
       (d) if the intimate identifying procedure being done on that person is the taking of a sample of that person’s blood — a qualified person.
   (3) A person who is present while an intimate identifying procedure is done by a person on another person (excluding a person who is present under section 54(4)) must, if practicable, be of the same sex as the person on whom the procedure is done.
   (4) Subsection (3) does not apply if the intimate identifying procedure is the taking of a sample of the person’s blood.
   (5) If this Part requires a power to be exercised in relation to a person by a person of the same sex as the person, the officer authorised to exercise the power may authorise a person of that sex to exercise the power.
   (6) A person so authorised may exercise the power.
   (7) If it is necessary to ascertain the sex of a person before exercising a power under this Part on the person and the sex of the person is uncertain to the officer authorised to exercise the power —
(a) the officer must ask the person to indicate whether a male or a female should exercise the power on the person and must act in accordance with the answer; and 
(b) in the absence of an answer, the person is to be treated as if of the sex that the person outwardly appears to the officer to be.

7. Non-consent to be assumed in some cases
A person who, having been requested under this Act to undergo an identifying procedure —
(a) does not reply; or
(b) having consented to it resists the carrying out of it,
is taken not to have consented to undergoing it.

237. Preventing a breach of the peace
It is lawful for any person who witnesses a breach of the peace to interfere to prevent the continuance or renewal of it, and to use such force as is reasonably necessary for such prevention and is reasonably proportioned to the danger to be apprehended from such continuance or renewal, and to detain any person who is committing or who is about to join in or to renew the breach of the peace for such time as may be reasonably necessary in order to give him into the custody of a police officer.

564. Arrest without warrant generally
(1) In this section “arrestable offence” means an offence punishable with imprisonment, with or without any other punishment.
(2) It is lawful for any person to arrest without warrant any person who is, or whom he suspects, on reasonable grounds, to be, in the course of committing an arrestable offence.
(3) Where an arrestable offence has been committed, it is lawful for any person to arrest without warrant any person who has committed the offence or whom he suspects, on reasonable grounds, to have committed the offence.
(4) Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, it is lawful for the police officer to arrest without warrant any person whom the police officer suspects, on reasonable grounds, to have committed the offence.
(5) Where it is lawful under this section for a police officer to arrest a person, it is lawful for the police officer, for the purpose of effecting the arrest, to enter upon any place where the person is or where the police officer suspects, on reasonable grounds, the person may be.
(6) Where any person is called upon by a person whom he believes, on reasonable grounds, to be a police officer to assist in effecting the
arrest under this section of a third person, it is lawful for the first person to assist the second person in effecting the arrest unless the first person knows
(a) that the third person has not committed an arrestable offence; or
(b) that there are no reasonable grounds for suspecting that the third person has committed an arrestable offence.

49. Police and property owners may apprehend offenders; police may search vehicles and people for stolen property
Any person found committing any offence punishable in a summary manner may be taken into custody without a warrant by any officer or constable of the Police Force, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every police officer or constable may also stop, search, and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property or liquor shall be offered to be sold, pawned, or delivered (if he shall have reasonable cause to suspect that any offence has been committed with respect to such property or liquor, or that the same, or any part thereof, has been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any such property or liquor as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property or liquor, to be dealt with according to law; and every person taken into custody without warrant for any offence against the provisions of this Act, or for any offence punishable in a summary manner, shall be detained in custody until he can be brought before a Justice to be dealt with according to law or until he shall have given bail for his appearance before a Justice in manner hereinbefore provided.

565A. Arrest of persons offending on aircraft or vessel
(1) The person in command of an aircraft or vessel, or any person authorised by him, may, on board the aircraft or vessel with such assistance as is necessary, arrest without warrant, a person whom he finds committing, or reasonably suspects of having committed, or of having attempted to commit an offence on or in relation to or affecting the use of the aircraft or vessel, and the person in command or the person authorised by him may hold the person so arrested in custody until he can be brought before a Justice to be dealt with according to law.
(2) The person in charge of an aircraft or vessel may, where he considers it necessary so to do in order to prevent an offence on or in relation to or affecting the use of an aircraft or vessel or to avoid danger to the safety of the aircraft or vessel or of persons on board the aircraft or vessel, with such assistance as he thinks necessary —

(a) place a person who is on board the aircraft or vessel under restraint or in custody; and

(b) if the aircraft or vessel is not in the course of a flight or voyage, remove a person from the aircraft or vessel.

18 568. Arrest during flight
It is lawful for any person to arrest without warrant any other person whom he believes, on reasonable grounds, to have committed an offence, and to be escaping from, and to be freshly pursued by some person whom, on reasonable grounds, he believes to have authority to arrest him for that offence.

19 50. Suspects and others may be ordered to move on (Comes into Operation 31 May 2005)
(1) A police officer may order a person who is in a public place, or in a vehicle, vessel or aircraft used for public transport, to leave it, or a part of it specified by the officer, if the officer reasonably suspects that the person —

(a) is doing an act —

(i) that involves the use of violence against a person;

(ii) that will cause a person to use violence against another person; or

(iii) that will cause a person to fear violence will be used by a person against another person;

(b) is just about to do an act that is likely to —

(i) involve the use of violence against a person;

(ii) cause a person to use violence against another person; or

(iii) cause a person to fear violence will be used by a person against another person;

(c) is committing any other breach of the peace;

(d) is hindering, obstructing or preventing any lawful activity that is being, or is about to be, carried out by another person;

(e) intends to commit an offence; or

(f) has just committed or is committing an offence.

(2) A police officer giving an order under subsection (1) may in addition do either or both of the following —
(a) order the person to go beyond a reasonable distance from a place, or the part of a place, set by the officer;  
(b) order the person to obey the order or orders for a period set by the officer; but the period must not be longer than 24 hours.

(3) For the purpose of giving an order under this section to a person whose personal details (as defined in section 16 of the Criminal Investigation (Identifying People) Act 2002) are unknown to the officer, a police officer may request the person to give the officer any or all of the person’s personal details.

(4) If a request is made under subsection (3), section 16 of the Criminal Investigation (Identifying People) Act 2002 applies to and in relation to the request in the same way as it applies to a request made under subsection (2) of that section.

(5) Any order given under this section to a person must —  
(a) be in writing in a form approved by the Commissioner of Police; and  
(b) be served on the person by giving it to the person in person or, if the person refuses to accept it, by leaving it near the person and orally drawing his or her attention to it.

(6) A person who, without reasonable excuse, does not comply with an order given by a police officer under this section commits an offence.  
Penalty: imprisonment for 12 months and a fine of $12 000.

(7) This section does not prevent a police officer charging a person with an offence without having exercised a power in this section.

26 711. Search warrant
If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place —  
(a) Anything with respect to which any offence has been or is suspected, on reasonable grounds, to have been committed; or  
(b) Anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence; or  
(c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence;  
he may issue his warrant directing a police officer or police officers named therein, or all police officers, to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.
Any such warrant is to be executed by day, unless the justice, by the warrant, specially authorises it to be executed by night, in which case it may be so executed.

Where it appears on the complaint that an offence involving the safety of an aircraft has been, is being or may be committed on board or in relation to the aircraft, the justice may direct in his warrant that any person on board the aircraft or any person who is about to board the aircraft may be searched.

A female person shall not be searched under the authority of a warrant issued under this section, except by a female person.

21 42. Police may enter places of public entertainment; removal of disorderly people
Any officer or constable of the Police Force may enter into any house, room, premises, or place where any public table, board, or ground is kept for playing billiards, bagatelle, bowls, fives, rackets quoits, skittles, or ninepins, or any game of the like kind, when and so often as any such member shall think proper; and may enter into any house, room or place kept or used in the said State for any theatrical or any public entertainments, or exhibitions, or for any show of any kind whatsoever, whether admission thereto is obtained by payment of money or not, at any time when the same shall be open for the reception of persons resorting thereto and may remove from such house, room, or place any common prostitute, or reputed thief, or other loose, idle, or disorderly person who shall be found therein, and may order any such common prostitute, reputed thief, or disorderly person to leave the said house, room or place, and in case such person shall refuse to leave the same, may take such person into custody, and every such person remaining in such house, room, or place after having been so ordered to leave, shall on conviction be liable to a fine not exceeding $300.

22 25. Extraordinary emergencies
Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.
25. Extraordinary emergencies
Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.

49. Police and property owners may apprehend offenders; police may search vehicles and people for stolen property
Any person found committing any offence punishable in a summary manner may be taken into custody without a warrant by any officer or constable of the Police Force, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every police officer or constable may also stop, search, and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property or liquor shall be offered to be sold, pawned, or delivered (if he shall have reasonable cause to suspect that any offence has been committed with respect to such property or liquor, or that the same, or any part thereof, has been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any such property or liquor as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property or liquor, to be dealt with according to law; and every person taken into custody without warrant for any offence against the provisions of this Act, or for any offence punishable in a summary manner, shall be detained in custody until he can be brought before a Justice to be dealt with according to law or until he shall have given bail for his appearance before a Justice in manner hereinbefore provided.

711. Search warrant
If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place —

(a) Anything with respect to which any offence has been or is suspected, on reasonable grounds, to have been committed; or
(b) Anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence; or
(c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence;
he may issue his warrant directing a police officer or police officers named therein, or all police officers, to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.

Any such warrant is to be executed by day, unless the justice, by the warrant, specially authorises it to be executed by night, in which case it may be so executed.

Where it appears on the complaint that an offence involving the safety of an aircraft has been, is being or may be committed on board or in relation to the aircraft, the justice may direct in his warrant that any person on board the aircraft or any person who is about to board the aircraft may be searched.

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26 49. Police and property owners may apprehend offenders; police may search vehicles and people for stolen property

Any person found committing any offence punishable in a summary manner may be taken into custody without a warrant by any officer or constable of the Police Force, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every police officer or constable may also stop, search, and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property or liquor shall be offered to be sold, pawned, or delivered (if he shall have reasonable cause to suspect that any offence has been committed with respect to such property or liquor, or that the same, or any part thereof, has been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any such property or liquor as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property or liquor, to be dealt with according to law; and every person taken into custody without warrant for any offence against the provisions of this Act, or for any offence punishable in a summary manner, shall be detained in custody until he can be brought before a Justice to be dealt with according to law or until he shall have given bail for his appearance before a Justice in manner hereinbefore provided.


68. **Search and seizure powers in respect of offenders under s. 65 to 67**

Any constable or other person apprehending any person charged with an offence against section 65, 66 or 67 may seize any horse or other cattle, or any money, goods, or vehicle in the possession or use of the person so apprehended and charged, and may take and convey the same as well as such persons before a Justice or Justices, and the Justice or Justices by whom any person is convicted of an offence against section 65, 66 or 67 may order that such offender be searched, and that his trunks, boxes, bundles, parcels, or packages, and any cart or other vehicle which may have been found in his possession or use, or under his control, shall be inspected and searched; and the said Justice or Justices may order that any money which may then be found with or upon such offender shall be paid and applied to defray the expense of apprehending and conveying to gaol and maintaining such offender during the time for which he shall have been committed, and the expense of the keep of any horse or other cattle so seized, during the time such horse or cattle shall be detained; and if, upon such search, money sufficient for the purposes aforesaid be not found, such Justice or Justices may order that such horse, cattle, and so much as is necessary of such other effects then found shall be sold, and that the produce of such sale shall be paid and applied as aforesaid, and also that the surplus of such money or effects, after deducting the charges for such sale, shall be returned to the said offender. And when any person shall be taken into custody on a charge of felony, his premises and property may be inspected and searched by any officer or constable of the Police Force.

28. **Powers of police officers when things suspected of being used in commission of offences**

1. Subject to this section, if there are reasonable grounds to suspect that any thing whatsoever —
   (a) with respect to which an offence has been, or is suspected to have been, or may be committed;
   (b) which has been, or is suspected to have been, or may be used for the purpose of committing an offence; or
   (c) which may provide evidence in respect of an offence,

   is in the possession of a person, a police officer may, using such force as is reasonably necessary and with such assistance as he considers necessary, stop and detain the person and search him together with any baggage, package, vehicle or other thing of any kind whatsoever found in his possession, and for that purpose may stop and detain any vehicle.

2. A person shall not be searched under subsection (1) except by —
   (a) a person of the same sex as the first mentioned person; or
   (b) a medical practitioner.
(3) A police officer who wishes to search a person under subsection (1) may, if it is not then and there practicable to comply with subsection (2) in relation to the person —
   (a) detain the person until; or
   (b) detain the person and convey him to a place where,
       it is practicable for subsection (2) to be complied with in relation to the person.

(4) A person shall not be detained, or detained and conveyed, under subsection (3) for longer than is reasonably necessary under the circumstances for the purpose of complying with subsection (2) in relation to the person.

29. **Powers of police officers when things suspected of being used in commission of offences**

(1) Subject to this section, if there are reasonable grounds to suspect that any thing whatsoever —
   (a) with respect to which an offence has been, or is suspected to have been, or may be committed;
   (b) which has been, or is suspected to have been, or may be used for the purpose of committing an offence; or
   (c) which may provide evidence in respect of an offence,
       is in the possession of a person, a police officer may, using such force as is reasonably necessary and with such assistance as he considers necessary, stop and detain the person and search him together with any baggage, package, vehicle or other thing of any kind whatsoever found in his possession, and for that purpose may stop and detain any vehicle.

(2) A person shall not be searched under subsection (1) except by —
   (a) a person of the same sex as the first mentioned person; or
   (b) a medical practitioner.

(3) A police officer who wishes to search a person under subsection (1) may, if it is not then and there practicable to comply with subsection (2) in relation to the person —
   (a) detain the person until; or
   (b) detain the person and convey him to a place where,
       it is practicable for subsection (2) to be complied with in relation to the person.

(4) A person shall not be detained, or detained and conveyed, under subsection (3) for longer than is reasonably necessary under the circumstances for the purpose of complying with subsection (2) in relation to the person.
49. Police and property owners may apprehend offenders; police may search vehicles and people for stolen property

Any person found committing any offence punishable in a summary manner may be taken into custody without a warrant by any officer or constable of the Police Force, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every police officer or constable may also stop, search, and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property or liquor shall be offered to be sold, pawned, or delivered (if he shall have reasonable cause to suspect that any offence has been committed with respect to such property or liquor, or that the same, or any part thereof, has been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any such property or liquor as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property or liquor, to be dealt with according to law; and every person taken into custody without warrant for any offence against the provisions of this Act, or for any offence punishable in a summary manner, shall be detained in custody until he can be brought before a Justice to be dealt with according to law or until he shall have given bail for his appearance before a Justice in manner hereinbefore provided.

31. Powers of police officers when things suspected of being used in commission of offences

(1) Subject to this section, if there are reasonable grounds to suspect that any thing whatsoever —
   (a) with respect to which an offence has been, or is suspected to have been, or may be committed;
   (b) which has been, or is suspected to have been, or may be used for the purpose of committing an offence; or
   (c) which may provide evidence in respect of an offence,
   is in the possession of a person, a police officer may, using such force as is reasonably necessary and with such assistance as he considers necessary, stop and detain the person and search him together with any baggage, package, vehicle or other thing of any kind whatsoever found in his possession, and for that purpose may stop and detain any vehicle.

(2) A person shall not be searched under subsection (1) except by —
   (a) a person of the same sex as the first mentioned person; or
   (b) a medical practitioner.
(3) A police officer who wishes to search a person under subsection (1) may, if it is not then and there practicable to comply with subsection (2) in relation to the person —
   (a) detain the person until; or
   (b) detain the person and convey him to a place where, it is practicable for subsection (2) to be complied with in relation to the person.

(4) A person shall not be detained, or detained and conveyed, under subsection (3) for longer than is reasonably necessary under the circumstances for the purpose of complying with subsection (2) in relation to the person.

32. **Powers of police officers when things suspected of being used in commission of offences**

(1) Subject to this section, if there are reasonable grounds to suspect that any thing whatsoever —
   (a) with respect to which an offence has been, or is suspected to have been, or may be committed;
   (b) which has been, or is suspected to have been, or may be used for the purpose of committing an offence; or
   (c) which may provide evidence in respect of an offence,
is in the possession of a person, a police officer may, using such force as is reasonably necessary and with such assistance as he considers necessary, stop and detain the person and search him together with any baggage, package, vehicle or other thing of any kind whatsoever found in his possession, and for that purpose may stop and detain any vehicle.

(2) A person shall not be searched under subsection (1) except by —
   (a) a person of the same sex as the first mentioned person; or
   (b) a medical practitioner.

(3) A police officer who wishes to search a person under subsection (1) may, if it is not then and there practicable to comply with subsection (2) in relation to the person —
   (a) detain the person until; or
   (b) detain the person and convey him to a place where, it is practicable for subsection (2) to be complied with in relation to the person.

(4) A person shall not be detained, or detained and conveyed, under subsection (3) for longer than is reasonably necessary under the circumstances for the purpose of complying with subsection (2) in relation to the person.
33 236. Accused person in custody, examination of, samples from

When a person is in lawful custody upon a charge of committing any offence, it is lawful for a police officer to search his person, and to take from him anything found upon his person, and to use such force as is reasonably necessary for that purpose.

When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it is lawful for a legally qualified medical practitioner, acting at the request of a police officer, and for any person acting in good faith in aid of, and under the direction of, the medical practitioner, to make such an examination of the person of the person so in custody as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that a sample of any matter on the person’s body will afford evidence as to the commission of the offence, it is lawful for —

(a) a legally qualified medical practitioner; or
(b) a nurse as defined in the Nurses Act 1992,
acting at the request of a police officer, and for any person acting in good faith in aid of, and under the direction of, the person acting at the request of the police officer, to take the sample from the person so in custody and to use such force as is reasonably necessary for that purpose.

Where —

(a) a person is found not guilty of an offence in respect of which a sample has been taken under this section; and
(b) the person requests that the sample and any genetic information arising from the taking of the sample be destroyed, the sample and any genetic information arising from the taking of the sample is to be destroyed in his presence after the time for an appeal from the finding has expired or an appeal from the finding has been resolved in his favour.
This section does not authorise the taking of an identifying particular (within the meaning of section 34 of the Criminal Investigation (Identifying People) Act 2002) and does not apply to such an identifying particular taken under that Act.

34 Interpretation

(1) In this Part, unless the contrary intention appears —

“interview” means an interview with a suspect by —

(a) an officer of the Corruption and Crime Commission; or

(a) a member of the Police Force;

“lawyer” means a certificated practitioner within the meaning of the Legal Practice Act 2003;

“officer of the Corruption and Crime Commission” has the meaning given to “officer of the Commission” by section 3 of the Corruption and Crime Commission Act 2003;

“Parliamentary Commissioner” means the Parliamentary Commissioner for Administrative Investigations appointed under the Parliamentary Commissioner Act 1971 and includes an Acting Commissioner, Deputy Commissioner or officer of the Commissioner, within the meaning of section 4 of that Act;

“Parliamentary Inspector” has the meaning given by section 3 of the Corruption and Crime Commission Act 2003;

“suspect” means a person suspected of having committed an offence;

“videotape” means any videotape on which is recorded an interview, whether or not it is the videotape on which the interview was originally recorded.

(2) In this Part, a reference to part of a videotape includes a reference to the visible part and to the audible part of the recording on the videotape.

35 Police may apprehend offenders, disorderly people, loiterers, etc.

(1) Any officer or constable of the Police Force, without any warrant other than this Act, at any hour of the day or night may apprehend any person whom he may find conducting himself in a disorderly manner, or using profane, indecent, or obscene language, or who shall use any threatening, abusive, or insulting words or behaviour, with intent or calculated to provoke a breach of the peace, in any street, public vehicle, or passenger boat; and also any person who shall ride or drive on or through any street, so negligently, carelessly, or furiously that the safety of any person may thereby be endangered; and also any person who shall cruelly or wantonly beat, ill-treat,
overdrive, overload, abuse or torture any living thing, or cause the same to be done, and also any person who shall convey or carry any
living thing in any street, in such a manner or position as to cause unnecessary pain or suffering, and all persons whom he shall have
just cause to suspect of having committed or being about to commit any offence, or of any evil designs, and all persons whom he shall
find or who shall have been lying or loitering in any street, yard, or other place, and not giving a satisfactory account of themselves, and
shall detain any person so apprehended in custody, until he can be brought before a Justice, to be dealt with for such offence.

(2) Any officer or constable of the Police Force, without any warrant other than this Act, at any hour of the day or night, may apprehend
any person whom he shall have just cause to suspect of having committed an offence in any place other than the State which, if
committed in the State, would be an indictable offence (including an indictable offence that may be dealt with summarily) and shall
detain any person so apprehended in custody, until he can be brought before a Justice to be dealt with according to law, and the
apprehension of a person pursuant to this subsection shall not be taken to be unlawful only by reason that it subsequently appears or is
found that the person apprehended did not commit the offence alleged.

36 49. Police and property owners may apprehend offenders; police may search vehicles and people for stolen property
Any person found committing any offence punishable in a summary manner may be taken into custody without a warrant by any officer or constable of
the Police Force, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or
any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and
every police officer or constable may also stop, search, and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that
anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner
anything stolen or unlawfully obtained; and any person to whom any property or liquor shall be offered to be sold, pawned, or delivered (if he shall
have reasonable cause to suspect that any offence has been committed with respect to such property or liquor, or that the same, or any part thereof, has
been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any
such property or liquor as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property or liquor, to be dealt
with according to law; and every person taken into custody without warrant for any offence against the provisions of this Act, or for any offence
punishable in a summary manner, shall be detained in custody until he can be brought before a Justice to be dealt with according to law or until he shall
have given bail for his appearance before a Justice in manner hereinbefore provided.
37 564. **Arrest without warrant generally**

(1) In this section “arrestable offence” means an offence punishable with imprisonment, with or without any other punishment.

(2) It is lawful for any person to arrest without warrant any person who is, or whom he suspects, on reasonable grounds, to be, in the course of committing an arrestable offence.

(3) Where an arrestable offence has been committed, it is lawful for any person to arrest without warrant any person who has committed the offence or whom he suspects, on reasonable grounds, to have committed the offence.

(4) Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, it is lawful for the police officer to arrest without warrant any person whom the police officer suspects, on reasonable grounds, to have committed the offence.

(5) Where it is lawful under this section for a police officer to arrest a person, it is lawful for the police officer, for the purpose of effecting the arrest, to enter upon any place where the person is or where the police officer suspects, on reasonable grounds, the person may be.

(6) Where any person is called upon by a person whom he believes, on reasonable grounds, to be a police officer to assist in effecting the arrest under this section of a third person, it is lawful for the first person to assist the second person in effecting the arrest unless the first person knows —

(a) that the third person has not committed an arrestable offence; or

(b) that there are no reasonable grounds for suspecting that the third person has committed an arrestable offence.

38 564. **Arrest without warrant generally**

(1) In this section “arrestable offence” means an offence punishable with imprisonment, with or without any other punishment.

(2) It is lawful for any person to arrest without warrant any person who is, or whom he suspects, on reasonable grounds, to be, in the course of committing an arrestable offence.

(3) Where an arrestable offence has been committed, it is lawful for any person to arrest without warrant any person who has committed the offence or whom he suspects, on reasonable grounds, to have committed the offence.

(4) Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, it is lawful for the police officer to arrest without warrant any person whom the police officer suspects, on reasonable grounds, to have committed the offence.

(5) Where it is lawful under this section for a police officer to arrest a person, it is lawful for the police officer, for the purpose of effecting
the arrest, to enter upon any place where the person is or where the police officer suspects, on reasonable grounds, the person may be.

(6) Where any person is called upon by a person whom he believes, on reasonable grounds, to be a police officer to assist in effecting the arrest under this section of a third person, it is lawful for the first person to assist the second person in effecting the arrest unless the first person knows —

(a) that the third person has not committed an arrestable offence; or

(b) that there are no reasonable grounds for suspecting that the third person has committed an arrestable offence.

39 232. Duty of persons arresting

It is the duty of a person executing any process or warrant to have it with him, and to produce it if required. It is the duty of a person arresting another, whether with or without warrant, to give notice, if practicable, of the process or warrant under which he is acting or of the cause of the arrest.

A failure to fulfill either of the aforesaid duties does not of itself make the execution of the process or warrant or the arrest unlawful, but is relevant to the inquiry whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.

40 90B. Embargo notices; forfeiture

(1) A court shall not order any thing to be forfeited, under this Part, where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made.

(2) Where anything liable to be seized under this Part cannot, or cannot readily, be so seized and detained, a Justice, on the application of a police officer or constable and if the Justice is satisfied that there is reasonable cause to believe that the thing may be required as evidence for the purposes of proceedings under this Act or is liable to forfeiture under this Act, may grant to that officer or constable an embargo notice and that officer or constable —

(a) shall, if it is practicable to do so, forthwith serve, or cause to be served, a copy of the embargo notice on —

(i) the possessor of the thing to which the embargo notice relates; and

(ii) on any other person on whose behalf or for whose benefit he has reason to believe that thing is possessed by the possessor;

and
(b) may serve or cause to be served a copy of the embargo notice on a person other than a person referred to in paragraph (a).

(3) Subject to subsections (6) and (7), a possessor of any thing to which an embargo notice relates who sells, leases, moves, transfers or otherwise deals with that thing or any part of it within a period of 21 days from the date of the embargo notice or, if an application in respect of that thing is made to the District Court under section 90C within that period, before that application is finally disposed of is guilty of an offence.
Penalty: $2 000.

(4) The possessor of any thing to which an embargo notice relates may apply to the District Court for leave to sell, lease, move, transfer or otherwise deal with that thing or any part of it.

(5) The District Court may, on receiving an application under subsection (4), give the applicant leave in writing to sell, lease, move, transfer or otherwise deal with the thing or any part of the thing to which the embargo notice concerned relates on such conditions, if any, as the District Court thinks fit to attach to that leave.

(6) A person to whom leave has been given under subsection (5) may sell, lease, move, transfer or otherwise deal with the thing or any part of the thing to which that leave relates in accordance with any conditions attached to that leave.

(7) A person who is the possessor of the thing to which an embargo notice relates may move that thing or any part of that thing for the purpose of protecting and preserving the same within the period referred to in subsection (3) or before the application referred to in that subsection is finally disposed of, as the case requires, with the prior consent of the officer or constable to whom the embargo notice was granted in accordance with any conditions attached to that consent.

(8) Notwithstanding anything in any other Act, a sale, lease, movement, transfer or other dealing with any thing which constitutes an offence under subsection (3) is null and void.

41 OP-39.7 Search Warrants (Execution)

Members Responsibilities

DRAFTING - For further information consult Search Warrant Precis on Corporate Knowledge Database

The issue of a search warrant is not something that will be undertaken lightly as it makes lawful what would otherwise be a trespass.
A search warrant must be drafted in such a way that the following points are described with sufficient particularity so as not to violate the rule against general search warrants. These points are:

- Description of the premises to be searched.
- Description of the objects of the search (ie the items being searched for).
- Description of the offence.
- It is NOT sufficient to merely state that you “have reasonable grounds to suspect/believe ...” The complaint to ground a search warrant must state the factual basis upon which your suspicion or belief is based.
- EXECUTION - For further information consult Search Warrant Precis and Standard Operating Procedures on Corporate Knowledge Database.
- It is the duty of any person executing ANY process or WARRANT to have it with him, and to produce it if required. Section 232 Criminal Code.
- The general rule is for search warrants to be executed in the day-time (between 6am and 9pm) unless the magistrate or Justice issuing it directs otherwise.
- If it is NOT specified the warrant must be executed in the DAY TIME.
- The time of execution is the time officers are acting under the authority of the warrant (i.e. conducting the search) and not merely the time of entry.
- The officer charged with executing the warrant must:-
a. Prepare and deliver an Operational Order delegating roles and responsibilities.
b. Conduct a risk assessment of the premises and occupants
c. Have the warrant with him.
d. Identify himself and, if in civilian clothes, produce his authority card, if required, as proof of his identity.
e. State the object of this visit.
f. Produce the warrant and show it to the occupier.
g. Request permission before proceeding to gain entry. If entry is refused REASONABLE force, in accordance with the terms of the warrant, may be used to gain entry.
h. Officers must conduct the search in the occupier's presence.
i. The premises should be searched in a systematic manner to ensure it is thoroughly searched.
j. An exhibits officer should be appointed. The exhibits officer should make a note of where each exhibit was found. Photographs of exhibits in situ should be obtained if possible, prior to moving the exhibit.

A copy of the search warrant and an interim receipt dealing any seized property must be completed and a copy given to the occupier of the premises.

In executing a search warrant, the officer may be placed in a position whereby he is refused permission to enter. Should this occur he should first request admission to the premises to be searched, and state the object of his visit and that he is ARMED with a search warrant.

After the demand has been made under these circumstances and being satisfied that the person who owns or occupies the premises knows full well that he is a police officer, then and only then may he break open doors to gain entry to the premises and exercise reasonable force in order to carry out the directions contained in the warrant.

Similarly in the case of locked boxes, the officer executing the warrant should first demand the keys of each box before breaking it open.

When executing search warrants, members will follow the directions contained in the warrant and not exceed the limits of the authority of the warrant. The search will be conducted in an orderly manner and the sequence of events recorded.
When a search warrant has been executed, the officer executing it should endorse it on the back, listing the property seized, the date and hour of execution and then sign such endorsement.

Where a search warrant is issued under a particular statute requiring that the seized property be taken before a Justice (eg. Section 711 Criminal Code) this should be done and a further endorsement added by the Justice.