



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 85

Police Act Offences

REPORT

AUGUST 1992

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

Commissioners

Chairman

Associate Professor M D Pendleton, LLB DipJuris (Syd) LLM (Lond)

Members

Mr R L Le Miere BEc BJuris (Hons) LLB (Hons) (WA)
Dr J A Thomson BA LLB (Hons) (WA) LLM SJD (Harv)

Officers

Executive Officer and Director of Research

Dr P R Handford LLB (Birm) LLM PhD (Camb)

Research Officers

Mr M G Boylson LLB (WA)
Mr W G Briscoe LLB (Hons) (Tas) MA (Cal)
Mr A A Head LLB (WA)

Staff

Mrs S Blakey
Ms K L Chamberlain
Mr L McNamara
Ms M A Ryan

The Commission's offices are on the 11th floor, KPMG House, 214 St George's Terrace, Perth, Western Australia, 6000. Telephone: (09) 481 3711. Fax: (09) 481 4197.

To: **HON J M BERINSON QC MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on the *Police Act Offences*.

M D PENDLETON, *Chairman*

14 August 1992

Contents

Paragraph

Table of Abbreviations

PART I - GENERAL

CHAPTER 1 - INTRODUCTION

1. Terms of reference	1.1
2. Discussion Paper and consultations	1.5
3. Developments since the Discussion Paper	1.7

CHAPTER 2 - THE POLICE ACT 1892

1. Structure	2.1
2. History	2.8
3. Comparison with the law elsewhere	2.15

CHAPTER 3 - THE COMMISSION'S APPROACH

1. Introduction	3.1
2. A Summary Offences Act	3.2
3. Individual offences	3.4
(a) Whether offences should be abolished	3.6
(i) Duplication	3.7
(ii) Relevance to contemporary society	3.10
(iii) Civil liberties implications	3.12
(iv) Consistency with criminal law principles	3.13
(v) Burden of proof	3.15
(vi) Frequency of usage	3.20
(vii) The position in other Australian jurisdictions	3.22
(viii) More appropriate location elsewhere	3.24
(b) What changes should be made to offences that are retained	3.25
(c) Penalties	3.26
4. Relationship with the Criminal Code	3.27
5. Police powers provisions	3.32
6. Other provisions in the Police Act	3.36

PART II - OFFENCE PROVISIONS

CHAPTER 4 - PREVENTIVE OFFENCES

1.	Introduction	4.1
2.	No lawful means of support: section 65(1)	4.2
3.	Sleeping rough: section 66(9)	4.6
4.	Consorting: sections 65(7) and (9)	4.9
5.	Section 43(1) offences	
	(a) Introduction	4.13
	(b) Being suspected of having committed an offence and not giving a satisfactory account of oneself	4.16
	(c) Being suspected of being about to commit any offence and not giving a satisfactory account of oneself	4.17
	(d) Lying or loitering in any street, yard or other place and not giving a satisfactory account of oneself	4.18
	(e) Being suspected of having evil designs and not giving a satisfactory account of oneself	4.22

CHAPTER 5 - INTERFERENCE WITH THE POLICE AND ALLIED OFFENCES

1.	Interference with the police in the execution of their duty: sections 20, 41(1), 41(7), 66(7), 67(3) and 90	
	(a) Offences	5.1
	(b) Recommendations	5.3
2.	Escaping legal custody and assisting escape	
	(a) Escaping legal custody: section 67(1)	5.6
	(b) Assisting escape: section 67A	5.9
3.	Harbouring or assisting suspected persons	5.11
4.	False reports: section 90A	5.13

CHAPTER 6 - DISORDERLY CONDUCT AND RELATED OFFENCES

1.	Disorderly conduct: sections 54, 59 and 44	
	(a) Offences	6.1
	(b) Recommendations	
	(i) Introduction	6.10
	(ii) Proscribed conduct	6.11
	(iii) Places in which conduct is proscribed	6.14

2.	Challenge to fight: section 64	6.16
3.	Exposing obscene pictures to the public: section 66(5)	6.19
4.	Wilful and obscene exposure of the person: section 66(11)	6.21
5.	Regulation of houses of public resort: section 84	6.27

CHAPTER 7 - OFFENCES RELATING TO PUBLIC ASSEMBLIES

1.	Introduction	7.1
2.	Obstruction of the streets: section 52	7.2
3.	Disorderly assembly: section 54A	7.7
4.	Public Meetings and Processions Act 1984	7.10

CHAPTER 8 - BEING UNLAWFULLY ON LAND OR PREMISES AND RELATED OFFENCES

1.	Being unlawfully on land or premises	
	(a) Offences	8.1
	(i) Being found in a place for an unlawful purpose: section 66(8)	8.2
	(ii) Being on premises without lawful excuse: section 66(13)	8.4
	(iii) Trespassing on enclosed land: section 82A	8.7
	(iv) Unlawfully remaining on premises: section 82B	8.12
	(b) Recommendations	8.15
2.	Hindering lawful activities	8.18
	(a) Offences	
	(i) Obstructing licence holders: section 67(4)	8.19
	(ii) Hindering lawful activities: section 82B(3)	8.21
	(b) Recommendation	8.23

CHAPTER 9 - PROSTITUTION AND RELATED OFFENCES

1.	Introduction	9.1
	(a) The existing policy on prostitution	9.3
	(b) The Report of the Community Panel	9.6
	(c) The limits of the Commission's recommendations	9.8
2.	Brothel keeping; Living on the earnings of prostitution: sections 76F, 76G	
	(a) Offences	9.9
	(i) Keeping premises for the purpose of prostitution	9.10
	(ii) Living on the earnings of prostitution	9.13
	(iii) Effect	9.15

(b)	Possible changes	9.16
(i)	Keeping premises for the purposes of prostitution	9.17
(ii)	Living on the earnings of prostitution	9.19
3.	Soliciting and loitering	
(a)	The offence	9.21
(b)	Possible changes	9.24
4.	Riotous or indecent behaviour by common prostitutes: section 65(8)	9.28
5.	Persistently soliciting or importuning for immoral purposes: section 76G(1)(b)	
(a)	The offence	9.30
(b)	Recommendation	9.32

CHAPTER 10 - GAMING OFFENCES

1.	Introduction	10.1
2.	Keeping a house for the purpose of betting: section 84C	10.6
3.	Receiving money on condition of paying money on the event of any bet: section 84D	10.9
4.	Advertising: sections 84G and 84H	10.13

CHAPTER 11 - OFFENCES INVOLVING DAMAGE TO PROPERTY

1.	Damage to property: section 80	11.1
2.	Damage to animals or plants in gardens: section 58A	11.6
3.	Extinguishing wantonly any light set up for public convenience: section 59	11.10

CHAPTER 12 - OFFENCES INVOLVING POSSESSION OF CRIME-RELATED PROPERTY

1.	Introduction	12.1
2.	Weapons: sections 65(4) and 65(4a)	
(a)	Offences	12.5
(b)	Recommendations	
(i)	Section 65(4)	12.7
(ii)	Section 65(4a)	12.10
3.	Protective jackets and vests: section 65(4aa)	12.13
4.	Implements to facilitate unlawful use of motor vehicles: section 65(4b)	12.16
5.	Deleterious drugs: section 65(5)	12.19
6.	Housebreaking implements and explosive substances: section 66(4)	12.24

CHAPTER 13 - OFFENCES AKIN TO STEALING

1.	Introduction	13.1
2.	Being suspected of having or conveying stolen goods: sections 69 and 71	
	(a) The offences	13.2
	(b) Recommendations	
	(i) Section 69	13.7
	(ii) Section 71	13.10
3.	Possession of gold, pearl or uncut diamond suspected of being stolen: sections 76A, 76C and 76D	
	(a) The offences	13.12
	(b) Recommendations	13.20
4.	Unlawfully taking or using animals: section 79A	13.22
5.	Unlawful use of a boat or taking a boat or any boat fitting: section 81	13.27
6.	Destroying property with intent to steal, or retaining or disposing of property: section 82	13.31

CHAPTER 14 - OFFENCES INVOLVING FRAUD AND DECEPTION

1.	Introduction	14.1
2.	Valueless cheques: section 64A	14.3
3.	Imposition upon charitable institutions or private individuals: section 66(2)	14.9
4.	Obtaining unemployment benefits without entitlement: section 66(2a) and (2b)	14.12
5.	Fortune telling: section 66(3)	14.16
6.	Fraudulently manufacturing or selling adulterated metals or substances: section 66(12)	14.22

CHAPTER 15 - OTHER OFFENCES IN PARTS V AND VI

1.	Introduction	15.1
2.	Wilful neglect of duty by police: section 47	15.2
3.	Mad dogs: section 51	15.4
4.	Negligent or furious driving: section 57	15.8
5.	Restriction on games on certain days: section 61	15.13
6.	Taking a dog into public gardens: section 63	15.19
7.	Begging: section 65(3)	15.22
8.	Wilful neglect: section 66(10)	15.25
9.	Repeated offences: sections 66(1) and 67(2)	15.28
10.	Persons selling adulterated or unwholesome articles of food: section 83	15.31

CHAPTER 16 - OFFENCES IN PART VII

1.	Introduction	16.1
2.	The general nature of Part VII	16.4
3.	Recommendation	16.6

(a)	Outdated nature of provisions	16.7
(b)	Duplication by other provisions in the Police Act	16.8
(c)	Duplication by other legislation	16.9
(d)	No scope for operation	16.10
(e)	The position in other jurisdictions	16.13

PART III - POWERS

CHAPTER 17 - ARREST AND RELATED POWERS

1.	Powers of arrest: introduction	17.1
2.	Powers of arrest: recommendations	
	(a) Introduction	17.7
	(b) The Commission's preferred approach	17.12
	(c) Arrest provisions in the Police Act that should be repealed	
	(i) Introduction	17.13
	(ii) Powers to arrest for any offence: sections 43(1) and 41(1)	17.14
	(iii) Powers to arrest for offences under the Police Act: sections 46 and 47	17.19
	(iv) Power to arrest for any offence punishable in a summary manner: section 49	17.21
	(v) Section 42	17.22
	(vi) Section 44	17.23
	(vii) Section 45	17.24
	(viii) Section 70	17.25
	(ix) Section 76G(3)	17.26
	(x) Section 49	17.27
	(xi) Section 82(3)	17.28
	(xii) Sections 96, 104, 108 and 110	17.29
	(xiii) Section 122	17.30
	(d) Arrest provisions of the Police Act that should be retained	17.31
	(i) Section 43(2)	17.32
	(ii) Section 45	17.33
	(iii) Section 50	17.34
3.	Power to demand name and address, and arrest: section 50	17.35
4.	Power to obtain particulars of identity: section 50AA	17.42
5.	Power to apprehend for sobering-up purposes	17.47

CHAPTER 18 - POWERS OF ENTRY, SEARCH AND SEIZURE

1.	Introduction	18.1
2.	Powers to search persons, vehicles and property	18.3
	(a) Section 49	18.4
	(b) Section 68	18.7

(c)	Other provisions	18.11
3.	Powers to enter premises	
(a)	Introduction	18.12
(b)	Entry for the purposes of arrest	
(i)	Without warrant: section 44	18.14
(ii)	With warrant: sections 70, 76G(3) and 122	18.16
(c)	Entry for the purposes of search	
(i)	Without warrant: sections 68 and 44	18.23
(ii)	With warrant: sections 70 and 76G(3)	18.32
(d)	Entry for other purposes	18.34
(i)	Section 42	18.35
(ii)	Section 44	18.39
(iii)	Sections 101 and 102	18.42
(iv)	Section 122	18.43
4.	Powers to enter ships	18.44
(a)	Section 40	18.45
(b)	Section 41(1)	18.49
(c)	Section 44	18.51
(d)	Section 41(2)	18.53
5.	Powers to seize property	18.55
6.	Location of retained provisions	18.59

PART IV

CHAPTER 19 - SUMMARY OF RECOMMENDATIONS

APPENDICES

- I List of those who commented on the Discussion Paper
- II Procedural and other provisions in the Police Act
- III Part VII offences
- IV Statistics on charges brought under the Police Act in the Perth and East Perth Courts of Petty Sessions

Table of Abbreviations

Courts of Petty Sessions Report	Law Reform Commission of Western Australia <i>Report on Courts of Petty Sessions: Constitution, Powers and Procedure</i> (Project No 55 Part II 1986)
Discussion Paper	Law Reform Commission of Western Australia <i>Discussion Paper on Police Act Offences</i> (Project No 85 1989)
Home Office Working Paper	(UK) Home Office Working Party on Vagrancy and Street Offences <i>Working Paper</i> (1974)
Home Office Report	(UK) Home Office <i>Report of the Working Party on Vagrancy and Street Offences</i> (1976)
Nichols	P W Nichols <i>Police Offences of Western Australia</i> (1979)
Murray Report	M J Murray <i>The Criminal Code: A General Review</i> (1983)
Russell	E Russell <i>A History of the Law in Western Australia and its Development from 1829 to 1979</i> (1980)
Stannage	C T Stannage <i>The People of Perth: A Social History of Western Australia's Capital City</i> (1979)

References to the "*Police Act*" or the "*1892 Act*" are references to the *Police Act 1892*.
References to particular sections not attributed to any other Act are references to sections in
this Act.

References to the "*1849 Ordinance*" and the "*1861 Ordinance*" are references to the *Police
Ordinance 1849* and the *Police Ordinance 1861*.

Further abbreviations used in Chapter 9 are set out in footnotes 5 and 6 in that chapter.

Part I - General

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission was asked:

"To review offences created by Parts V, VI and VII of the *Police Act 1892* and report:

- (i) As to whether any of those offences should be abolished; and
- (ii) With regard to those offences which should be retained, what changes, if any, including changes to their description and definition, are desirable to make the law more readily understood and more relevant to modern conditions."¹

1.2 The Commission has treated section 20,² which makes it an offence to disturb, hinder or resist a member of the police force in the execution of his³ duty, as falling within its terms of reference. This offence, although it is contained in Part II of the *Police Act*, is closely related to other offences involving interference with the police found in Parts V and VI.

1.3 The Commission has also examined the ambit of the powers of arrest, entry, search and the like conferred by Parts V, VI and VII of the *Police Act*. These powers are closely related to the offences under review, and in many cases offences and entry, search and arrest powers are all conferred by the same provision. In addition, powers of entry and search have been specifically referred to the Commission as part of its reference on Privacy.⁴

¹ The reference resulted from a suggestion made by the Commission, in accordance with its statutory function under s 11(1) of the *Law Reform Commission Act 1972*, to make proposals for the review of areas of law with a view to reform, that certain of the offences in the *Police Act 1892* were in need of modernisation.

² With the approval of the Attorney General: see letter dated 9 September 1986.

³ Where sections of the *Police Act* or other non-gender-neutral statutes are indirectly quoted or summarised in this report, the male pronouns and adjectives are reproduced without alteration. Under s 10 of the *Interpretation Act 1984*, words importing the masculine gender include the feminine and words importing the feminine gender include the masculine.

⁴ See paras 3.33-3.34 below.

1.4 This Report deals with the Western Australian *Police Act*. It does not deal with any offences under the Commonwealth law,⁵ which are outside the Commission's jurisdiction.

2. DISCUSSION PAPER AND CONSULTATIONS

1.5 The Commission issued a Discussion Paper⁶ in May 1989 which examined the provisions of Parts V, VI and VII in detail and made provisional suggestions for reform. Thirty-eight individuals, organisations or departments responded. Their names are listed in Appendix I. Respondents included civil liberties groups, legal officers of the Aboriginal Legal Service, the Legal Aid Commission, the Youth Legal Service, the Women's Advisory Council, members of the public, the Police Department, the Police Union and individual police officers, the Law Society, other lawyer groups and individual lawyers and justices of the peace. The Commission wishes to express its appreciation to all the commentators for the time and trouble they took in making comments on the Discussion Paper. All views expressed have been taken into account in the preparation of this Report.

1.6 The Commission's research has also been assisted by discussions with members and officers of the Victorian Law Reform Commission, which is reviewing similar offences in Victoria,⁷ and with police representatives, the Director of Public Prosecutions and other persons and bodies in Western Australia. The Commission has also had the benefit of discussions with representatives of the Police and Attorney General's Departments in other Australian States and Territories, and with the English Law Commission. Assistance has also been provided by the Australian Bureau of Statistics (Western Australia Office), which furnished the Commission with statistics of charges brought under each section of the *Police Act*.⁸ These statistics relate to charges in Perth and East Perth Courts of Petty Sessions, which together deal with about half the total charges in Courts of Petty Sessions in Western Australia. They may not give a fully accurate picture of the position in country areas,⁹ statistics for which are not available.

⁵ Such as those under the *Crimes Act 1914 (Cth)*. A Review Committee, chaired by Sir Harry Gibbs, has recently conducted a *Review of Commonwealth Criminal Law*.

⁶ *Police Act Offences* (Project No 85 1989), referred to in this Report as the "Discussion Paper".

⁷ *Summary Offences Act 1966* and *Vagrancy Act 1966: A Review* (Discussion Paper No 26 1992).

⁸ These statistics relate to 1989, the latest year for which statistics are presently available. They are set out in full in Appendix IV, and are referred to in footnotes throughout this Report. Equivalent statistics for 1984-1985 were set out in Appendix I of the Discussion Paper. These are also reproduced in Appendix IV.

⁹ Eg as regards charges for unlawfully taking or using animals (s 79A), gold stealing (ss 76A, 76C and 76D) or trespassing on enclosed land (s 82A).

3. DEVELOPMENTS SINCE THE DISCUSSION PAPER

1.7 Important developments have occurred in two areas since the issue of the Discussion Paper. First, as foreshadowed in the Discussion Paper,¹⁰ the *Police Act* has been amended so as to decriminalise the offences of being found drunk in a public place (section 53) and being a habitual drunkard (section 65(6)). The *Acts Amendment (Detention of Drunken Persons) Act 1989*, which abolished these offences, introduced provisions under which police are given powers to apprehend and detain drunken persons, without making an arrest, until they sober up.¹¹ This amendment has made it unnecessary for the Commission to deal with this issue in any detail.

1.8 Second, in contrast to the Discussion Paper, which contained a detailed chapter on prostitution offences,¹² this Report deals with this issue more briefly. The Discussion Paper was written against the background of the Government's expressed policy of retaining the present approach to prostitution and not introducing any changes without general community support.¹³ It was not concerned to deal with the issue of prostitution as such, but was confined to the particular aspects of prostitution with which the *Police Act* is concerned - in general, the public order aspects of prostitution, such as its impact on activities in streets and other public places - and to proposals for change which were consistent with the Government's policy.

1.9 Subsequent to the issue of the Discussion Paper, the Minister for Police appointed a Community Panel on Prostitution to make recommendations on what changes, if any, should be made to the present policy on prostitution. It submitted its final report in September 1990.¹⁴ The Panel's Report recommended the abolition of the existing offences relating to prostitution in the *Police Act*. That Report is still under consideration. In this Report the Commission therefore confines itself to discussing the implications of the proposals of the Community Panel on these offences, and what changes of a formal nature might be made to the existing *Police Act* offences if the present policy on prostitution is to continue.

¹⁰ Para 10.17.

¹¹ These provisions are set out in a new Part VA of the *Police Act*.

¹² Ch 9.

¹³ Paras 9.3 and 9.4.

¹⁴ *Final Report of the Community Panel on Prostitution (1990)*.

Chapter 2

THE POLICE ACT 1892

1. STRUCTURE

2.1 The *Police Act 1892* serves the twin purposes of regulating the police force and providing for a large number of simple offences.¹ The Act is divided into a number of Parts. The first six Parts - Parts I, II, IIA, III, IIIA and IV - are concerned with the administration of the Western Australian police force. They deal respectively with the appointment of officers and constables, the regulations, duties and discipline of the police force, the Police Appeal Board, the appointment and regulation of special constables, aboriginal aides and the establishment of police districts. Parts II, IIA and III of the Act also contain offences. In the main, these are offences which can only be committed by members of the police force, such as failing to deliver up accoutrements on leaving the force,² but some offences can be committed by members of the public.³

2.2 These Parts of the Act are not dealt with in this Report. Proposals for the reform of these provisions are to be incorporated in a Police Administration Bill to be introduced in the present session of Parliament.⁴

2.3 Parts V, VI and VII of the Act are the subject of the Commission's reference. Part VA, which was created in 1989,⁵ contains the powers to deal with drunken persons which replace the offences involving drunkenness formerly found in Part VI.

¹ The *Criminal Code* uses the term "simple offence" to denote an offence that is not an indictable offence: see s 3. An indictable offence is triable by a judge and jury in the Supreme Court or District Court (unless the defendant is able to and does elect to be tried summarily). A simple offence is triable summarily by magistrates (sitting without a jury) in a Court of Petty Sessions. In most other jurisdictions simple offences are called summary offences.

² S 13.

³ Namely s 16 (personating or attempting to bribe members of the Police Force); s 16A (unauthorised use of the word "detective"); s 18 (harbouring constables during hours of duty); s 20 (interference with police). S 20 is dealt with in this Report for reasons explained in para 1.2 above.

⁴ See Western Australian *Parliamentary Debates* (Legislative Council) 12 March 1992, 5.

⁵ By the *Acts Amendment (Detention of Drunken Person) Act 1989*: see para 1.7 above.

2.4 Part V deals mainly with police powers to enter and search premises and detain property, and to apprehend offenders, but most of the sections in this Part also contain offence provisions.

2.5 Part VI sets out offences, punishable summarily, which are in force throughout the State. This Part contains a large number of general offences, dealing with a wide variety of matters including vagrancy, prostitution, betting, damage to property, possession of stolen goods and interference with the police. Despite the title of this Part of the Act, a number of provisions contain no offences but set out police powers or other regulatory provisions.⁶

2.6 In contrast to Part VI, Part VII makes provision for offences which apply only where no similar provisions have been made in by-laws or regulations by any Municipality, Shire Council or Board of Health.⁷ The offences set out in this Part deal with public nuisances of various kinds.

2.7 Part VIII contains provisions ancillary to the offence provisions set out in Parts V, VI and VII. This Report contains no detailed consideration of these provisions.⁸ However the issue of what should happen to these provisions following reform of the other Parts of the Act is briefly considered below.⁹

2. HISTORY¹⁰

2.8 Few of the *Police Act's* provisions have been developed in the context of contemporary life and modern conditions. Most are provisions of considerable antiquity and can be traced to provisions in United Kingdom legislation of the early 19th century or New South Wales statutes of the same period.

2.9 The major United Kingdom sources of the *Police Act* are the *Vagrancy Act 1824*,¹¹ the *Metropolitan Police Acts 1829 and 1839*,¹² and the *Metropolitan Police Courts Act 1839*.¹³

⁶ Ss 68, 70, 72-76, 76B, 76E and 78. S 76I contains definitions.

⁷ See s 95.

⁸ With the exception of ss 122-123, which are provisions on powers of the same kind as those in Parts V, VI and VII.

⁹ See paras 3.36-3.38.

¹⁰ For a more detailed account see Discussion Paper paras 2.1-2.12.

¹¹ The *Vagrancy Act 1824* replaced legislation dating back to the 16th century. The original purpose of this legislation was to deal with the problems of the poorer classes, but by 1824 the Act had become a general

The earliest Australian statute, the New South Wales *Police Act 1833*,¹⁴ is also an important source of provisions in the Western Australian *Police Act*. Though based in part on the *Metropolitan Police Act 1829*, a substantial part of the New South Wales Act was devoted to local government matters.¹⁵ Conditions in the other Australian colonies were similar and so these provisions were incorporated in other Australian police legislation, including the Western Australian *Police Act*.

2.10 The earliest police legislation in Western Australia was the *Police Ordinance 1849*, enacted because some enlargement and formal definition of police powers was thought necessary due to the imminent commencement of transportation of convicts to Western Australia.¹⁶ It was replaced by the *Police Ordinance 1861*, the major reason for this legislation being the formation of a united police force in 1853. In each case, these enactments were based on the United Kingdom and New South Wales Acts referred to in the previous paragraph rather than being drawn up with local conditions in mind.¹⁷

2.11 In 1892 the present *Police Act* replaced the 1861 Ordinance. It was stated in Parliament that the primary object was to consolidate the existing legislation.¹⁸ However, the draftsman¹⁹ did not build upon the 1861 Ordinance. Instead, he took as his model the South Australian *Police Act 1869*. This Act was firmly based on the United Kingdom and New South Wales Acts, like all other 19th century Australian *Police Acts*. However, unlike other police legislation, the *South Australian Act* combined all the provisions relating to the police - both administrative provisions and offence provisions - in the one statute. The Parts into which the *Western Australian Act* is divided are inherited from the South Australian statute. The draftsman added the gaming provisions (which had not previously appeared in Western

catalogue of petty crimes. It classified persons committing particular offences as idle and disorderly persons, rogues and vagabonds or incorrigible rogues according to the seriousness of the offence, which was reflected in the penalty imposed.

¹² The 1829 Act set up Sir Robert Peel's police force. Both Acts were in force in the London metropolitan area. The *Town Police Clauses Act 1847* contained equivalent provisions designed to be incorporated into Acts regulating the policing of other towns.

¹³ The major purpose of this Act was the regulation of the London Police Courts, now called Magistrates' Courts - the equivalent of Courts of Petty Sessions in Western Australia.

¹⁴ This Act regulated the police in the town and port of Sydney. The *Police (Towns) Act 1838* and the *Police (Sydney Hamlets) Act 1853* introduced similar provisions for adjacent areas.

¹⁵ The long title of the Act refers to "removing and preventing Nuisances and Obstructions". "In the absence of effective local government, the police were given the task of administering not only traditional criminal laws but also those affecting public health and hygiene.": D Chappell and P R Wilson *The Police and the Public in Australia and New Zealand* (1969) 9.

¹⁶ Russell 187.

¹⁷ Id 186-187.

¹⁸ Western Australian *Parliamentary Debates* (1891) Vol 2, 61 (Hon G Shenton), 239 (Hon S Burt).

¹⁹ Who appears to have been J C B James, the Commissioner of Titles: see (1985) 28 *JPWA Journal* 32.

Australian statute law) and some of the provisions of the 1861 Ordinance not found in the South Australian Act which he wished to preserve.

2.12 There have been many amendments to the *Police Act* since 1892.²⁰ However its basic organisation remains unaltered, and the drafting style remains very much that of the 19th century. Among the provisions added in earlier years were the 1893 amendments relating to betting²¹ and the 1902 amendments dealing with prostitution,²² both based on United Kingdom legislation, and the 1902 provisions on gold stealing,²³ extended to pearl stealing in 1907,²⁴ which sought to deal with problems then current in Western Australia. Drug offences were introduced into the Act by a series of amending Acts beginning in 1928.²⁵ Provisions introduced in more recent years include passing valueless cheques,²⁶ trespass²⁷ and provisions regulating public meetings.²⁸

2.13 Other provisions have been removed. Provisions as to assault²⁹ and dog stealing³⁰ were transferred to the *Criminal Code* on its enactment in 1902. Some of the procedural provisions were also transferred to the new *Justices Act* in the same year. In subsequent years various provisions relating to animals,³¹ the regulation of public meetings,³² drugs³³ and gaming³⁴ have been removed from the *Police Act* and replaced by more specific legislation.

²⁰ 67 statutes passed between 1893 and 1990 make amendments to the *Police Act* - 52 of them since 1952. For a survey of all important amendments between 1893 and 1972, see D Brown *Police Offences* (1972) 10 *UWAL Rev* 254, 262-270.

²¹ *Police Act Amendment Act 1893*; see now *Police Act 1892* ss 84A-84H.

²² *Police Act Amendment Act 1902* ss 7 and 8; see now *Police Act 1892* ss 76F and 76G.

²³ *Police Act Amendment Act 1902* ss 2-6; see now *Police Act 1892* ss 76A-76E.

²⁴ *Police Act Amendment Act 1907*; see now *Police Act 1892* ss 76A-76E.

²⁵ The *Police Offences (Drugs) Act 1928* inserted former Part VIA "Opium and Dangerous Drugs". The former Part VIB, dealing with heroin, was added by the *Police Act Amendment Act 1953*. Both parts were subsequently amended on several occasions. For the eventual removal of the drug offences to the *Misuse of Drugs Act 1981* see para 2.13 below.

²⁶ S 64A, inserted by *Police Act Amendment Act 1959* s 3.

²⁷ S 82A, inserted by *Police Act Amendment Act 1963* s 3 and s 82B, inserted by *Police Amendment Act 1980* s 6.

²⁸ S 54A, inserted by *Police Act Amendment Act (No 2) 1970* s 3, and s 54B, inserted by *Police Act Amendment Act 1976* s 5. For the repeal of s 54B see para 2.13 below.

²⁹ Ss 55 and 56.

³⁰ S 62.

³¹ S 79 - replaced by *Prevention of Cruelty of Animals Act 1912* s 4; see now *Prevention of Cruelty to Animals Act 1920* s 4.

³² S 54B - see now *Public Meetings and Processions Act 1984*.

³³ Part VIA was replaced by the *Misuse of Drugs Act 1981*. Part VIB was repealed by the *Police Act Amendment Act 1976*, its substance having been incorporated in Part VIA.

³⁴ Ss 85-89C were repealed by the *Acts Amendment and Repeal (Gaming) Act 1987*. Replacement offences are set out in ss 41-42 and 44-45 of the *Gaming Commission Act 1987*.

2.14 As a result of all these amendments the *Police Act* is now an incoherent collection of miscellaneous offences. Any unity that it may have had when originally drafted has long since disappeared.

3. COMPARISON WITH THE LAW ELSEWHERE

2.15 All other Australian jurisdictions, at one time or another, have enacted legislation similar to the *Police Act*.³⁵ Whereas in Western Australia old legislation has been retained, in most other jurisdictions it has been redrafted and modernised.

2.16 Thus, in most jurisdictions, the equivalent legislation is now called the *Summary Offences Act*.³⁶ In cases where the Act was initially called the *Police Act*, the old title has been replaced by a more suitable alternative which gives a more accurate description of its purpose. In those jurisdictions where police administration and offence provisions were combined in the same Act, the police administration provisions have been removed to a separate Act.³⁷

2.17 In nearly all cases, the provisions of these statutes have been redrafted in a more modern form and arranged in a more coherent order.³⁸ In several jurisdictions the legislation has been reformed by repealing out-of-date offences and modernising others. The two

³⁵ New South Wales: *Police Act 1833*, later supplemented by *Police Act 1853* and *Police Offences Act 1855*, all replaced by *Police Offences Act 1901*; *Vagrancy Act 1835*, successively replaced by *Vagrancy Act 1851*, *Vagrancy Act 1901* and *Vagrancy Act 1902*. Queensland: the New South Wales legislation was received in 1859 and remained in force there until 1931. Victoria: the *Vagrant Act 1852* and the *Town and Country Police Act 1854* were based on the then-current New South Wales legislation. They were replaced by the *Police Offences Act 1865* and by several successive consolidations, the latest being the *Police Offences Act 1958*. Tasmania: *Police Act 1838*, successively replaced by *Police Act 1865*, *Police Act 1905*, *Police Offences Act 1935*. South Australia: *Police Act 1844*, successively replaced by *Police Act 1863*, *Police Act 1869*, *Police Act 1916* and *Police Act 1936*. The *Police Act 1916* (SA) was the model for the Northern Territory Police and *Police Offences Ordinance 1923*, and this in turn was used as the basis of the Australian Capital Territory *Police Ordinance 1927* and *Police Offences Ordinance 1930*. For generally similar legislation elsewhere, see *Police Offences Act 1884* (NZ), replaced in 1908 and 1927; (Papua) *Vagrancy Act 1912*, *Police Offences Act 1912*; (New Guinea) *Police Offences Act 1925*.

³⁶ *Summary Offences Act 1988* (NSW) (the new name was first adopted in the *Summary Offences Act 1970*); *Summary Offences Act 1966* (Vic) (but some of the equivalent provisions are contained in other legislation: see fn 44 below); *Summary Offences Act 1953* (SA) (originally called the *Police Offences Act*, but renamed in 1985); *Summary Offences Act* (NT) (renamed in 1978); *Summary Offences Act 1981* (NZ); *Summary Offences Act 1977* (PNG). In the other jurisdictions, the title of the equivalent Act varies: see *Vagrants, Gaming and other Offences Act 1931* (Qld); *Police Offences Act 1935* (Tas); *Police Offences Act 1930* (ACT).

³⁷ *Police Offences Act 1953* (SA); *Summary Offences Act 1978* (NT). In the ACT, although the *Police Offences Ordinance 1930* had been based on the South Australian legislation, the police administration provisions had been put in a separate Act (the *Police Ordinance 1927*) from the beginning.

³⁸ See particularly *Vagrants, Gaming and Other Offences Act 1931* (Qld); *Summary Offences Act 1970* (NSW); *Police Act 1905* (Tas); *Police Offences Act 1935*; *Police Offences Act 1953* (SA).

jurisdictions which have enacted the most comprehensive reforms are New South Wales and the Australian Capital Territory.

2.18 In New South Wales, legislation passed in 1979 repealed the *Summary Offences Act 1970* and replaced it with 16 separate Acts.³⁹ A number of offences seen as out of date, particularly drunkenness, having no visible lawful means of support, offensive conduct, unseemly language and certain offences relating to prostitution, were repealed. In 1983 the repealed offence of offensive conduct in public places was reintroduced on a more limited basis.⁴⁰ The *Summary Offences Act 1988* increased penalties and reintroduced the option of a prison sentence for a number of offences. It also brought some of the individual statutes⁴¹ together again in one enactment. Although there have been shifts of direction since 1979, there is no doubt that the present legislation in New South Wales represents a significant improvement on the old pre-1979 law.

2.19 The reforms in the Australian Capital Territory have been even more comprehensive than in New South Wales. The *Police Offences (Amendment) Ordinances 1983* and *1984* repealed practically all the provisions of the *Police Offences Ordinance*.⁴² This left a *Police Offences Ordinance* containing only six sections prescribing offences, nearly all dealing with prostitution.

2.20 Two other jurisdictions in which there have been significant reforms are South Australia and New Zealand. In both jurisdictions the legislation,⁴³ in substance, drafting and arrangement, is greatly superior to the *Police Act 1892*.

2.21 In the other Australian jurisdictions the reforms have not been so substantial, though in no case is the current legislation as old as in Western Australia. In Victoria - where in 1966

³⁹ The most important of these were the Offences in *Public Places Act*, the *Public Assemblies Act*, the *Intoxicated Persons Act* and the *Prostitution Act*, and amendments to the *Crimes Act 1900*, the *Inclosed Lands Protection Act 1901* and the *Gaming and Betting Act 1912*. Certain provisions of the *Police Offences Act 1901* remained in force. On the New South Wales 1979 legislation, see J M Smail, J Miles and K Shadbolt *Justices Act and Summary Offences* (New South Wales) paras 9001-9161 (November 1980); New South Wales *Parliamentary Debates*, 23 April 1979, 4826-4832, 4917-4926; J S Andrews "*Repeal*" of the *New South Wales Summary Offences Act* (1979) 3 *Crim LJ* 295.

⁴⁰ *Offence in Public Places (Amendment) Act 1983*(NSW)

⁴¹ The *Offences in Public Places Act 1979*, the *Public Assemblies Act 1979* and the *Prostitution Act 1979* were all repealed: New South Wales *Parliamentary Debates* (Assembly), 31 May 1988, 804-808.

⁴² Except for certain provisions which were transferred to the *Crimes Act 1900* (a New South Wales statute applying in the ACT) and a new *Unlawful Games Ordinance 1984*.

⁴³ *Summary Offences Act 1981*(NZ); *Summary Offences Act 1953*(SA) - the major reforms were effected by the *Police Offences Act Amendment Act 1985*, which gave the *Summary Offences Act* its present title.

the *Police Offences Act 1958* was divided up into a number of individual enactments,⁴⁴ without much substantial reform - the need for reform has been recognised by the Attorney General, who in August 1988 asked the Victorian Law Reform Commission to review the *Vagrancy Act 1966* and the *Summary Offences Act 1966*. The Victorian Commission issued a Discussion Paper, reviewing a range of possible reforms, in July 1992. The reforms, if implemented, would give Victoria a modern *Summary Offences Act* comparable to those of New South Wales and the Australian Capital Territory.

2.22 In Western Australia the *Police Act* in essence remains much as it was when originally drafted in 1892. The contrast with the situation in most other jurisdictions is marked.⁴⁵

⁴⁴ *Vagrancy Act 1966* (Vic); *Summary Offences Act 1966*; *Protection of Animals Act 1966*; *Lotteries Gaming and Betting Act 1966*. Part V of the *Police Offences Act 1958* (dealing with obscene and indecent publications) continued in force.

⁴⁵ At the time of the enactment of the *Criminal Code* a proposal to reform the *Police Act* was under consideration: see Western Australian *Parliamentary Debates* (1902) Vol 20, 2768. In 1906 a Police Offences Bill was introduced into Parliament which would have consolidated all legislation then existing and remodelled the Act, with substantial redrafting and rearrangement of sections. The debates in Parliament reveal that the draftsman had undertaken wide research and used provisions from legislation in all the Australian jurisdictions, England and New Zealand as the source of particular sections: see Western Australian *Parliamentary Debates* (1906) Vol 29, 549-556, id (1907) Vol 31, 530-532. In 1952 there was a move to redraft the Act and divide it into separate Acts dealing with police administration and offences: see Western Australian *Parliamentary Debates* (1952) Vol 132, 1558. This followed the enactment of the *Police Act Amendment Act 1952* consolidating all amendments into the main Act. In 1964 it was announced that the Government was undertaking a review of all statutes, including the *Police Act*: see Western Australian *Parliamentary Debates* (1964) Vol 168, 1496. On each occasion, no major reforms to the *Police Act* resulted.

Chapter 3

THE COMMISSION'S APPROACH

1. INTRODUCTION

3.1 In Chapters 4 to 16 of this Report the Commission makes recommendations as to the offences contained in Parts V, VI and VII of the *Police Act*. The Commission **recommends** that some offences be abolished and that others be retained, either in their present form or with amendments. In Chapters 17 and 18 the Commission makes recommendations as to the powers of arrest, entry, search and seizure contained in Parts V, VI and VII. Again these recommendations involve the retention or revision of some provisions and the repeal of others. In this Chapter the Commission deals with a number of general issues which underpin the recommendations in Chapters 4 to 16 and 17 and 18. Many of these issues were dealt with in Chapter 3 of the Discussion Paper.

2. A SUMMARY OFFENCES ACT

3.2 The Commission **recommends** that the offence provisions recommended for retention should be separated from the administration provisions in the earlier Parts of the *Police Act* and set out in a separate statute called the *Summary Offences Act*. This recommendation was foreshadowed in the Discussion Paper.¹ It will be reflected by the proposals for reform of the administration provisions of the *Police Act* which are to be incorporated in a Police Administration Act.²

3.3 Enactment of a separate *Summary Offences Act* would implement a proposal first made in 1906,³ and would follow the example of South Australia and the Northern Territory, which abandoned the original South Australian model of a single Act containing both administration and offence provisions in favour of separate legislation regulating the police force and setting out summary offences.⁴ Both South Australia and Northern Territory use the title "Summary

¹ Para 3.15.

² See para 2.2 above.

³ See para 2.22 above fn 45.

⁴ See para 2.16 above.

Offences Act", as do New South Wales, Victoria and New Zealand.⁵ It is inappropriate for simple offences to be set out in an Act entitled the "Police" Act, just as it was inappropriate for the inferior criminal courts to be referred to as "Police" Courts.⁶ Even if it be argued that the use of the word "Police" has nothing to do with the Police Force, but refers to the regulation of a town or city,⁷ this usage is now obsolete, and it is misleading and undesirable to refer to particular offences as "police offences".

3. INDIVIDUAL OFFENCES

3.4 The Commission's terms of reference require it to review the offences in Parts V, VI and VII of the *Police Act* and make recommendations as to whether any offences should be abolished, and what changes should be made to those which are retained to make the law more readily understood and more relevant to modern conditions.

3.5 A number of general considerations have guided the Commission in making its recommendations.

(a) Whether offences should be abolished

3.6 Where the Commission has recommended that an offence be abolished, it has generally done so for one or more of the reasons discussed below under the following headings -

- (i) duplication;
- (ii) relevance to contemporary society;
- (iii) civil liberties implications;
- (iv) consistency with criminal law principles;
- (v) burden of proof;
- (vi) frequency of usage;
- (vii) the position in other Australian jurisdictions; and
- (viii) more appropriate location elsewhere.

⁵ Ibid.

⁶ The reference to "Police Court" in s 22 was amended to read "Court of Petty Sessions" in 1983: *Police Amendment Act 1983* s 3.

⁷ A usage derived from the Greek "polis", meaning town or city: see Nichols xxi.

(i) Duplication

3.7 Where an offence in the *Police Act* is broadly similar to some other offence, the law can be simplified by eliminating one of them.

3.8 In many cases, there is duplication of offences within the *Police Act* itself. Sometimes this has occurred as a result of provisions being drawn from different sources by the drafter of the 1892 Act or of the South Australian model which he used - for example, the various offences involving interference with the police.⁸ In other instances, the duplication has resulted from older provisions not being modified or repealed when new provisions were added, as in the case of the offences involving offensive weapons.⁹ The Commission's recommendations eliminate such instances of unnecessary duplication.¹⁰

3.9 In other cases duplication has been caused by the enactment of new legislation which supersedes provisions in the *Police Act* without repealing those provisions. An important example of this process is the enactment of provisions in the *Health Act 1911* and the *Local Government Act 1960* (or its predecessors) which render obsolete the nuisance and obstruction provisions in Part VII of the *Police Act*.¹¹ In such cases, the Commission's recommendation that the *Police Act* provision be repealed eliminates such duplication without affecting the scope of the criminal law.¹²

(ii) Relevance to contemporary society

3.10 Many offences in the *Police Act* owe their origins to bygone social conditions and have little relevance to contemporary society. This is the case, for example, with offences

⁸ Ss 20, 41(1), 41(7), 66(7), 67(3) and 90: see paras 5.1-5.5 below.

⁹ Ss 65(4) and 65(4a): see paras 12.5-12.12 below.

¹⁰ For other cases in which the Commission's recommendations are based on the elimination of duplication within the *Police Act*, see paras 6.1-6.15 (ss 54, 59 and 44); paras 11.6-11.10 (ss 58A, 59: extinguishing lights); paras 13.10-13.11 (s 71); paras 13.12-13.21 (ss 76A-76E); paras 13.31-13.34 (s 82); paras 15.22-15.24 (s 65(3)); paras 16.1-16.14 (Part VII).

¹¹ See paras 16.1-16.14 below and Appendix III.

¹² For other cases in which the Commission's recommendations are based on the elimination of duplication between the *Police Act* and more recent legislation, see paras 6.16-6.18 (s 64); paras 6.19-6.20 (s 66(5)); paras 10.1-10.8 (ss 84B and 84C); paras 11.6-11.10 (ss 58A and 59: extinguishing lights); paras 14.9-14.11 (s 66(2)); paras 14.22-14.24 (s 66(12)); paras 15.2-15.3 (s 47); paras 15.4-15.7 (s 51); paras 15.8-15.12 (s 57); paras 15.19-15.21 (s 63); paras 15.25-15.27 (s 66(10)); paras 15.31-15.33 (s 83); paras 16.1-16.14 (Part VII).

involving being found in a "place, stable or outhouse" for an unlawful purpose,¹³ prize-fighting (fighting, usually with bare fists for reward),¹⁴ attempts to obtain "sustenance relief" by false representations,¹⁵ pretending to tell fortunes,¹⁶ and preventing the playing of certain games on Christmas Day and Good Friday.¹⁷ Practically the whole of Part VII reflects the social conditions of the early 19th century.¹⁸

3.11 A particular aspect of this problem is that many offences in the *Police Act* single out particular people on the basis of their status, rather than because of their conduct on a particular occasion. An example is section 42, which gives police power to remove any common prostitute, reputed thief, or other loose, idle or disorderly person from theatres and similar premises. If such a person remains after being ordered to leave, an offence is committed. This approach can be traced back to the original purposes of the Vagrancy Acts (to which such provisions owe their origin), which were passed to deal with the poorer classes and the problems they occasioned.¹⁹ In the Commission's view it is unsatisfactory for offences which depend on the category a person falls into, rather than on their conduct, to remain on the statute book, unless their existence is justified by some other consideration. Accordingly the Commission **recommends** the repeal of a number of offences on the ground that they are based on the status of the offender.²⁰

(iii) *Civil liberties implications*

3.12 The Commission has considered the offences in the Act from the standpoint of whether they maintain an appropriate balance between the interests of individuals and those of the state. Although essentially a statute setting out petty offences, the *Police Act* contains a

¹³ S 66(8): see paras 8.2-8.17 below. In addition, s 66(9) makes it an offence to wander about or lodge in any outhouse, deserted or unoccupied building, or in the open air, or in any vehicle, without any visible lawful means of support: see paras 4.6-4.8 below.

¹⁴ S 64: see paras 6.16-6.18 below.

¹⁵ S 66(2a) and (2b): see paras 14.12-14.15 below.

¹⁶ S 66(3): see paras 14.16-14.21 below.

¹⁷ S 61: see paras 15.13-15.18 below.

¹⁸ See paras 16.4-16.5 below. For other examples of cases where the Commission's recommendations are based on the lack of relevance of the offence to contemporary society, see paras 9.28-9.29 (s 65(8)); paras 12.7-12.9 (s 65(4)); paras 13.10-13.11 (s 71).

¹⁹ On the history of the Vagrancy Acts, see W Blackstone *Commentaries* Book 4 para 198; L Radzinowicz *A History of English Criminal Law and its Administration from 1750* vol 4 (1968) 1-42; L Radzinowicz and R Hood *A History of English Criminal Law and its Administration from 1750* vol 5 (1986) 339-375; Home Office Working Paper Appendix A; K Buckley *Offensive and Obscene: A Civil Liberties Casebook* (1970) 237-252; see also the judgment of Scott LJ in *Ledwith v Roberts* [1937] 1 KB 232, 261-266.

²⁰ See paras 4.2-4.5 (s 65(1)); paras 4.9-4.12 (s 65(7) and (9)); paras 9.28-9.29 (s 65(8)).

number of offences which affect civil liberties, for example freedom of the person,²¹ freedom of assembly and association,²² freedom of expression,²³ and the right to silence when charged with a criminal offence.²⁴ Important civil liberties issues are also raised by the powers of arrest, entry, search and seizure found in the *Police Act*.²⁵ In a number of instances, its recommendations for the repeal or modification of particular offences are based on conclusions that the offences in question represent an unnecessary intrusion on civil liberties.²⁶

(iv) *Consistency with criminal law principles*

3.13 There is an important relationship between the offences in Parts V, VI and VII of the *Police Act* and the *Criminal Code*. These Parts of the Act were originally conceived as a code of simple offences and the procedure for dealing with them, just as the *Criminal Code*, originally enacted in 1902 and re-enacted in 1913, was intended to be a codification of all indictable offences. General principles of criminal law should therefore apply to the *Police Act*, and legislation replacing it, just as much as to the Code. In many respects, this is already recognised. For example, the general principles of criminal responsibility set out in Chapter V of the Code, and many other Code provisions of a general nature,²⁷ apply to all offences and not just Code offences.

3.14 In the Commission's view, a few *Police Act* offences are inconsistent with general criminal law principles. One example is the offence of possessing offensive weapons,²⁸ which applies even in circumstances when the use of such weapons would be a legitimate exercise of the right of self-defence recognised by the Code.²⁹ Another example is the offence of being suspected of being about to commit an offence,³⁰ the existence of which is incompatible with the principle that the criminal law only punishes those who have committed acts which have

²¹ Ss 65(1) and 66(9) (see paras 4.2-4.8 below).

²² Ss 52, 54A (see paras 7.1-7.9 below); ss 67(4) and 83B(3) (see paras 8.18-8.23 below).

²³ Ss 54 and 59 (see paras 6.1-6.15 below); s 66(5) (see paras 6.19-6.20 below).

²⁴ S 71 (see paras 13.3-13.6, 13.10-13.11 below).

²⁵ See Chs 17 and 18.

²⁶ See paras 4.2-4.5 (s 65(1)); paras 4.6-4.8 (s 66(9)); paras 8.18-8.23 (ss 67 and 82B(3)); paras 13.10-13.11 (s 71).

²⁷ Eg arrest (*Criminal Code* s 564), compensation and restitution (ss 716A-719).

²⁸ S 65(4a) (see paras 12.10-12.12), and see also s 65(5) (paras 12.19-12.23).

²⁹ S 31.

³⁰ S 43(1): see para 4.17.

the potential for harm, such as an incitement or attempt to commit an offence, and not a mere suspicion that a person is about to commit an offence.³¹

(v) *Burden of proof*

3.15 A fundamental principle of the criminal law is that it is for the Crown to prove all the elements of an offence beyond reasonable doubt.³² This principle has been adopted in Code jurisdictions such as Western Australia. It is only in relation to specific defences, such as insanity,³³ or other matters where something is to be presumed against the defendant until the contrary is proved, that the burden of proof is placed on the defendant on the balance of probabilities.³⁴ These cases are comparatively rare. In the *Police Act*, on the other hand, a number of offences place the burden of proving a particular matter on the defendant on the balance of probability. The following bear the burden of proving a particular matter -

- * Persons having no visible lawful means of support.³⁵
- * Persons in possession of deleterious drugs or housebreaking implements.³⁶
- * Persons in possession of property reasonably suspected of being stolen.³⁷
- * Persons found in possession of gold, pearl or uncut diamonds reasonably suspected of being stolen,³⁸ persons charged with assisting them,³⁹ and persons accompanying them at the time of finding.⁴⁰

³¹ As G Williams *Textbook of Criminal Law* (2nd ed 1983) 402 states:
"So long as a crime lies merely in the mind it is not punishable, because criminal thoughts often occur to people without any serious intention of putting them into execution."

³² *Woolmington v DPP* [1935] AC 462, 481 per Viscount Sankey: "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. . . . If, at the end of and on the whole of the case, there is a reasonable doubt . . . the prosecution has not made out the case and the prisoner is entitled to an acquittal." See also *He Kaw Teh v R* (1985) 157 CLR 523.

³³ See the Commission's Report on *The Criminal Process and Persons Suffering from Mental Disorder* (Project No 69 1991) paras 2.23-2.25.

³⁴ See J M Herlihy and R G Kenny *An Introduction to Criminal Law in Queensland and Western Australia* (3rd ed 1990) para 621, and Ch 6 generally.

³⁵ Ss 65(1) and 66(9): see paras 4.2-4.8. In *Zanetti v Hill* (1962) 108 CLR 433 at 449, Menzies J said of s 65(1): "It is a provision creating offences outside the ordinary principles of the criminal law whereby the prosecution must prove every element of an offence beyond reasonable doubt and in specified circumstances the section requires a person charged to exculpate himself to the satisfaction of the justices".

³⁶ Ss 65(5) and 66(4): see paras 12.19-12.27.

³⁷ S 69: see paras 13.2-13.9.

- * Tenants or occupiers of premises where gold, pearl or uncut diamonds are found,⁴¹ persons present at the time of the finding,⁴² and persons watching or patrolling such premises.⁴³
- * Persons who obtain money or property by passing cheques which are not paid on presentation within 60 days of opening a bank account.⁴⁴
- * Persons who live with, or are habitually in the company of, a prostitute and have no visible means of support.⁴⁵

In such cases the defendant is denied the right to which defendants are normally entitled under general principles of criminal law.⁴⁶

3.16 Reversing the normal burden of proof, and requiring the defendant in a criminal case to prove his or her innocence, is generally disapproved.⁴⁷ In recent years, the practice has been condemned in the reports of a number of investigating bodies, including the Senate Standing Committee on Constitutional and Legal Affairs,⁴⁸ the Victorian Legal and Constitutional Committee⁴⁹ and the Review of Commonwealth Criminal Law.⁵⁰

³⁸ S 76A: on ss 76A-76E see paras 13.12-13.21.

³⁹ S 76D(1).

⁴⁰ S 76D(2)(b).

⁴¹ S 76B.

⁴² S 76C.

⁴³ S 76D(2)(a).

⁴⁴ S 64A: see paras 14.3-14.7.

⁴⁵ S 76G(1)(a): see paras 9.13-9.20.

⁴⁶ It should also be noted that s 72 of the *Justices Act 1902* provides that where a complaint of a simple offence negatives any exemption, exception, proviso or condition contained in the Act creating the offence, the defendant has the burden of proving that he or she is entitled to a defence based on the exemption, exception, proviso or condition. There is no similar rule for indictable offences. In such cases s 72 has the effect of placing a legal burden of proof on the defendant. In its Courts of Petty Sessions report (para 6.33) the Commission recommended that s 72 should ultimately be repealed and that, as a transitional measure, it should be amended so as to apply only to offences presently existing. A review should be undertaken of all offences where the onus of proof is reversed with the object of determining whether the reversal can be justified in any case. Where it is considered to be necessary to have a special rule, the rule should be expressed in the provision creating the offence.

⁴⁷ See eg the authoritative discussion by G Williams *The Proof of Guilt* (3rd ed 1963) 184-186 and "The Logic of 'Exceptions'" (1988) 47 *Camb LJ* 261.

⁴⁸ *The Burden of Proof in Criminal Proceedings* (1982).

⁴⁹ *Report on the Burden of Proof in Criminal Cases* (1985).

⁵⁰ *Final Report* (1991) Part II.

3.17 In addition, reversal of the burden of proof is generally inconsistent with the International Covenant on Civil and Political Rights, article 14(2) of which provides that:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

This Covenant has been incorporated into Australian law as Schedule 2 to the *Commonwealth Human Rights and Equal Opportunity Commission Act 1986*.⁵¹ It was ratified by Australia and has been in force in Australia since 13 November 1980.⁵² The First Optional Protocol to the International Covenant, which came into force for Australia on 25 December 1991, gives individuals a direct right of petition to the Human Rights Commission of the United Nations General Assembly.⁵³ A statutory provision which reverses the burden of proof is not rendered invalid by article 14(2). The Human Rights and Equal Opportunity Commission set up under the 1986 Act has power only to attempt conciliation with the consent of the parties and no power to make an enforceable determination. An individual could complain to the Human Rights Committee of the United Nations General Assembly under the First Optional Protocol, but there are a number of procedural hurdles to be surmounted, most importantly the exhaustion of all local remedies, but again this could not result in the invalidation of the offending statutory provision. Nonetheless the existence of article 14(2), and its interpretation by the Human Rights Committee,⁵⁴ show the extent to which reverse onus provisions are now disapproved of by international law.⁵⁵

3.18 There are provisions similar to article 14(2) in the Canadian Charter of Rights and Freedoms and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Section 11(d) of the Canadian Charter provides that any person charged with an offence has the right to be presumed innocent until proved guilty according to law. A Canadian court may declare that a reverse onus provision violates the presumption of innocence recognised by the Charter and is therefore invalid, though in each case it is

⁵¹ Whether this has the effect of incorporating the Covenant into State, as opposed to Commonwealth, law is debatable. There is also some doubt whether the reference to the Covenant in Schedule 2 amounts to incorporation. See generally G P J McGinley "The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered" (1990) 12 *Adel LR* 367.

⁵² Review of Commonwealth Criminal Law *Human Rights in Relation to the Commonwealth Criminal Law* (Discussion Paper No 15 1988) para 2.2.

⁵³ *International Protection of Human Rights 'Reform'* (No 63 Summer 1992) 31.

⁵⁴ See D McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 403-405, 419-420.

⁵⁵ The Commission is indebted to Ms Meredith Wilkie, Research Fellow at the University of Western Australia Crime Research Centre, for assistance with the matters discussed in this para.

necessary to examine the substance and effect of the provision. In *R v Oakes*,⁵⁶ for example, the Canadian Supreme Court found that a provision of the *Canadian Narcotics Control Act 1970*, under which a defendant found in possession of a narcotic bore the onus of disproving that he did not have it for the purpose of trafficking, violated the presumption of innocence recognised by section 11(d) and was therefore of no force and effect. The court said:

"If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt."⁵⁷

Article 6(2) of the European Convention is in identical terms to article 14(2) of the International Covenant. The European Commission on Human Rights may make a declaration that a reverse onus provision infringes article 6(2).⁵⁸ In countries which have recognised the right of individual petition, individuals have a right to complain to the Commission, which can attempt conciliation and if this fails report a violation of the law. Neither of these provisions has any effect in Australia, but they provide further illustration of the general worldwide disapproval of reverse onus provisions.

3.19 In the Discussion Paper⁵⁹ the Commission stated its provisional view that the proposed *Summary Offences Act* should conform with the general principles found in the *Criminal Code*, and that the burden of proof should not be reversed unless there are special reasons for so doing. The developments referred to above have reinforced that view. Accordingly the Commission has recommended the abolition of some offences which reverse the burden of proof⁶⁰ and the modification of others to eliminate the reversal.⁶¹

(vi) *Frequency of usage*

3.20 One factor which has influenced the Commission in drawing up its recommendations is the frequency of usage of particular offences. Appendix IV sets out statistics showing the number of charges brought under each *Police Act* offence in the Perth and East Perth Courts

⁵⁶ (1986) 26 DLR(4th) 200.

⁵⁷ Id 222.

⁵⁸ For comment by the Commission on art 6(2), see *Pfunder's Case: Austria v Italy* (1963) 6 Yearbook ECHR 740.

⁵⁹ Para 3.25.

⁶⁰ Ss 64A, 65(1), 66(9), 76A, 76B, 76C, 76D.

⁶¹ Ss 65(5), 66(4), 69, 76G(1)(a).

of Petty Sessions in 1989, the latest year for which statistics are available.⁶² These courts together deal with about half the charges in Courts of Petty Sessions in the State as a whole. While it is likely that there will be some variations in smaller population centres and rural areas,⁶³ these statistics are nonetheless a useful guide to the sections of the Act under which charges are brought.

3.21 The fact that no or few charges are brought under a particular section does not of itself prove that the offence is not necessary, nor does the fact that a particular section is frequently used preclude reform. Nonetheless, in a number of instances the fact that particular offences are not used is a consideration which, together with other reasons, has caused the Commission to conclude that certain offences should not be retained.⁶⁴

(vii) *The position in other Australian jurisdictions*

3.22 As pointed out in Chapter 2,⁶⁵ in most other Australian jurisdictions the legislation equivalent to the *Police Act* has been reformed and many offences that used to exist have been repealed. The Commission has borne in mind the importance of not repealing a particular offence simply to fall into line with the position elsewhere. The trend in other jurisdictions is not conclusive evidence of the correctness of a particular view. Further, there may be factors peculiar to Western Australia which may justify a difference in the law.

3.23 However, in the absence of special factors of this kind, the attitude taken in other jurisdictions is a consideration which, together with others, has influenced the Commission to recommend the repeal of particular offences.⁶⁶ The summary offences statutes in the various

⁶² Appendix I of the Discussion Paper contained similar figures for the period 1 July 1984 - 30 June 1985. These are reproduced in Appendix IV to enable comparison to be made with the 1989 figures.

⁶³ For example, charges of gold stealing under s 76A are likely to be brought in Kalgoorlie; some sections, eg ss 79A (unlawfully taking animals) and 82 (destroying property with intent to steal), contemplate rural conditions.

⁶⁴ See paras 4.2-4.5 (S 65(1)); paras 4.6-4.8 (S 66(9)); para 4.17 (s 43(1): being about to commit an offence); paras 5.11-5.12 (s 41(1): harbouring); paras 8.18-8.23 (ss 67(4) and 82B(3)); paras 11.6-11.10 (ss 58A and 59: extinguishing lights); paras 13.31-13.34 (s 82); paras 14.10-14.11 (s 66(2)); paras 14.22-14.24 (s 66(12)); paras 15.2-15.3 (s 47).

⁶⁵ Paras 2.15-2.22 above.

⁶⁶ See paras 4.2-4.5 (s 65(1)); paras 4.6-4.8 (s 66(9)); paras 4.9-4.12 (ss 65(7) and (9)); para 4.17 (s 43(1): being about to commit an offence); paras 5.11-5.12 (s 41(1): harbouring); paras 8.18 - 8.23 (ss 67(4) and 82B(3)); paras 9.28 - 9.29 (s 65(8)); paras 11.6 - 11.10 (ss 58A, 59: extinguishing lights); paras 13.10-13.11 (s 71); paras 13.12-13.21 (ss 76A-76E); paras 13.31-13.34 (s 82); paras 14.10-14.11 (s 66(2)); paras 14.22-14.24 (s 66(12)); paras 15.8-15.12 (s 57); paras 15.22-15.24 (s 65(3)); paras 16.1 - 16.14 (Part VII).

Australian jurisdictions all have a common ancestry⁶⁷ and deal with the same kinds of problems. The South Australian, Northern Territory and Australian Capital Territory legislation is of particular assistance because the South Australian *Police Act 1869* was the basis of the legislation in each of these jurisdictions, and this was the model which was used by the drafter of the Western Australian *Police Act*.

(viii) *More appropriate location elsewhere*

3.24 A final consideration which has influenced the Commission is the Western Australian statute book viewed as a whole. Particular provisions which originally were properly located in the *Police Act* are now more appropriately placed elsewhere. The chief example is the provisions on betting, which the Commission **recommends** should be incorporated in the *Betting Control Act 1954*.⁶⁸ Relocation of offences along such lines merely continues a process which has been going on ever since 1892.⁶⁹

(b) What changes should be made to offences that are retained

3.25 In many cases, the Commission **recommends** that offences which are to be retained should be modified. Often the changes recommended by the Commission are changes of substance, and the reasons behind such recommendations are set out in relation to each particular offence. At a more general level, however, the Commission is concerned to ensure that the new legislation which replaces the *Police Act* is drafted in contemporary form. In particular, it **recommends** that -

1. All offences which are retained should be redrafted in the current style used by Parliamentary Counsel.⁷⁰ Suggested drafts of particular offences put forward in this Report are intended to reflect this approach.
2. The drafting of the offences should be consistent both within the proposed *Summary Offences Act* and with the *Criminal Code*. This applies particularly to the expression of mental elements in offences.

⁶⁷ See para 2.15 above.

⁶⁸ See paras 10.1-10.16 below.

⁶⁹ See para 2.13 above.

⁷⁰ See G C Thornton *Legislative Drafting* (3rd ed 1987) 291-294. It should be noted that the provisions of the *Police Act* as currently drafted are not gender-neutral. As to this, see Ch 1 fn 3 above.

3. Definitions and terminology should be standardised to the extent that the context permits. This applies, for example, to terms such as "public place" and "premises", and also to references to members of the police force⁷¹ and the courts which deal with offences.⁷² Anachronisms such as references to "hard labour" in relation to imprisonment should be removed.

(c) Penalties

3.26 The Commission **recommends** that when the offences are redrafted the penalties set out for each offence should be reviewed, so that they are appropriate to the offence in question and consistent as between different offences. The Commission has not conducted any detailed examination of the penalties specified in the offence provisions because its terms of reference do not require it to do so. It has however commented on particular cases where the penalty seems inappropriate, or inconsistent with that provided for other offences.⁷³

4. RELATIONSHIP WITH THE *Criminal Code*

3.27 In many instances *Police Act* offences overlap, completely or partially, with offences in the *Criminal Code* which deal with the same subject matter.⁷⁴ In such cases, the police have a discretion as to whether to charge the defendant with an indictable offence under the Code or a simple offence under the *Police Act*.⁷⁵

⁷¹ The Act usually refers to "members" or "officers and constables", but there are some interesting distinctions and variations, eg "senior constable in charge of a Police Station" (s 40), "any member of the Police Force of or above the rank of sergeant" (s 52(4)); "constable or other peace officer" (s 67(3)), as to which see Nichols 108. It would be more appropriate to use the term "police officer" which is defined in s 5 of the *Interpretation Act 1984*.

⁷² The Act contains frequent references to hearings before "a Justice" or "two or more Justices" or "a stipendiary magistrate". If the offences are simple offences, the procedure for dealing with them is set out in the *Justices Act 1902*. For the Commission's recommendations for changes in this procedure, see Courts of Petty Sessions Report Chs 4-7.

⁷³ For earlier general reviews of the penalties in the *Police Act*, see *Police Act Amendment Act 1964* and *Police Act Amendment Act (No 2) 1975*.

⁷⁴ The major instances are: damage to property (s 80 and *Criminal Code* ss 444 and 465); challenge to fight (s 64 and *Criminal Code* s 73); possession of offensive weapons or housebreaking implements (ss 65(4), 65(4a) and 66(4), and *Criminal Code* s 407); unlawfully taking animals (s 79A and *Criminal Code* s 428); imposition on charitable institutions (s 66(2) and *Criminal Code* s 409); fraudulently manufacturing spurious metals (s 66(12) and *Criminal Code* s 409).

⁷⁵ Note that s 126 of the *Police Act* provides that nothing in the Act should prevent a person being prosecuted on indictment for an offence made punishable on summary conviction by the Act. S 127 allows a person charged with an offence cognisable by a court of superior jurisdiction to be committed for trial to a court of competent jurisdiction. For discussion of these provisions see Appendix II.

3.28 The position is complicated by the fact that many Code offences allow an alternative of summary prosecution for an indictable offence. Generally, such provisions give the defendant a right to elect summary trial, subject to the control of the court.⁷⁶ In such a situation there may be three possible alternatives. In a case involving damage to property, for example -

- * The defendant could be charged with the indictable offence of damage to property under section 444 of the Code, and prosecuted on indictment before a judge and jury. The maximum penalty on conviction is 10 years' imprisonment.⁷⁷
- * In cases involving damaging property other than by fire, the defendant could be charged with the indictable offence under section 444, but if the amount of the injury done does not exceed \$4,000, or if the amount of the injury done does not exceed \$10,000 and the court considers that the charge can adequately be dealt with summarily, the defendant may elect to be tried summarily by a Court of Petty Sessions. In this case, under section 465 of the Code the maximum penalty is imprisonment for 3 years or a fine of \$12,000.
- * The defendant may be charged with the simple offence of damage to property under section 80 of the *Police Act*. The defendant will be tried summarily by a Court of Petty Sessions, and the maximum penalty is imprisonment for 6 months or a fine of \$500.

If the defendant is charged with the indictable offence he or she has a say in whether or not the case is tried on indictment, but the initial decision whether to charge the indictable offence or the simple offence is in the hands of the police.

3.29 In the Discussion Paper⁷⁸ the Commission took the provisional view that if it was appropriate to provide a choice between summary prosecution and prosecution on indictment that choice should be exercised by the defendant, subject to the overriding control of the court, and that the continued existence of overlap between Code and *Police Act* offences, with the

⁷⁶ Note however *Criminal Code* s 426(3), under which, when an offender is charged with an offence under ss 378 (stealing) or 414 (receiving), it is the *prosecutor* who has the right to request the court to deal with the offence summarily.

⁷⁷ Unless the property is destroyed or damaged by fire, in which case the penalty is 14 years' imprisonment.

⁷⁸ Para 3.29.

decision as to which to charge being left in the hands of the police, was inconsistent with this principle. It suggested that the position be rationalised by eliminating *Police Act* offences which duplicated Code offences, instead amending the Code offence to permit the alternative of summary prosecution.

3.30 Having given this matter further consideration in the light of the views of commentators on the Discussion Paper, the Commission is persuaded that its initial view does not represent the most desirable approach to the problem. The Commission's initial view that summary offences should always give way to indictable offences was motivated by two factors -

- * The importance of the right of jury trial.
- * Legislative economy, ensuring that wherever possible the law prescribes one offence rather than two.

However, other factors work in favour of retaining the ability to choose between summary and indictable offences -

- * From the point of view of the police, mounting a summary prosecution is a much simpler and less time-consuming procedure than launching a prosecution for an indictable offence.
- * From the point of view of the defendant, a summary prosecution may be preferable. He or she will be able to plead guilty by indorsement, without making a personal appearance in court,⁷⁹ which is not possible in the case of indictable offences, even if the defendant intends to elect to be tried summarily. The trial may be over much sooner and the penalty may well be less severe.

3.31 The Commission's final view is therefore that no general principle should determine the outcome of situations where there are overlapping *Police Act* and Code offences. The balance of advantage will fall differently in different cases.

⁷⁹ See *Justices Act 1902* ss 135-136; Courts of Petty Sessions Report paras 6.21-6.26.

- * Thus, in cases of damage to property, for example, the Commission **recommends** that the simple offence should continue to exist alongside the Code offence, because it is a more suitable way of dealing with minor property damage cases.⁸⁰
- * Conversely, in cases of disorderly assembly, where there is an overlap between the simple offence in section 54A of the *Police Act* and the indictable offences of unlawful assembly and riot in sections 62 to 65 of the *Criminal Code*, the importance of the civil liberties considerations involved in such cases have influenced the Commission to recommend the repeal of the *Police Act* offence. In its place a defendant charged with one of the Code offences should be given the right to elect summary trial.⁸¹

5. POLICE POWERS PROVISIONS

3.32 The Commission's terms of reference require it to review the offences created by Parts V, VI and VII. Many sections in those Parts of the Act, in addition to prescribing offences, confer on the police powers to arrest, demand name and address, take particulars of identity, search persons, premises and vehicles, and seize property.⁸² These provisions, like the offence provisions, suffer from defects both of substance and of drafting. Though in some cases they are set out in separate sections which do not contain any offence,⁸³ many sections weave together offences and powers in a single section.⁸⁴

3.33 The Commission has a reference on privacy, under which it is required:

"To inquire into and report upon -

- (1) The extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of Western Australia, and the extent to which procedures adopted to give effect to those laws give rise to or permit such intrusions or interferences. . ."

⁸⁰ See paras 11.1-11.5 below.

⁸¹ See paras 7.7-7.9 below.

⁸² Similar powers are conferred by ss 122 and 123, the first two sections in Part VIII.

⁸³ Ss 40, 45, 46, 49, 50AA, 68, 70.

⁸⁴ Eg ss 41(1), 42, 43(1), 44.

Particular instances of intrusions and interferences specifically referred to in the terms of reference include:

"(c) powers of entry on premises or search of persons or premises by police and other officials . . ."⁸⁵

The terms of reference do not confine the Commission to these specific instances but require it to deal with all undue intrusions into or interferences with privacy.

3.34 With the approval of the Attorney General, the Commission is dealing with its privacy reference by examining specific areas involving privacy issues.⁸⁶ It has chosen to deal with the police powers conferred by the *Police Act* in this Report. Chapter 17 accordingly deals with arrest and powers ancillary to arrest, and Chapter 18 with search, entry and seizure. In considering these provisions the Commission has had regard to factors similar to those which have guided the Commission in making recommendations as to offences. In particular, many of the provisions in the *Police Act* simply duplicate provisions in the *Criminal Code* and are therefore redundant. The remaining powers must balance the need for the police to perform their duties effectively with the need to prevent unnecessary intrusions on civil liberties.

3.35 The most important provisions on police powers are in the *Criminal Code*. In the Commission's view, those *Police Act* powers that remain should be transferred to the Code, so that all the most important provisions on arrest, entry, search and the like can be found in the same statute. The recommendations made in Chapters 17 and 18 are designed to bring this about.

6. OTHER PROVISIONS IN THE POLICE ACT

3.36 Other provisions in Parts V, VI and VII deal with -

* Rights of aggrieved persons to recover compensation for damage or injury caused by offenders.⁸⁷

⁸⁵ The Commission has issued a Working Paper and Survey on *Privacy and Statutory Powers of Intrusion*.

⁸⁶ See eg Report on *Confidentiality of Medical Records and Medical Research* (Project No 65 Part II 1990); Discussion Paper on *Professional Privilege for Confidential Communications* (Project No 90 1991).

⁸⁷ Ss 80(3), 81, 82(1), 82(2), 82(3), 82A(1), 90A(3), 90A(4), 105, 106, 107, 110, 112, 114, 120. See also s 20 in Part II.

- * Court powers to order that stolen property be restored to its rightful owner,⁸⁸ that stolen goods be recovered from persons into whose hands they have come, and that unclaimed goods be disposed of.⁸⁹
- * Forfeiture of particular items of property, such as offensive weapons and housebreaking implements,⁹⁰ and more general forfeiture provisions.⁹¹
- * Various procedural matters.⁹²

Some of these provisions are contained in sections which also set out offence provisions, but others are not.

3.37 Likewise, there are procedural provisions in Part VIII which apply to prosecutions under the *Police Act*.

3.38 Most of these provisions are as outdated as many of the offence and powers provisions, having been drawn from the same sources. In view of its terms of reference the Commission has not given extended consideration to any of these provisions. However, if the Commission's recommendations are accepted, the offences that remain will be put in a separate Summary Offences Act and the powers will be transferred to the *Criminal Code*. The Government has already accepted a proposal to transfer the police administration provisions in the *Police Act* to a separate Police Administration Act. The result of this process will be to leave in the *Police Act* only a few isolated sections in Parts V, VI and VII and most of Part VIII. In Appendix II the Commission therefore sets out the results of its investigations into the origins of these provisions and its views as to whether they need to be retained, and if so, in which Act.

⁸⁸ Ss 76E, 82(3).

⁸⁹ Ss 72-76, 78.

⁹⁰ Ss 65, 66, 76E, 83.

⁹¹ Ss 90B and 90C.

⁹² Ss 50A, 52A, 67.

Part II - Offence Provisions

Chapter 4

PREVENTIVE OFFENCES

1. INTRODUCTION

4.1 The *Police Act* contains a number of "preventive" offences - offences with which a defendant may be charged when it is suspected that the person is about to commit, or is likely to commit, some other offence. A number of these offences are dealt with in this Chapter. In many cases they single out persons having no visible means of support or persons who fall into particular classes. Several of these offences require defendants to give a good account of themselves in order to escape conviction. Other preventive offences are dealt with in Chapter 12.

2. NO LAWFUL MEANS OF SUPPORT: SECTION 65(1)

4.2 Section 65(1) of the *Police Act* provides that:

"Every person having no visible lawful means of support or insufficient lawful means of support, who being thereto required by any Justice, or who having been duly summoned for such purpose, or brought before any Justice, shall not give a good account of his means of support to the satisfaction of such Justice"

commits an offence.

4.3 According to Kitto J in the High Court in *Zanetti v Hill*,¹ this section is not directed to the punishment of poverty in itself. It is concerned with people whose lawful means of support are insufficient for the way they are living: it assumes that such people are likely to resort to dishonest activities in order to maintain their lifestyle.²

¹ (1962) 108 CLR 433, 441.

² Ibid; cf 439 per Dixon CJ; 449 per Menzies J.

4.4 The Commission **recommends** that the offence be repealed³ because -

1. It is capable of being used as a device for investigating suspicious persons. Persons should not be liable to prosecution merely on suspicion of involvement in some unspecified wrongdoing.
2. It is inconsistent with the general principles of criminal law, which normally require the prosecution to prove all the elements of the offence beyond reasonable doubt. Under section 65(1) all that it is necessary for the prosecution to do is to raise a reasonable or probable presumption that the defendant has no visible lawful means of support.⁴
3. Most other Australian jurisdictions have abolished it.⁵
4. Few charges are laid under the section.⁶

4.5 The Police Union, unlike the Police Department which favoured repeal, argued that section 65(1) should be retained. The Union suggested that it was a means of controlling drug dealers and others who make a living from crime. If it is used in this manner, very little use is made of it. Other means are available to deal with these people. One is an order for the examination of a person by the Supreme Court where a restriction order has been made under the *Crimes (Confiscation of Profits) Act 1988*.⁷ Another is a monitoring order directing a financial institution to give information to a law enforcement agency.⁸

3. SLEEPING ROUGH: SECTION 66(9)

4.6 Section 66(9) provides that:

³ Most of those who commented on the matter, including the Police Department, favoured repeal of the offence.

⁴ *Zanetti v Hill* (1962) 108 CLR 433, 449. Kitto J at 442 dissented from the majority, holding that proof beyond reasonable doubt was necessary.

⁵ The equivalent offence has been abolished in South Australia, the ACT, the Northern Territory, New South Wales and Victoria. Apart from Western Australia, the offence survives only in Tasmania: (Tas) *Police Offences Act 1935* s 5 and Queensland: *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(i).

⁶ There were no charges in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁷ S 22(4)(c).

⁸ *Crimes (Confiscation of Profits) Act 1988* s 42.

"Every person wandering about or lodging in any outhouse, deserted or unoccupied building, or in the open air, or in any vehicle, not having any visible lawful means of support, and not giving a good account of himself"

commits an offence.

4.7 This, like the previous offence, is one of a number of ancient offences which deal with English social problems of the 16th to 19th centuries, in particular those of the poorer classes.⁹

The Commission **recommends** that this offence be repealed because -

1. It is out of step with modern ideas of civil liberties and inappropriate in current social conditions.
2. It is inconsistent with the general principles of criminal law, which normally require the prosecution to prove all the elements of the offence beyond reasonable doubt. All that it is necessary for the prosecution to do is to raise a reasonable or probable presumption that the defendant has no visible lawful means of support.
3. The offence is drafted in extremely wide terms. Literally it is an offence for persons to wander about in the open air and not to give a good account of themselves.
4. It is retained in only one other Australian jurisdiction: Tasmania.¹⁰
5. Few charges are laid under the section.¹¹

4.8 A distinction can be made between those who sleep rough on private property and those who sleep rough in other places, such as in parks or under bridges. While the former may well cause unease or disturbance to the occupants, the latter are unlikely to cause

⁹ Discussion Paper para 2.4.

¹⁰ *Police Offences Act 1935*(Tas) s 8(1)(i). The South Australian provision from which s 66(9) was derived (*Police Act 1869* s 63(13)), and the ACT and Northern Territory sections based on it (*Police Offences Ordinance 1930* (ACT) s 23(1)(q); *Police and Police Offences Ordinance 1923* (NT) s 57(1)(o)), have been repealed.

¹¹ There were no charges under this section in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

disturbance to anyone. However there is no need to retain section 66(9) to deal with those who sleep rough on private property because they can be dealt with by trespass offences.¹²

4. CONSORTING: SECTIONS 65(7) AND (9)

4.9 Section 65 provides that an offence is committed by:

"(7) The occupier of any house which shall be frequented by reputed thieves, prostitutes, or persons who have no visible means of support.

...

(9) Every person who habitually consorts with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support."

4.10 The first *Vagrancy Act* drafted for New South Wales, because of that colony's origins as a convict settlement, included provisions not found in English Vagrancy Acts - provisions which made it an offence to be in the company of certain persons or classes of persons thought to be undesirable. The Act provided that it was an offence to be in the company of aboriginal natives, or to be the occupier of a house frequented by reputed thieves or persons who had no visible lawful means of support, or a person found in a house with company with such persons.¹³ The *Police Act* 1892 inherited these provisions.¹⁴ A further provision was added to the New South Wales *Vagrancy Act* in 1929, making it an offence to consort habitually with reputed criminals or known prostitutes or persons who had been convicted of vagrancy. This was apparently inserted in the Act because of the prevalence of razor gangs in Sydney in the 1920's.¹⁵ It was still on the New South Wales statute book in 1955 (though the razor gangs had long since disappeared), in which year it was added to the Western Australian *Police Act* as section 65(9).¹⁶

4.11 The Commission **recommends** that these offences be repealed because -

¹² See Ch 8.

¹³ *Vagrancy Act 1835* (NSW) s 2.

¹⁴ S 65(2), dealing with being in the company of aboriginal natives, was repealed in 1974 (by the *Police Act Amendment Act 1974* s 3) but s 65(7) is still in force.

¹⁵ K Buckley *Offensive and Obscene: A Civil Liberties Casebook* (1970) 250.

¹⁶ By the *Police Act Amendment Act 1955* s 2. It was stated in Parliament that other States had found consorting laws to be an effective way of combating crime: Western Australian *Parliamentary Debates* (1955) Vol 141, 328.

1. It is inconsistent with the principles of the criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with particular people, whether they are known to be in a particular category or are merely reputed to fall into a particular category, should not be criminal. As King CJ pointed out:

"Apart from the statute the conduct to be punished may be quite innocent. A person may find, by reason of the family into which he was born and the environment in which he must live, that it is virtually impossible to avoid mixing with people who must be classed as reputed thieves. He is to be punished not for any harm which he has done to others, but merely for the company which he has been keeping, however difficult and even disloyal it might be to avoid it. The wisdom and even the justice of such a law may be, and often has been, questioned."¹⁷

2. The equivalent of section 65(7) has been abolished in a number of jurisdictions,¹⁸ and the equivalent of section 65(9) has been either abolished¹⁹ or confined within a much narrower compass by restricting it to consorting with known criminals.²⁰

4.12 In order to provide a means of preventing the commission of more serious offences, the Police Department submitted that the offence of consorting (section 65(9)) should be retained but redrafted to confine it to known criminals.²¹ However, if consorting offences provide a means of preventing offences,²² they do so in a very indirect way by limiting contact with known criminals.²³ The prosecution is not required to prove that the defendant has consorted with persons for an unlawful or criminal purpose: to constitute the offence, the

¹⁷ *Jan v Fingleton* (1983) 32 SASR 379, 380.

¹⁸ ACT, Northern Territory, New Zealand.

¹⁹ ACT.

²⁰ *Crimes Act 1900* (NSW) s 546A (habitually consorting with persons who have been convicted of indictable offences, knowing that they have been convicted of indictable offences); *Summary Offences Act 1981* (NZ) s 6 (habitually associating with a convicted thief in circumstances from which it can reasonably be inferred that the association is likely to lead to a crime involving dishonesty).

²¹ Two jurisdictions with modern summary offences, New South Wales and New Zealand, retain an offence of habitually consorting with known criminals: fn 20 above.

²² In practice, few charges are laid for these offences. There were no charges for either offence in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

²³ The legislative purpose which underlies consorting offences is one "designed to inhibit a person from habitually associating with persons of the . . . designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity": *Johanson v Dixon* (1979) 143 CLR 376, 385 per Mason J.

association need not have any particular purpose.²⁴ The law provides other, more direct, means of preventing the commission of offences, for example, the law of attempt²⁵ and the offences of incitement²⁶ and conspiracy.²⁷

5. SECTION 43(1) OFFENCES

(a) Introduction

4.13 Section 43(1) provides as follows:

"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."

4.14 The predominant purpose of section 43(1) was to confer on members of the police force a power to arrest without warrant where specified offences are committed. In the main, these are offences which appeared elsewhere in the Act -

- (1) being found disorderly (section 54);²⁸
- (2) using profane, indecent or obscene language or using threatening, abusive or insulting words or behaviour, with intent or calculated to provoke a breach of the peace (section 59);²⁹

²⁴ Id 383.

²⁵ *Criminal Code* s 552.

²⁶ Id s 553.

²⁷ Id ss 558-560.

²⁸ S 54, unlike s 43(1), also covers disorderly conduct in a police station or lock-up.

²⁹ S 43(1), unlike s 59, covers such conduct in a public vehicle or passenger boat.

- (3) negligent, careless or furious driving (section 57);
- (4) cruelty to animals (section 79).³⁰

4.15 As interpreted by the courts,³¹ the section also creates further preventive offences -

- (1) being suspected of having committed an offence;
- (2) being suspected of being about to commit an offence;
- (3) loitering; and
- (4) evil designs.

In each of these four cases failure to give a satisfactory account is an essential element of the offence. Unlike the provisions previously considered in paragraphs 4.2 to 4.12 above, the essence of these offences is suspicious **conduct** on a particular occasion, not a person's lifestyle or associations. These offences are discussed in the following paragraphs.

(b) Being suspected of having committed an offence and not giving a satisfactory account of oneself

4.16 Though no reported case confirms its existence, it appears that it is an offence under section 43(1) to be a person whom the police have just cause to suspect of having committed an offence and failing to give a satisfactory account.³² The Commission's attention has not been drawn to any use to which such an offence has been put, and it **recommends** that it be repealed.³³

(c) Being suspected of being about to commit any offence and not giving a satisfactory account of oneself

4.17 Section 43(1) makes it an offence to be suspected of being about to commit an offence and failing to give a satisfactory account of oneself.³⁴ No attempt to commit an offence is

³⁰ When s 79 of the *Police Act* was repealed and replaced by the *Prevention of Cruelty to Animals Act 1912*, the power of arrest in s 43(1) was allowed to remain, even though s 9 of the 1912 Act gave the police a power to arrest on warrant. The *Prevention of Cruelty to Animals Act 1920*, which replaced the 1912 Act and is still in force, added a power to arrest without warrant (s 10) modelled on s 43(1) of the *Police Act*.

³¹ See *Hagan v Ridley* (1948) 50 WALR 112; *Di Camillo v Wilcox* [1964] WAR 44; *Delmege v Smith* (unreported) Supreme Court of Western Australia, 2 May 1986, Appeal No 339 of 1985; *Sullivan v Johnson* (unreported) Supreme Court of Western Australia, 21 July 1986, Appeal No 307 of 1986.

³² It is probably only an offence because of the way s 43(1) is drafted.

³³ The 12 commentators who specifically referred to this offence agreed that it should be repealed.

³⁴ The wide potential of this offence is evident from *Delmege v Smith* (unreported) Supreme Court of Western Australia, 2 May 1986, Appeal No 339 of 1985, in which the defendant was arrested while

necessary. The Commission **recommends** that this offence be repealed³⁵ for the following reasons -

1. The criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement or an attempt. One suggested justification for the existence of the offence was that a person could not be charged with attempting or inciting another to commit a simple offence. This is no longer the case at least so far as simple offences under the *Criminal Code* are concerned.³⁶ In any case it is not a sufficient reason for retaining the offence. It is preferable to apply the law relating to attempting or inciting another to commit a simple offence under the Code to all simple offences.³⁷
2. The mischief with which this offence is concerned can be adequately dealt with by other offences.³⁸
3. Charges are seldom brought for this offence.³⁹
4. The offence has no equivalent in the legislation of any other Australian jurisdiction.

(d) Lying or loitering in any street, yard or other place and not giving a satisfactory account of oneself

4.18 This offence⁴⁰ involves two elements: loitering and failing to give a satisfactory account.⁴¹ Loitering involves something more than merely standing or waiting openly in the

demonstrating against a visit by United States ships and was charged with being suspected of being about to commit the offence of disorderly conduct. He was convicted, but the conviction was overturned on appeal on the grounds that on the evidence it was not possible for the magistrate to find that the police officer had just cause to suspect the defendant of being about to commit disorderly conduct, and that the magistrate had not found that the defendant had failed to give a satisfactory account of himself.

³⁵ A more limited offence should be created if one is needed. For example, it was suggested to the Commission that this part of s 43 could be used to deal with cheating in the written driving examination, but it would surely be preferable to create a more specific offence.

³⁶ See *Criminal Code* s 555A(1) and (2) (inserted in 1990).

³⁷ The Society of Labor Lawyers suggested that there should be a general attempt provision for simple offences.

³⁸ Eg loitering (see paras 4.18-4.21 below); trespass (see paras 8.1-8.17 below).

³⁹ There were none in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁴⁰ Nearly all the charges under s 43(1) are charges of loitering. 238 of the 272 charges brought under this subsection in the Perth and East Perth Courts of Petty Sessions in 1989 were for loitering: see Appendix IV.

⁴¹ *Hagan v Ridley* (1948) 50 WALR 112.

street.⁴² In *Attorney-General of Hong Kong v Sham Chuen*⁴³ the Privy Council considered the meaning of loitering under section 160(1) of the Hong Kong Crimes Ordinance.⁴⁴ It concluded:

"Obviously a person may loiter for a great variety of reasons, some entirely innocent and others not so. It would be unreasonable to construe the subsection to the effect that there might be subjected to questioning persons loitering for plainly inoffensive purposes, such as a tourist admiring the surrounding architecture. The subsection impliedly authorises the putting of questions to the loiterer, whether by a police officer or by any ordinary citizen. The putting of questions is intrusive, and the legislation cannot be taken to have contemplated that this would be done in the absence of some circumstances which make it appropriate in the interests of public order. So their Lordships conclude that the loitering aimed at by the subsection is loitering in circumstances which reasonably suggest that its purpose is other than innocent."⁴⁵

The time, place, and manner of action or inaction of the person concerned are all relevant to the question of whether there is loitering or not.⁴⁶ That person's motive may well be relevant to the question whether any account which the person subsequently gives is satisfactory.⁴⁷ Whether the account is satisfactory is a question for the court.

4.19 The arguments for retaining this type of offence are -

1. It is a preventative measure which allows a police officer to act on the officer's own observations of suspicious conduct, rather than on the complaint of a member of the public.⁴⁸ In particular it enables the officer to deal with a number of preparatory acts where there may be no indication of the exact nature of the contemplated offence or where the person may not have proceeded far enough to justify a charge of attempt.

⁴² Id 123 per Dwyer CJ.

⁴³ [1986] 1 AC 887.

⁴⁴ It provides that:

"Any person who loiters in a public place or in the common parts of any building shall, unless he gives a satisfactory account of himself and a satisfactory explanation for his presence there, be guilty of an offence . . .".

⁴⁵ At 896.

⁴⁶ See *Di Camillo v Wilcox* [1964] WAR 44, 48.

⁴⁷ Ibid.

⁴⁸ Hong Kong Law Reform Commission *Report on Loitering* (Topic 23 1990) para 8.15.

2. If this type of offence did not exist, the police might have to wait for, at the very least, an attempt, but this could endanger people⁴⁹ and property.⁵⁰

The arguments against retaining this type of provision or for retaining it in a different form are-

1. It is objectionable to place an obligation on a person to give a satisfactory account even though this may only be required where the person is loitering in "circumstances which reasonably suggest that its purpose is other than innocent".
2. The power could be exercised over persons whose behaviour was not otherwise unlawful such as demonstrators or protesters.
3. There are other means of preventing the commission of offences: warnings or cautions or simply the presence of a uniformed police officer.

4.20 Having considered the above arguments, the Commission **recommends** that the existing provision be replaced, as a preventative measure, with a "move-on" power in the following terms:⁵¹

- (1) Where a person is loitering in a public place and a police officer has reasonable grounds for believing that the person has committed, or is likely to commit, an offence or a breach of the peace, the police officer may request the person to give an explanation of his or her presence there and if the person does not give a reasonable explanation the officer may direct the person to leave the vicinity.
- (2) A person who contravenes a direction given under subsection (1) commits an offence.

⁴⁹ Eg where a person is observed following another, this might give rise to the suspicion that the loiterer is about to rob a vulnerable victim or commit a sexual assault.

⁵⁰ Eg peeping into or trying the doors or gates of buildings which might give rise to the suspicion that the loiterer is about to burgle the building or rob someone inside it.

⁵¹ For a similar power see the *Summary Offences Act 1953(SA)* s 18, *Summary Offences Act (NT)* s 47A(2) and *Police Offences Act 1930 (ACT)* s 35.

Penalty: \$500 or imprisonment for 6 months.

(3) It is a sufficient defence to a prosecution for an offence under subsection (2) if the defendant satisfies the court that he or she -

(a) did not have the capacity to understand the request or direction or to give a reasonable explanation; or

(b) gave the police officer a reasonable explanation for his or her presence in the place.

4.21 An offence formulated in this manner has the following advantages -

1. It continues to allow police officers to take action to prevent the commission of an offence where suspicious conduct has been observed. An officer would not have to wait for an attempt to be made before taking action.

2. However, a person could not be asked to give an explanation unless there was something which reasonably suggested that the loitering was other than innocent.

3. The person is given an opportunity to explain his or her presence in the place in question. The person cannot be directed to move on unless he or she fails to give a reasonable explanation.

4. It protects those in the community, such as migrants, aboriginals and intellectually handicapped persons, who may have poor communication skills by providing that it is a defence if the defendant satisfies the court that he or she did not have the capacity to understand the request or direction or to give a reasonable explanation.

5. It does not expand the scope of the criminal law to include behaviour which falls short of an attempt. The offence would be contravening a direction to leave the vicinity in the absence of a reasonable explanation for the person's

presence there. It is therefore a defence that the person gave a reasonable explanation.

(e) Being suspected of having evil designs and not giving a satisfactory account of oneself

4.22 This offence is made out if a person engages in morally reprehensible conduct for which the person is unable to offer any satisfactory explanation.⁵² All but one⁵³ of the cases of which the Commission is aware involve suspicious conduct towards children. Recent examples that have led to a charge or conviction are as follows -⁵⁴

1. Over a period of nine months, a man lured four girls aged between six and eight years into his home by bribing them with gifts and money. He was charged with two offences of "evil designs", 14 acts of aggravated sexual assault and one of aggravated indecent assault.⁵⁵
2. A man showed a 14 year old boy with cerebral palsy, on a number of occasions during a period of a month, "a video depicting bizarre sex".⁵⁶
3. A teacher tried to entice a 17 year old girl to pose nude for photographs. On another occasion he tried to entice a 16 year old girl to appear nude in a video which was to be sent to Asia.⁵⁷
4. A man pleaded guilty to three charges of having evil designs towards three girls, all under 13 years of age. He obtained their names from the pen-pal section of *The West Australian*, telephoned them and invited them to write to a fictitious 13 year old daughter. He replied to their letters pretending to be the

⁵² *Sullivan v Johnson* (unreported) Supreme Court of Western Australia, 21 July 1986, Appeal No 307 of 1986.

⁵³ The exception involved a man who followed a female shopper at a supermarket and looked down the front of her dress when she bent over: *Sullivan v Johnson* (unreported) Supreme Court of Western Australia, 21 July 1986, Appeal No 307 of 1986. Depending on the circumstances, this case might involve disorderly conduct: paras 6.1-6.15 below.

⁵⁴ There were 12 charges in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁵⁵ "Widower faces sex charges" *The West Australian* 6.4.1991.

⁵⁶ "Man fined for showing sex video to boy" *The West Australian* 26.9.1990.

⁵⁷ "Teacher tried to entice girl to pose nude" *The West Australian* 9.3.1990.

daughter. Eventually he asked them if they would masturbate in front of the daughter and if they would mind the daughter masturbating in front of them.⁵⁸

5. A trainee scout leader allegedly involved young boys aged from 13 to 16 in satanic cult and paedophile activities. He pleaded guilty to charges of "evil designs" and charges of indecent dealing with the boys. The basis for the "evil designs" charges was that he suggested to the boys that they take part in occult initiation ceremonies with sexual connotations.⁵⁹

4.23 The Commission **recommends** that the "evil designs" provision be repealed⁶⁰ because it is not necessary to deal with situations such as those referred to above for the following reasons -

1. The *Criminal Code* contains a number of offences for the protection of children. These provide ways of dealing with conduct of the type referred to in paragraph 4.22 above: for example showing offensive material to children under 16 years,⁶¹ indecently recording a child⁶² and procuring, inciting or encouraging a child to do an indecent act.⁶³
2. Alternative charges are available: for example, importuning for immoral purposes⁶⁴ and disorderly conduct in a public place.⁶⁵
3. There are other means of dealing with persons engaged in conduct of the kind for which the evil designs offence has been used: such as use of the proposed "move-on" power,⁶⁶ warnings, cautions or simply the presence of a uniformed police officer.

⁵⁸ *Pen-pal case a "sex fantasy" The West Australian* 3.1.1991.

⁵⁹ *Perth schoolboys in satanic orgies The West Australian* 12.3.1991.

⁶⁰ 13 of the 17 commentators on this matter agreed. Those opposed included the Police Department and the Police Union.

⁶¹ *Criminal Code* s 204A.

⁶² Id s 320(6).

⁶³ Id s 320(5).

⁶⁴ *Police Act* s 76G(1)(b): paras 9.30-9.33 below.

⁶⁵ Paras 6.1-6.15 below.

⁶⁶ Para 4.20 above.

4. Where the offender intends to commit some other offence it is not necessary to wait until harm is done because, at least in the case of indictable offences or simple offences under the *Criminal Code*, it is an offence to attempt to commit the offence.⁶⁷ Indeed, most of the cases mentioned in paragraph 4.22 above involved other offences or attempts to commit other offences.

5. It is wrong in principle that a person can be convicted because of a supposed intention, even if it is also necessary to establish failure to give a satisfactory account.

⁶⁷ *Criminal Code* ss 552 and 555A

Chapter 5

INTERFERENCE WITH THE POLICE AND ALLIED OFFENCES

1. INTERFERENCE WITH THE POLICE IN THE EXECUTION OF THEIR DUTY: SECTIONS 20, 41(1), 41(7), 66(7), 67(3) AND 90

(a) Offences

5.1 A number of offences scattered in different parts of the *Police Act* deal, in various ways, with interference with the police in the execution of their duty.¹ The most important of these is section 20² which provides that:

"If any person shall disturb, hinder, or resist any member of the Police Force in the execution of his duty, or shall aid or incite any person thereto, every such offender, being convicted thereof before any two or more Justices, shall for every such offence, forfeit and pay a sum not exceeding five hundred dollars; and also such further sum of money as shall appear to the convicting Justices to be a reasonable compensation³ for any damage or injury caused by such offender to the uniform, clothing, accoutrements, horse or vehicle of such member of the force, or of any medicine or other expenses incurred in consequence of personal injury sustained by him thereby, or may either instead of or in addition to such forfeiture and payment, be imprisoned for a term not exceeding six months."

Other similar offences are contained in sections 41(1),⁴ 41(7),⁵ 66(7),⁶ 67(3)⁷ and 90.⁸

5.2 Under section 20 it is an offence to disturb, hinder or resist any member of the police force in the execution of the officer's duty. The other offences all cover some or all of the

¹ In addition to the offences dealt with in this section, see s 42, refusing to leave premises (paras 8.12-8.14 below); s 50, neglecting or refusing to give name and address (para 17.35 below).

² It should be noted that there were 1161 charges under s 20 in the Perth and East Perth Courts of Petty Sessions in 1989, but no charges under ss 41(1), 41(7), 66(7), 67(3) or 90: see Appendix IV.

³ On compensation provisions see para 5.5 below.

⁴ Under which it is an offence for the master of a ship or any other person to resist or wilfully prevent or obstruct police exercising the powers of entry and search granted by s 41(1).

⁵ Under which it is an offence to resist or wilfully obstruct police exercising the powers to enter and detain vessels conferred by s 41(2).

⁶ Under which it is an offence for a person violently to resist arrest for an offence under s 65.

⁷ Under which it is an offence for a person violently to resist arrest for an offence under s 66.

⁸ Under which it is an offence for a person wilfully to prevent police authorised under the *Police Act* from entering premises, or obstruct or delay them in such entry.

same ground.⁹ One offence, section 41(7), is wider than section 20 in one particular respect: it provides that it is an offence to resist or wilfully obstruct not only a member of the police force but also a person lawfully assisting the officer.

(b) Recommendations

5.3 In the Commission's view, there is no need to retain all these overlapping offences. The Commission accordingly **recommends** that the offences in sections 41(1), 41(7), 66(7), 67(3) and 90 be repealed¹⁰ leaving section 20 as the sole simple offence in this area.¹¹ The other Australian jurisdictions have only a single summary offence of this kind.¹²

5.4 The Commission **recommends**, however, that section 20 be modernised. It suggests that this be done by redrafting the section in the following manner:

A person who disturbs, hinders or resists, or aids or incites any person to disturb, hinder or resist, a police officer in the execution of his or her duty or other person

⁹ The reason why the *Police Act* contains all these overlapping provisions is that they were all to be found in the South Australian *Police Act 1869* (except for section 41(7), which is a modern addition) which was the model for the *Police Act*: para 2.11 above. The South Australian Act drew them from a variety of sources in earlier English legislation. For example ss 20, 66(7) and 67(3) are derived from the *Vagrancy Act 1824*, and s 41(1) from the *Metropolitan Police Act 1839*.

¹⁰ Almost all of the commentators, including the Police Department, agreed. One commentator submitted that s 90 should be retained because it was a specific provision and Parliament had given specific consideration to the circumstances enumerated in the section, as evidenced by the higher penalty. S 90 is more specific but as para 5.11 of the Discussion Paper points out, it was originally one of the gaming provisions and was first separated from them and then left behind when they were removed. Thus the argument that Parliament had given specific consideration to the circumstances enumerated in the section does not take its history into account.

¹¹ Under s 172 of the *Criminal Code* it is an indictable offence to obstruct or resist any public officer, including a police officer, while engaged in the discharge or attempted discharge of the duties of his office under any statute. Though there is some common ground between this and the *Police Act* offence, the Code offence is concerned with any public officer carrying out statutory duties and so is much wider. The Commission considers that s 20 should continue to deal specifically with the police. The *Criminal Code* contains some other provisions relevant to interference with the police. Under s 176 it is an offence for any person who, having reasonable notice that he is required to assist a police officer in making an arrest or preserving the peace, omits to do so without reasonable excuse. Under s 318, before its amendment in 1985, it was an offence to assault, resist or wilfully obstruct a police officer in the execution of his duty. Following recommendations in the Murray Report 213, s 318 has been limited to assaults on public officers, on the basis that resistance and wilful obstruction is covered by s 172. Amendments to s 172 suggested in the Murray Report 107 have not been implemented.

¹² *Crimes Act 1914* (Cth) s 76; *Crimes Act 1900* (NSW) s 546C; *Summary Offences Act 1966* (Vic) s 52(1); *Summary Offences Act 1953* (SA) s 6; *Police Offences Act 1935* (Tas) s 34B; *Police Act 1937* (Qld) s 59. In some cases the above offences also refer to assaulting a police officer in the execution of his duty. In the Northern Territory the equivalent of s 20 has been repealed, although the equivalent of s 66(7) remains: *Summary Offences Act* (NT) s 57(1)(m). The major offence is found in s 121 of the *Criminal Code* (NT). In the ACT the sole provision appears in s 18 of the *Crimes (Offences Against the Government) Act 1989*.

lawfully assisting a police officer in the execution of his or her duty commits an offence.

Penalty: \$500 or imprisonment for 6 months.¹³

5.5 The effect of this provision is the same as section 20 except in two respects. First, it does not provide compensation for police officers: a provision for compensation in section 20 is no longer necessary in the light of the general provisions for compensation and restitution in the *Criminal Code* which are as wide as those in section 20.¹⁴ Secondly, the redrafted section 20 includes persons lawfully assisting the police. A similar provision presently appears in section 41(7), which the Commission **recommends** be repealed.

2. ESCAPING LEGAL CUSTODY AND ASSISTING ESCAPE

(a) Escaping legal custody: section 67(1)

5.6 Section 67(1) provides that:

"Every person who shall break or escape out of any legal custody"

commits an offence.¹⁵

5.7 Provisions in other legislation create offences of escaping from lawful custody. The *Criminal Code*¹⁶ provides that a prisoner in lawful custody after conviction for an indictable offence who escapes from such custody is guilty of a crime and liable to imprisonment for three years.¹⁷ The *Prisons Act 1981*¹⁸ provides that a prisoner who escapes or prepares or attempts to escape from lawful custody is guilty of an offence.¹⁹

¹³ This penalty is not as great as that under s 90 which provides for a term of imprisonment not exceeding two years.

¹⁴ Ss 716A-719.

¹⁵ There were 138 charges in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

¹⁶ S 146.

¹⁷ The Murray Report 101 recommended that this section be amended so as to apply to simple offences as well as indictable offences, and that the penalty be increased. These recommendations have not been implemented.

¹⁸ S 70(c).

¹⁹ "Prisoner" means a person committed to prison for punishment, on remand, for trial, to be kept in strict custody, for contempt of court or Parliament or otherwise ordered into strict security or safe custody, or otherwise ordered to be detained in a prison: s 3.

5.8 The Commission **recommends** that section 67(1) be retained²⁰ because it has a much wider scope than the Code offence: it applies to a person in lawful custody who has not been convicted of an offence. Again, section 67(1) has a wider scope than the *Prisons Act* offence: it applies to escape from lawful custody other than a prison.²¹

(b) Assisting escape: section 67A

5.9 Section 67A, added to the *Police Act* in 1975,²² provides that:

"Any person who aids, harbours, maintains, or employs another person who, to his knowledge, has broken or escaped out of any legal custody and is illegally at large, commits an offence and is liable on summary conviction to a fine not exceeding five hundred dollars or to a term of imprisonment not exceeding six months or both."²³

5.10 Apart from section 67A there are various provisions in the *Criminal Code* dealing with assisting an escapee. Section 145(1) provides that a person who aids a prisoner in escaping or attempting to escape from lawful custody is guilty of a crime and liable to imprisonment for seven years. Section 148 provides that any person who harbours, maintains or employs a person who is an offender under sentence of such a kind as to involve deprivation of liberty and illegally at large is guilty of a misdemeanour and liable to imprisonment for two years.²⁴ Section 67A is wider than either of these provisions because it applies to assisting any persons who have escaped from legal custody and not just those under sentence. The Commission therefore **recommends** that section 67A be retained.

3. HARBOURING OR ASSISTING SUSPECTED PERSONS

5.11 Section 41(1), after giving police powers to stop, detain, enter and search vessels and arrest suspected persons,²⁵ deals with the situation where such persons are on board ship.²⁶ It provides that:

²⁰ This is consistent with the recommendations in the Murray Report 100.

²¹ The Commission suggests that the provisions in the *Police Act*, the *Criminal Code* and the *Prisons Act* be rationalised, perhaps when the recommendations in the Murray Report concerning s 146 of the Code come to be considered.

²² By the *Police Act Amendment Act (No 2) 1975* s 34.

²³ There were 11 charges in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

²⁴ The Murray Report 102 recommended that this section be amended so as also to apply to a person who aids this type of offender.

²⁵ See paras 18.48-18.49 (entry and search), 17.16 (arrest).

²⁶ S 41(1) is curious in that the offence is stated to be a misdemeanour, yet is triable before justices.

". . . if the master . . . shall harbour or conceal, or rescue or attempt to rescue, or assist any such suspected persons, such master and every other person so offending shall be deemed to have committed a misdemeanour, and shall suffer such punishment by fine, not exceeding five hundred dollars, and such imprisonment, with or without hard labour, for a term not exceeding six months, as any two or more Justices before whom such offender shall be convicted, shall determine."

This provision differs from section 67A of the *Police Act*²⁷ and *Criminal Code* provisions²⁸ in that it applies to "suspected persons". The other provisions apply to persons in "legal custody", in "lawful custody", "undergoing a sentence" or "under sentence".

5.12 This offence is anomalous in that it applies only to ships. It is also little used²⁹ and there is no equivalent offence in other Australian jurisdictions. The offence could be retained and extended to apply generally so as to make it an offence to harbour or assist a person known to be a "suspected person". However, such an offence would endanger the cohesion of families and the Commission does not consider that such disruption is warranted where a person is merely a suspected person. Accordingly, the Commission **recommends** that the offence of harbouring, concealing, rescuing or attempting to rescue or assist suspected persons contained in section 41(1) be repealed.³⁰

4. FALSE REPORTS: SECTION 90A

5.13 Section 90A provides that:

"(1) Every person who, by a written or oral statement made to a member of the Police Force, represents, contrary to the fact and without a genuine belief in the truth of his statement, the existence of a circumstance reasonably calling for police investigation or inquiry commits an offence.

(2) Every person who does any act, with the intention of creating the belief or suspicion that -

(a) an offence has been committed; or

²⁷ Para 5.9 above.

²⁸ Ss 144, 145, 146 and 148.

²⁹ There were no charges for harbouring or assisting a suspected person in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

³⁰ All but one of the 14 who commented on this offence, including the Police Department and the Police Union, agreed that it should be repealed.

- (b) **human life has, or may have, been lost; or**
- (c) **a person's safety is, or may be, endangered,**

knowing, at the time of doing that act, that the circumstance with respect to which he intends to create the belief or suspicion does not exist, commits an offence.

...

(5) A person guilty of an offence against this section is liable on conviction to a fine not exceeding five hundred dollars and to imprisonment for a term not exceeding six months, or both."

5.14 Section 90A was inserted in the *Police Act* in 1945,³¹ as a result of concern at the number of false reports being made to the police, and that under the existing law it was not possible to take proceedings against the persons responsible.³² The section was re-enacted with amendments in 1962.³³ Section 90A can be used to deal with various kinds of conduct, including false distress calls and bomb hoaxes.³⁴ Similar legislation is in force in most other Australian jurisdictions.³⁵ The Commission **recommends** that section 90A be retained.³⁶

³¹ By the *Police Act Amendment Act 1945* s 3.

³² Western Australian *Parliamentary Debates* (1945) Vol 115, 670-671.

³³ By the *Police Act Amendment Act 1962* s 4, as to which see Western Australian *Parliamentary Debates* (1962) Vol 161, 558.

³⁴ Following a recommendation in the Murray Report 228-230, s 338C of the *Criminal Code* provides an indictable offence of making false statements as to the existence of threats or plans to harm persons or property, which is triable summarily in appropriate cases (see *Criminal Code* s 5). The Report contemplated that the offence in section 90A would remain, and recommended that the penalty be increased to 18 months' imprisonment or a fine of \$3,000: Murray Report 229.

³⁵ *Summary Offences Act 1966* (Vic) s 53; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 34A; *Police Offences Act 1935* (Tas) s 44A; *Summary Offences Act 1953* (SA) ss 62, 62A; *Summary Offences Act* (NT) s 68A.

³⁶ There were 8 charges in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

Chapter 6

DISORDERLY CONDUCT AND RELATED OFFENCES

1. DISORDERLY CONDUCT: SECTIONS 54, 59 and 44

(a) Offences

6.1 Section 54 sets out the offence of disorderly conduct:

"Every person who shall be guilty of any disorderly conduct on any street, public place, or in any passenger boat or vehicle, any Police Station, or lock-up, shall, on conviction, be liable to a penalty of not more than five hundred dollars for every such offence, or to imprisonment, with or without hard labour, for any term not exceeding six calendar months, or to both fine and imprisonment."

6.2 Section 59 deems certain conduct to be disorderly conduct, and also sets out a number of related offences:

"Every person who in any street or public place or to the annoyance of the inhabitants or passengers, shall sing any obscene song or ballad, or write or draw any indecent or obscene word, figure, or representation, or use any profane, indecent, or obscene language, shall be deemed guilty of disorderly conduct and be punishable accordingly, and any common prostitute who shall solicit, importune or accost any person or persons for the purpose of prostitution, or loiter about for the purpose of prostitution in any street, or place, or within the view or hearing of any person passing therein, and any person who shall use any threatening, abusive, or insulting words or behaviour in any public or private place, whether calculated to lead to a breach of the peace, or not, or who shall extinguish wantonly any light set up for public convenience, shall forfeit and pay on conviction any sum not exceeding forty dollars, or may be committed to gaol for any period not exceeding one calendar month."¹

6.3 Section 44 creates further offences covering similar ground, but dealing specifically with disorderly conduct on board ships and in licensed premises:

"Any constable, when so ordered by any officer of police, and any officer or constable of the force whenever called upon by the master or any officer of any

¹ Soliciting is dealt with in paras 9.21-9.27 below. Extinguishing lights set up for public convenience is dealt with in para 11.10 below.

ship or vessel (not being then actually employed in Her Majesty's Service and not being a vessel of war, the commanding officer whereof shall hold a commission from any foreign Government or Power), lying in any of the waters of the State or any dock thereto adjacent, may enter into and upon such ship or vessel, and without any warrant other than this Act, apprehend any person whom he may find behaving himself in an indecent or disorderly manner, or using profane, indecent, or obscene language, or using any threatening, abusive, or insulting words or behaviour, with intent or calculated to provoke a breach of the peace; and any officer or constable of the force may enter at any hour of the day or night into any house licensed for the sale of fermented or spirituous liquors, or any licensed boarding, eating, or lodging house, and without any warrant other than this Act, apprehend any person whom he may find behaving himself in an indecent or disorderly manner, or using any such language as aforesaid or words or behaviour as aforesaid, with intent or calculated to provoke a breach of the peace; and to search therein for offenders and otherwise perform his duty, using as little annoyance to the inmates as possible; and any person so apprehended shall be detained in custody until he can be brought before a Justice to be dealt with for such offence; and every such person so apprehended shall unless a different penalty for his offence be prescribed by this Act be liable on conviction to a fine not exceeding one hundred dollars, or imprisonment for a term not exceeding one month."

6.4 In many cases, the conduct covered by section 44 would be an offence under section 54 or section 59. Such conduct would therefore not be an offence under section 44.² Where ships other than passenger boats and certain kinds of licensed premises are not public places, an offence may only be committed under section 44.³

6.5 There is much overlap between these sections. Together they cover the following kinds of conduct -

- (a) disorderly conduct⁴ (section 54) or behaving in an indecent or disorderly manner (section 44);

² Since, under the final words of s 44, ss 54 and 59 prescribe a different penalty for the offence.

³ S 43 is similar to s 44 in that it gives the police power to arrest a person conducting himself in a disorderly manner, using profane, indecent or obscene language, or using 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 then provides that the person is to be detained in custody until he can be brought before a justice to be dealt with for "such offence". It has been held that s 43 creates certain offences (see paras 4.13-4.23 above), but there is no authority suggesting that it creates offences of conducting oneself in a disorderly manner, using profane, indecent or obscene language, or using threatening, abusive or insulting words or behaviour.

⁴ Disorderly conduct is conduct which is not only sufficiently ill-mannered or in bad taste to meet with the disapproval of well-conducted and reasonable men and women, but also tends to annoy or insult persons faced with it sufficiently deeply or seriously to warrant the interference of the criminal law: *Melser v Police* [1967] NZLR 437, 444 per Turner J. It involves a breach of the peace, or a likelihood of a breach of the peace occurring: *Comerford v Pollard* (unreported) Supreme Court of Western Australia, 29 July 1982, Appeal No 131 of 1982, 3 per Olney J.

- (b) singing any obscene song or ballad (section 59);
- (c) writing or drawing any indecent or obscene word, figure or representation (section 59);
- (d) using any profane, indecent or obscene language (sections 59, 44);
- (e) using any threatening, abusive or insulting words or behaviour⁵ (sections 59, 44).⁶

Generally the proscribed conduct must occur in a public place, though under section 59 the conduct in (e) is also proscribed in a private place.

6.6 These provisions are much used in practice. Most charges under section 54 are for disorderly conduct,⁷ as are most charges under section 59.⁸ Examples of disorderly conduct are scuffles between individuals in a bar⁹ and throwing a flare with smoke coming from it onto the deck of a visiting American warship causing fear and alarm amongst people in the general area.¹⁰

⁵ Threatening, abusive and insulting behaviour are familiar concepts in the criminal law. Words or behaviour are threatening if they cause persons of ordinary firmness to apprehend physical harm to their persons or property. Where a qualification is added, such as "If you want fight, you can have it as much as you like", the words may not amount to threatening words: *Lipman v McKenzie* (1903) 5 WALR 17. They are abusive if those who hear them are likely to be provoked to violence by what was said; and they are insulting if they assail the person at whom they are directed with offensively dishonouring or contemptuous speech or action: *Little v Pickett* (unreported) Supreme Court of Western Australia, 18 April 1979, Appeal No 7 of 1979, adopting the test used by the High Court in *Thurley v Hayes* (1920) 27 CLR 548. The cases cover a wide range of situations. At one extreme are expressions of personal animosity (eg *Moran v Stack* (unreported) Supreme Court of Western Australia, 31 March 1983, Appeal No 333 of 1982 ("gestapo bastard")); at the other are expressions of political: eg *Brutus v Cozens* [1973] AC 854 (anti-apartheid demonstration at Wimbledon) or racist views: eg *Jordan v Burgoyne* [1963] 2 QB 744.

⁶ S 44 requires that the words or behaviour must be with intent or calculated to provoke a breach of the peace, but under s 59 this is immaterial.

⁷ There were 2,822 charges under s 54 in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV. 2,805 of these were for disorderly conduct.

⁸ There were 394 charges under s 59 in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV. 260 of these were for disorderly conduct, 55 for threatening words or behaviour, 38 for insulting words or behaviour, 33 for soliciting for the purpose of prostitution and 8 for obscene language.

⁹ *Green v Rolfe* (unreported) Supreme Court of Western Australia, 14 February 1983, Appeal No 340 of 1982.

¹⁰ *Gerritsen v Smith* (unreported) Supreme Court of Western Australia, 16 October 1985, Appeal No 212 of 1985.

6.7 In most cases the provisions in sections 54, 59 and 44 are limited to happenings in a street or public place.¹¹ However section 54 also includes any passenger boat or vehicle and any police station or lock-up, and section 44 deals with conduct on board ship, or in premises licensed for the sale of fermented or spirituous liquors, or licensed boarding, eating or lodging houses. Section 59 includes behaviour which does not take place in a street or public place but annoys "inhabitants or passengers", that is, people who are in a street or public place. It appears that the insertion of the word "or" after the words "in any street or public place" may have been a draftsman's error, because the earlier legislation required both that the conduct take place in a public place and that it annoy inhabitants or passengers.¹² It is however consistent with legislation in other jurisdictions to regulate disorderly conduct and the like which takes place on private property if it is within the view or hearing of persons in a public place.¹³ There is an important distinction between such a situation and one in which the conduct in question does not affect anyone in a public place: thus no offence was committed by a woman who annoyed her neighbour by uttering obscene words as she hung up her washing in her own back yard.¹⁴ In one instance, however, section 59 is not consistent with these principles. The use of threatening, abusive or insulting words, whether calculated to lead to a breach of the peace or not, is an offence in any public or private place.

6.8 In *Keft v Fraser*,¹⁵ the Supreme Court of Western Australia suggested that, in determining whether an offence had been committed under sections 54 or 59, all public places are not the same. The appellant, whose stage name was Rodney Rude, had been convicted of using obscene language in a public place. He had given a performance in the Perth Concert Hall, during which he made frequent use of the word "fuck" and its derivatives. The audience had been warned that language which might offend would be used, but were apparently enthusiastic about the performance. Burt CJ said that whether conduct was disorderly had to be judged by having regard, inter alia, to the audience and the nature of the public place in which the performance was held:

"The idea of a 'public place' as used in the statute is not simply geographical. It is assumed to contain human beings with ears. And so regarded all public places are not

¹¹ Reference both to a street and to a public place is strictly unnecessary, since "street" is defined by s 2 as including "road, thoroughfare and public place".

¹² *Keft v Fraser* (unreported) Supreme Court of Western Australia, 21 April 1986, Appeal No 428 of 1985, 6-8 per Burt CJ.

¹³ Eg *Summary Offences Act 1988* (NSW) s 4.

¹⁴ *Ross v Gaskin* (unreported) 17 April 1984 (see (1974) 17 *JPWA Journal* 167).

¹⁵ (Unreported) Supreme Court of Western Australia, 21 April 1986, Appeal No 428 of 1985.

the same. If it be a place where people of all kind are assembled such as, to take a local example, the Hay Street Mall at high noon, then the use of the words complained of here if uttered for all to hear could, I think, be fairly described as being obscene and to use such words in that way and in that place and at that time could fairly, I think, be described as being disorderly conduct. Their use upsets the order of that place by interfering with the free use of that place by persons who have a right to use that place without being subjected to words which offend them and cause them distress. . . . The words in this case were not uttered in Hay Street Mall, they were used in a public place which was the Perth Concert Hall and in the hearing of 1800 adults, each of whom had been told in advance that 'some language might offend'.¹⁶

6.9 These words do not imply that an offence will never be committed if the conduct takes place in a hall or other premises which people have paid to enter, and the audience is appreciative of the performance. All the circumstances have to be taken into account, including the place and the nature of the conduct in question. In *Keft v Fraser* the court distinguished the earlier case of *Carroll v Gutman*¹⁷ in which it was held that another entertainer, Austen Tayshus, had been rightly convicted of using obscene language. Burt CJ said that in that case the obscenity appeared both in the words used and the ideas conveyed.¹⁸ The fact that the performance had taken place in a hotel bar, and that those who had heard it had paid an entrance fee to do so, did not prevent it from being adjudged obscene. The court reached a similar decision in *Cullen v Fuller*,¹⁹ in which the respondent had performed a striptease act in the public bar of a hotel. She was charged with acting in an indecent manner in a public place. In the light of evidence as to the details of her act, the court held that the offence had been committed. The magistrate had misapplied the decision in *Keft v Fraser* by construing it to mean that whether or not indecent behaviour in a public place constituted disorderly conduct was to be determined by a consideration of the nature of the place and the audience, without reference to other factors.

(b) Recommendations

(i) Introduction

6.10 The above offences play an important part in regulating the activities of individuals in society. People should not be prevented from saying or doing particular things merely because other members of society disapprove. On the other hand, in the interests of the

¹⁶ Id 10-12.

¹⁷ (Unreported) Supreme Court of Western Australia, 19 July 1985, Appeal Nos 82-83 of 1985.

¹⁸ (Unreported) Supreme Court of Western Australia, 21 April 1986, Appeal No 428 of 1985, 9.

¹⁹ (Unreported) Supreme Court of Western Australia, 25 November 1986, Appeal No 439 of 1986.

community as a whole, the freedom to say and do as one wishes in public cannot be completely unrestricted. The major difficulty with the existing law is the form in which it is set out. There is no logical reason why the law should be set out in three separate sections, particularly as there is much duplication and overlapping between them and the sections also deal with quite different matters such as prostitution and damage to property. Nor is there any logic in the strange relationship between section 54 and section 59, as a result of which some (but not all) of the offences particularised in section 59 are deemed to be disorderly conduct under section 54. As Burt CJ pointed out in *Keft v Fraser*,²⁰ the sections are "legislative curiosities".²¹

(ii) *Proscribed conduct*

6.11 The Commission **recommends** that sections 54, 59 and 44 be combined and redrafted in a modern form so as to eliminate the duplication and illogicality of those sections. The redrafted provision should provide that any person who is guilty of any disorderly conduct or uses any threatening, abusive or insulting words or behaviour commits an offence. This is the same as the existing sections except in those respects discussed below.

6.12 The Commission considered reducing the various offences now found in sections 54, 59 and 44 to a single all-embracing formula.²² It concluded that this was unlikely to be satisfactory because it would inevitably be vague and open-ended and would require application to particular situations by the courts before its meaning became clear. The advantage of the approach adopted by the Commission is that it is based on the wording of the existing offences and there is already a considerable body of judicial authority to assist in determining how those offences apply in particular situations.

6.13 One respect in which the Commission's recommendation departs from the existing law is that it does not expressly make -

²⁰ (Unreported) Supreme Court of Western Australia, 21 April 1986, Appeal No 428 of 1985, 4.

²¹ The form in which they appear in the Act results from the draftsman having copied them from the *South Australian Police Act 1869*. The reason why the South Australian draftsman included all three provisions is not clear. It is not easy to trace them back into the early 19th century English legislation, though see *Metropolitan Police Act 1839 (UK)* s 54(11), (12) and (13) and *Town Police Clauses Act 1847 (UK)* ss 28(16), 28(18) and 29 for some of the provisions.

²² As was done in NSW (*Offences in Public Places Act 1979* s 5, see now *Summary Offences Act 1988* s 4) and the ACT (*Crimes Act 1900* s 546A); Discussion Paper para 6.16.

- (a) singing any obscene song or ballad;
- (b) writing or drawing any indecent or obscene word, figure or representation; or
- (c) using any profane, indecent or obscene language,

an offence. The Commission considers that it is unnecessary to make express provision for them because each type of conduct is capable of amounting to "disorderly conduct", depending on the circumstances. As with the present law, the courts will define disorderly conduct.

(iii) *Places in which conduct is proscribed*

6.14 There are inconsistencies in the existing offences as to the place in which the proscribed conduct takes place:

- (a) Disorderly conduct is an offence if committed on any street, public place, or in any passenger boat or vehicle, police station or lock-up (section 54) but behaving in an indecent or disorderly manner is also an offence if committed in any ship or vessel (not being then actually employed in Her Majesty's Service, and not being a foreign warship) lying in State waters or any dock thereto adjacent, or any house licensed for the sale of spirituous liquors or any licensed boarding, eating or lodging house (section 44).
- (b) Singing obscene songs or ballads, and writing or drawing indecent or obscene words, figures, or representations, are offences if committed in any street or public place or to the annoyance of the inhabitants or passengers (section 59).
- (c) Using profane, indecent or obscene language is an offence if committed in any street or public place or to the annoyance of the inhabitants or passengers (section 59), or in any public vehicle or passenger boat (section 43(1)), or in any ship or vessel (not being then actually employed in Her Majesty's Service, and not being a foreign warship) lying in State waters or any dock thereto

adjacent, or any house licensed for the sale of spirituous liquors or any licensed boarding, eating or lodging house (section 44).

- (d) Using threatening, abusive or insulting words or behaviour is an offence if committed in any public **or private** place, whether calculated to lead to a breach of the peace or not (section 59), but if done with intent or calculated to provoke a breach of the peace is an offence if committed in any public vehicle or passenger boat (section 43 (1)), or in any ship or vessel (not being then actually employed in Her Majesty's Service, and not being a foreign warship) lying in State waters or any dock thereto adjacent, or any house licensed for the sale of spirituous liquors or any licensed boarding, eating or lodging house (section 44).

6.15 To rationalise this position, the Commission **recommends** that the conduct which is the subject of the proposed offence²³ should be proscribed in, or within view or hearing from, a public place,²⁴ and in any parts of a police station or a police lock-up that are not a public place. As compared with the existing law, the proposed offence would -

1. Include a naval ship or vessel and, indeed any military conveyance, that is in a public place.
2. Include both disorderly conduct and threatening, abusive or insulting words or behaviour in any parts of a police station or police lock-up. The Commission considered confining the proscribed conduct to those parts of a police station or police lock-up that are a public place. However, in the absence of disciplinary offences like those that apply to prisons,²⁵ the police would be deprived of a means of preventing and controlling misconduct in these places which would affect both the officers concerned and those held in custody.

²³ Para 6.11 above.

²⁴ For example, "public place" might be defined as follows:

(a) a place (whether or not covered by water); or

(b) a part of premises,

that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons; or

(c) a means of conveyance that is in a public place: see *Summary Offences Act 1988 (NSW)* s 3.

²⁵ *Prisons Act 1981* Part VII.

3. Exclude threatening, abusive or insulting words or behaviour when committed in a private place and not within view or hearing from a public place. This change is consistent with the principle that the purpose of the legislation is to control conduct in a public place, or within the view or hearing of persons in a public place. Other Australian jurisdictions have an offence of using threatening, abusive or insulting words or behaviour, but in every case it is limited to happenings in public places, or within the view or hearing of persons in public places.²⁶

4. Limit the proposed offence to conduct in a public place. This would mean that, unlike section 59, it could not be used to deal with domestic violence: the power to arrest the offender would not be available to deter a repeat of the misconduct. However, in most domestic violence situations an assault would be involved²⁷ and the power to arrest for this offence would provide a deterrent.²⁸ Persistent difficulties in a domestic situation can also be dealt with by orders to keep the peace²⁹ and other means of dealing with domestic violence, such as counselling.³⁰ Recently, the Domestic Violence Advisory Council in its Discussion Paper on a Proposal to Enact Family Violence Legislation (May 1992) recommended that family violence legislation be introduced giving a police officer power to enter any place where family violence has occurred or is occurring for so long as is necessary to arrange and give assistance to any person to ensure that the danger of family violence no longer exists. Where there are reasonable grounds for suspecting that family violence is likely to occur and there is an imminent danger of personal injury, a police officer would have power to detain any person for a reasonable period for the purpose of obtaining and serving a restraining order on him or her.

²⁶ *Summary Offences Act 1966* (Vic) s 17(1); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 7; *Summary Offences Act 1953* (SA) s 7; *Police Offences Act 1935* (Tas) s 12.

²⁷ Assault includes attempting or threatening to apply force of any kind by any bodily act or gesture: *Criminal Code* s 222.

²⁸ Under the Commission's preferred approach to arrest, a person could be arrested for the purpose of preserving the safety and welfare of the person: paras 17.11-17.12 below.

²⁹ *Justices Act 1902* Part VII.

³⁰ See *Break the Silence* Report of the Task Force on Domestic Violence to the Government of Western Australia (1986) para 9.43.

2. CHALLENGE TO FIGHT: SECTION 64

6.16 Section 64 provides:

"Every person who shall send or accept, either by word or letter, or publish any challenge to fight for money, or shall engage in any prize-fight, shall upon conviction thereof by any two or more Justices, forfeit and pay a sum not more than two hundred and fifty dollars, or may be imprisoned, with or without hard labour, for any term not exceeding three calendar months; and the convicting justices may, if they shall think fit, also require the offender to find sureties for keeping the peace."

6.17 A "prize-fight", as the term was understood in the 19th century, was a fight with fists (usually bare fists) for reward.³¹ It is an offence not only to engage in prize-fighting but also to send, accept or publish a challenge to fight for money. It is immaterial whether the fight takes place in a public or a private place.

6.18 The Commission **recommends** that section 64 be repealed.³² Summary offences in the *Boxing Control Act 1987*³³ deal with the problem of boxing contests for reward in money or money's worth³⁴ in the modern context. In addition, there is an offence similar to section 64 in the *Criminal Code*.³⁵ If the *Criminal Code* offence were retained, a "summary conviction penalty" could be provided for the offence, thus enabling the charge to be dealt with summarily at the election of the person charged if a Court of Petty Sessions considered that it could adequately be dealt with summarily.³⁶

³¹ *Pallante v Stadiums Pty Ltd* (No 1) [1976] VR 331, in which McInerney J discusses the history of prize-fighting.

³² All but one of those who commented, including the Police Department and the Police Union, agreed.

³³ It is an offence to engage in a boxing contest when not registered as a boxer (s 24), to arrange a boxing contest when not registered as an industry participant (s 33) or to promote, arrange or conduct a boxing contest without a permit (s 47(1)).

³⁴ Under s 3 of the *Boxing Control Act 1987* "boxing contest" means a "contest, display or exhibition between 2 boxers but does not include -

- (a) sparring, other than sparring for public entertainment;
- (b) a prescribed test, display or exhibition of boxing;
- (c) a contest, display or exhibition of boxing for a prescribed prize not being a contest, display or exhibition of boxing persons who engage in boxing for a monetary prize or other reward in money or money's worth."

³⁵ S 73. This offence is a misdemeanour carrying a penalty of imprisonment for one year. The Murray Report 70 recommended that it be increased to two years' imprisonment.

³⁶ *Criminal Code* s 5.

3. EXPOSING OBSCENE PICTURES TO THE PUBLIC: SECTION 66(5)

6.19 Section 66(5) provides that:

"Every person exposing to view in any street, road, thoroughfare, highway, or public place, or who shall expose or cause to be exposed in any window, or other part of any shop or other building situate in any public place, or highway, or who shall offer for sale or attempt to dispose of any obscene print, picture, drawing, or representation"

commits an offence.³⁷

6.20 The Commission **recommends** that section 66(5) be repealed. It has been superseded by the *Indecent Publications and Articles Act 1902* which regulates and in appropriate cases prohibits the sale, distribution, publication and exhibition of indecent and obscene articles,³⁸ pictures, drawings or representations and printed or written matter.³⁹ In particular, the printing, sale, possession for sale, publishing, distribution or exhibition of an indecent or obscene article, book, paper, newspaper, writing, picture, photograph, lithograph, drawing or representation is an offence under section 2. The sale or hire, possession for sale or hire, publication, distribution, display or exhibition of restricted publications in a street or public place is an offence under section 11.⁴⁰ The Murray Report⁴¹ recommended the repeal of section 204 of the *Criminal Code*, which deals with obscene publications and exhibitions, because it has been overtaken by the provisions of the *Indecent Publications and Articles Act 1902*.

³⁷ There were 12 charges under s 66(5) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

³⁸ S 1A(1) of the Act provides that "article" includes:

"(a) any cinematographic or other type of film, slide and any other form of recording from which a visual image can be produced; and

(b) any gramophone record, wire recording tape or other device or thing by or on which words or sounds are recorded and from which they are capable of being reproduced".

In the Commission's view, this covers all of the items (prints, pictures, drawings or representations) set out in s 66(5).

³⁹ S 66(5) is derived from a provision in s 4 of the *Vagrancy Act 1824 (UK)* which has now been repealed. An equivalent of the subsection was either not adopted or has since been repealed in the other Australian jurisdictions. There is a modern equivalent of the subsection in the *Summary Offences Act 1953 (SA)* (s 33).

⁴⁰ The penalties provided by these sections are lower than that provided by s 66(5) of the *Police Act*. For example, under s 2 of the *Indecent Publications and Articles Act 1902* the maximum penalty for a first offence is \$250 or imprisonment for three months. The maximum penalty under s 66(5) of the *Police Act* is \$1,000 or imprisonment for 12 months. The penalties provided by the *Indecent Publications and Articles Act 1902* could be reviewed if thought necessary.

⁴¹ 129.

**4. WILFUL AND OBSCENE EXPOSURE OF THE PERSON:
SECTION 66(11)**

6.21 Section 66(11) provides that:

"Any person wilfully and obscenely exposing his person in any street or public place, or in the view thereof, or in any place of public resort"

commits an offence.⁴²

6.22 The offence is committed if the exposure -

- (a) takes place in a street or public place, or in view thereof, or in any place of public resort;⁴³ and
- (b) is wilful and obscene.⁴⁴

6.23 The Commission **recommends** that the offence be redrafted in the following gender neutral terms:

A person who wilfully and obscenely exposes his or her genitals to any other person in or within view of a public place commits an offence.

Penalty: \$1,000 or imprisonment for 12 months.

6.24 The existing section refers to the wilful and obscene exposure by the defendant of "his person". This is a euphemism of long standing, also found in equivalent provisions in most other jurisdictions. In England it has been held to be a synonym for "penis",⁴⁵ suggesting that only males can be convicted of the offence. In Western Australia, however, the offence has

⁴² There were 64 charges under s 66(11) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁴³ A public place is one where the public have a right of access at any hour of the day or night, whereas a place which the public can enter only at certain times (for example, a room in a private house in which an auction was being held) is a place of public resort: *Morgan v Smallman* (1874) 5 ALJ 165.

⁴⁴ "Obscene" has essentially the same meaning as in s 59: that is, an exposure is obscene if it transgresses the generally accepted bounds of decency and goes so far beyond the accepted standards as to shock the tribunal of fact: Discussion Paper para 6.8.

⁴⁵ *Evans v Ewels* [1972] 2 All ER 22.

not been limited in this way.⁴⁶ The proposed redraft of the offence makes it clear that both males and females may be convicted of the offence.⁴⁷

6.25 As with the existing provision, nudity in itself is not obscene. Nor is wilful exposure of the genitals.⁴⁸ It is the circumstances in which the exposure takes place and before whom that may render the exposure obscene. The Commission acknowledges that, given the anatomical differences between the genitals of males and females, it is an offence which is rarely likely to be committed by a female.

6.26 The proposed redraft also removes the distinction between a public place and a place of public resort, a distinction which is obscure.

5. REGULATION OF HOUSES OF PUBLIC RESORT: SECTION 84

6.27 Section 84 provides as follows:

"(1) Every person who shall have or keep any house, shop, or room, or any place of public resort, and who shall wilfully and knowingly permit drunkenness or other disorderly conduct in such house, shop, room, or place, or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall, on conviction for every such offence, be liable to a fine not exceeding two hundred and fifty dollars, or imprisonment for a term not exceeding three months: provided always, that if the offender be a person licensed under the *Liquor Act 1970*,⁴⁹ this enactment shall not be construed to exempt him from the penalties or penal consequences to which he may be liable for committing an offence against that Act or the regulations made thereunder.

⁴⁶ S 10(a) of the *Interpretation Act 1984* provides that in any written law "words importing the masculine gender include the feminine". In *Valle v Whyte* (unreported) Supreme Court of Western Australia, 29 November 1983 Appeal No 313 of 1983 there was no suggestion that the offence could not be committed by women: see fn 48 below.

⁴⁷ The *Summary Offences Act 1988* (NSW) s 5 ("his or her person") and the *Summary Offences Act 1981* (NZ) s 27 ("his or her genitals") expressly extend the offence to men and women in the same terms.

⁴⁸ In *Hilderbrandt v Boom* (unreported) Supreme Court of Western Australia, 21 July 1983, Appeal No 138 of 1983, it was held that no offence was committed where the respondent was merely standing in a path in the sandhills with his bathers down to his knees and his penis in his hand without attempting to attract attention. In *Valle v Whyte* (unreported) Supreme Court of Western Australia, 29 November 1983, Appeal No 313 of 1983, it was held that a woman who was posing in the nude for a photographer on Scarborough Beach did not commit the offence. Similarly, in New South Wales, it was held that a woman on Bondi Beach who used zinc cream to make it appear that she was wearing a bikini did not commit an offence under s 6 of the *Offences in Public Places Act 1979* (NSW) (now replaced by s 5 of the *Summary Offences Act 1988*(NSW): "Woman wins right to go nude at Bondi" *The West Australian*, 3 June 1988, 22. What is obscene must be judged according to the current standards of decency of the community: *Cullen v Meckelenberg* [1977] WAR 1.

⁴⁹ Now repealed and replaced by the *Liquor Licensing Act 1988*.

(2) Every person who, being the occupier, keeper or person having the charge or control of a shop or other place of public resort, shall knowingly permit or suffer a child apparently under the age of sixteen years to enter and remain therein, under such circumstances as shall indicate that the mental, physical or moral welfare of such child is likely to be in jeopardy, shall on conviction for every such offence, be liable to a fine not exceeding one hundred dollars, or imprisonment for a term not exceeding one month."

6.28 Section 84(1) creates an offence of permitting drunkenness or disorderly conduct on premises of the kind covered by the section, or permitting prostitutes or persons of notoriously bad character to meet there. As the proviso indicates, there are equivalent offences under the liquor licensing legislation in respect of licensed premises.⁵⁰ Despite the punctuation, it is clear that the words "of public resort" qualify the words "house, shop, or room" as well as "place".⁵¹

6.29 As section 84(1) applies to a wider range of premises than the liquor licensing legislation, it should be retained⁵² so as to complement it. The offence may be necessary where there is disorderly conduct on unlicensed premises such as a "BYO" restaurant. However, it requires redrafting. Although the drafting of the offence has been modernised, it still contains vague and uncertain criteria.⁵³ In addition, as was stated above,⁵⁴ it is inconsistent with the principles of the criminal law to make it an offence to have some association with or merely to allow a meeting of particular people. Offences should proscribe conduct thought deserving of punishment. To overcome these problems, the Commission **recommends** that the offence be redrafted as follows:

A person who keeps premises where provisions or refreshments are sold or consumed and who knowingly permits drunkenness or disorderly conduct to take place on these premises commits an offence.

⁵⁰ See now *Liquor Licensing Act 1988* s 115. S 84 of the *Police Act* applies to a wider range of premises than the *Liquor Licensing Act* offence.

⁵¹ S 58 of the *Police Ordinance 1861* began "Whereas it is expedient that the Provisions made by Law for preventing disorderly Conduct in the Houses of licensed Victuallers be extended to other Houses of public Resort . . .".

⁵² Though few, if any, charges are laid under it. There were no charges for either offence in the Perth and East Perth Courts of Petty Sessions in either 1984-1985 or 1989: see Appendix IV.

⁵³ In particular, the reference to suffering or permitting "prostitutes or persons of notoriously bad character to meet together and remain therein".

⁵⁴ Para 4.11.

Penalty: \$250 or imprisonment for three months.⁵⁵

6.30 This draft does not contain a provision equivalent to section 84(2).⁵⁶ A child whose mental, physical or moral welfare is likely to be in jeopardy would best be dealt with under the care and protection provisions of the *Child Welfare Act 1947*.⁵⁷ Under this Act⁵⁸ an authorised officer of the Department for Community Services or a police officer may approach any child appearing or suspected to be in need of care and protection, for example, where the child is "found in such circumstances . . . as to indicate that the mental, physical or moral welfare of the child is likely to be in jeopardy".⁵⁹ Following such an apprehension, the Children's Court of Western Australia can declare a child to be in need of care and protection and may order that the child be committed to the care of the Department or placed under the control of the Department.⁶⁰

⁵⁵ The equivalent offence in South Australia, s 20 of the *Summary Offences Act 1953*, has been modernised along similar lines.

⁵⁶ Like s 84(1), s 84(2) appears not to be used. The section formerly contained no qualification relating to the circumstances of the child's presence. In *Higgon v O'Dea* [1962] WAR 140 the defendant was convicted of permitting a person under the age of 16 years to enter and remain in an amusement arcade. The Full Court held that the words had to be given their literal meaning, even though the result was absurd, because this was the only construction possible, and so it was an offence to allow a child to enter any premises of the kind in question. As a result of this decision, the section was amended by the *Police Act Amendment Act 1963* s 4 so as to limit it to presence in specified circumstances.

⁵⁷ Ss 29-32.

⁵⁸ S 29.

⁵⁹ *Child Welfare Act 1947* s 4.

⁶⁰ *Id* s 30.

Chapter 7

OFFENCES RELATING TO PUBLIC ASSEMBLIES

1. INTRODUCTION

7.1 Two provisions of the *Police Act*, sections 52 and 54A, provide means of controlling crowds of people. Section 52 gives the Commissioner of Police power to prevent the obstruction of streets. Section 54A provides a means of dealing with an assembly of three or more people which disturbs the peace or which will needlessly provoke other persons to disturb the peace. Other provisions for the control of crowds of people are found in sections 62-65 of the *Criminal Code* (which deal with unlawful assemblies and riots) and the *Public Meetings and Processions Act 1984*. The latter Act replaced the much criticised section 54B¹ of the *Police Act*, which had been enacted in 1976.² It authorises the Commissioner of Police to grant a permit for a public meeting or procession in a street.³

2. OBSTRUCTION OF THE STREETS: SECTION 52

7.2 Section 52 provides:

"(1) The Commissioner of Police, from time to time, and as occasion shall require, may give instructions to members of the Police Force for the purpose of regulating the route and pace to be observed by all vehicles, horses, and persons, and for preventing obstruction of the streets and thoroughfares by processions, meetings, or assemblies or in case of fires, and to provide for keeping order and for preventing any obstructions of the thoroughfares in the immediate neighbourhood of all public buildings and offices, theatres, and other places of public resort, and in any case where the streets or thoroughfares may be thronged or may be liable to be obstructed, and to prevent any interference with or annoyance of any congregation, or meeting engaged in divine worship in any building consecrated or otherwise, and for keeping order and preventing obstructions on and near the water on which any sporting event or other assembly is held, but no such instruction shall be given for the purpose of frustrating -

¹ See Western Australian *Parliamentary Debates* (1979) Vol 224, 1996-1999 and 2010-2018.

² By the *Police Act Amendment Act 1976* s 5. The section was repealed and re-enacted by the *Police Act Amendment Act 1979* s 4.

³ For a more detailed account of the Act see paras 7.10-7.11 below.

- (a) **the holding of a meeting or the conduct of a procession authorized pursuant to a permit or order granted under the *Public Meetings and Processions Act 1984*; or**
 - (b) **the holding or conduct of an event on a road closed pursuant to an order granted under Part VA of the *Road Traffic Act 1974*.⁴**
- (2) **A member of the Police Force acting in accordance with instructions given under subsection (1) of this section may give such directions as may seem expedient to him to give effect to those instructions.**
- (3) **Every person who, after being acquainted with the same, fails to observe or contravenes any directions given under subsection (2) of this section commits an offence.**

Penalty: One hundred dollars.

- (4) **The power vested in the Commissioner of Police by subsection (1) of this section may be exercised by any member of the Police Force of or above the rank of sergeant duly authorized by the Commissioner of Police for the purpose."**

7.3 In spite of amendments to the section in 1976 and 1979,⁵ the drafting style of the section remains cast in the 19th century mould. Moreover, the ambit of the powers given to the Commissioner of Police by the section is not very clear. The section sets out a number of particular kinds of instructions which the Commissioner has power to give.⁶ In addition it empowers the Commissioner to give instructions "in any case where the streets or thoroughfares may be thronged or may be liable to be obstructed". Read literally, this might seem to give the Commissioner very wide powers. However a decision on the equivalent English provision⁷ confirms that the words "in any case" must be read as confined to situations of the kind set out previously. If this decision applies to section 52, the words of the section now give a misleading view of its scope.

7.4 The Commission **recommends** that section 52 should be retained to supplement the provisions of the *Public Meetings and Processions Act 1984*.⁸ It allows the Commissioner of Police to issue instructions in cases where there has been no application under the 1984 Act or

⁴ This Part provides provisions similar to those in the *Public Meetings and Processions Act* for events on roads (such as race meetings or speed tests) which do not include an event that is a public meeting or procession under the *Public Meetings and Processions Act*.

⁵ *Police Act Amendment Act 1976* s 4; *Police Act Amendment Act 1979* s 3.

⁶ The exercise of the power conferred on the Commissioner may be delegated to a police officer of or above the rank of sergeant.

⁷ *Brownsea Haven Properties Ltd v Poole Corporation* [1958] Ch 574, dealing with s 21 of the *Town Police Clauses Act 1847* (UK).

⁸ Paras 7.10-7.12 below.

to which that Act does not apply. No other provision in the *Police Act* allows the police to issue instructions in such circumstances. These instructions cannot be used to frustrate the purposes of the 1984 Act.

7.5 While the Commission considers that the provision should be retained, it **recommends** that it should be modernised, and should set out more clearly the circumstances in which it applies. It should be redrafted in the following manner:⁹

(1) The Commissioner of Police may give instructions to police officers for -

- (a) regulating traffic of all kinds;
- (b) preventing obstructions;
- (c) maintaining order,

in any public place.

(2) No such instruction shall be given for the purpose of frustrating -

- (a) the holding of a meeting or the conduct of a procession authorized pursuant to a permit or order granted under the *Public Meetings and Processions Act 1984*;
or
- (b) the holding or conduct of an event on a road closed pursuant to an order granted under Part VA of the *Road Traffic Act 1974*.

(3) A police officer acting in accordance with instructions given under subsection (1) may give such directions as may seem expedient to him or her to give effect to those instructions.

(4) A person who knowingly contravenes a direction given under subsection (3) commits an offence.

Penalty: \$100.

⁹ This redraft is based on the *Summary Offences Act 1953 (SA)* s 59 and the existing s 52.

(5) The power vested in the Commissioner of Police by subsection (1) may be exercised by any police officer of or above the rank of sergeant duly authorized in writing by the Commissioner of Police for the purpose.¹⁰

(6) In this section "public place" means -

- (a) a place (whether or not covered by water); or
- (b) a part of premises,

that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons.

7.6 The Commission recommended above¹¹ that offences which it proposes for retention be separated from the police administration provisions and the other provisions found in the *Police Act* and be incorporated in a Summary Offences Act. While the proposed provision does contain an offence, it is merely incidental to a provision which gives the Commissioner of Police power to prevent obstructions and maintain order in public places, so long as the exercise of the power does not frustrate the holding of a meeting or the conduct of a procession authorised under the *Public Meetings and Processions Act 1984*. Nevertheless, the Commission **recommends** that the proposed provision be incorporated in the proposed *Summary Offences Act* and not the proposed Police Administration Act.

3. **DISORDERLY ASSEMBLY: SECTION 54A**

7.7 Section 54A provides:

"(1) A disorderly assembly is an assembly of three or more persons who assemble in such a manner or who so conduct themselves when they are assembled as to give persons in the neighbourhood of the assembly reasonable grounds to apprehend that the persons so assembled -

¹⁰ The power to delegate to officers of or above the rank of sergeant has been retained because, in a State the size of Western Australia, commissioned officers are not widely distributed.

¹¹ Paras 3.2-3.3.

- (a) **will disturb the peace; or**
- (b) **will by that assembly needlessly provoke other persons to disturb the peace.**
- (2) **Persons lawfully assembled may become a disorderly assembly if being assembled they conduct themselves in such a manner as is referred to in subsection (1) of this section.**
- (3) **Any member of a disorderly assembly who, after being warned by a member of the Police Force to disperse immediately and go peaceably to his home or his lawful business, neglects or refuses to do so, commits an offence.**

Penalty: Five hundred dollars or a term of imprisonment not exceeding six months or both.¹²

7.8 This section was added in 1970¹³ to deal with situations in which large crowds had gathered, and in which proving the offence of disorderly conduct under section 54 against particular individuals was impossible.¹⁴ The section is a summary equivalent of the Code offences of unlawful assembly and riot¹⁵ and the drafting of the section was obviously based on these offences. According to the second reading speech, there was a need for a simple offence to deal with assemblies for which the higher penalties under the Code offences were not appropriate.¹⁶

7.9 The Commission **recommends** that section 54A be repealed for the following reasons -

1. Because a charge for this offence raises issues of civil liberties and freedom of assembly and speech, the offence created by this section is one for which the person charged should have the opportunity to be tried by a jury which is provided by a charge under the equivalent Code offences. That opportunity should not depend on the exercise of a discretion by a police officer to charge under either section 54A or the Code offences.

¹² There was only one charge under s 54A in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

¹³ By the *Police Act Amendment Act (No 2) 1970* s 3.

¹⁴ *Western Australian Parliamentary Debates* (1970) Vol 188, 1548. The second reading speech mentions particular incidents on the Scarborough beachfront.

¹⁵ Criminal Code ss 62-65.

¹⁶ *Western Australian Parliamentary Debates* (1970) Vol 188, 1548. See however the suggestion in Russell 236 that the offence was introduced to avoid the necessity for jury trial.

2. It is unnecessary to retain the offence to deal with assemblies for which the higher penalties under the *Criminal Code* are inappropriate, because this problem can be dealt with by providing a "summary conviction penalty" for the Code offences. To enable charges under sections 63 or 64 of the Code to be dealt with summarily at the election of the person charged¹⁷ if the court, having regard to the nature and particulars of the charge, considers that the charge can be adequately dealt with summarily,¹⁸ the Commission **recommends** that a "summary conviction penalty" be provided for these offences.

4. PUBLIC MEETINGS AND PROCESSIONS ACT 1984

7.10 Under the *Public Meetings and Processions Act 1984* a person who or a body which proposes to hold a public meeting or conduct a procession in a street may give written notice to the Commissioner of Police setting out the proposal and applying for a permit.¹⁹ If the meeting or procession substantially conforms with the terms of the permit, a person participating in the meeting or procession is not guilty of any offence against the provisions of any Act or law regulating the movement of traffic or pedestrians, or relating to the obstruction of a street.²⁰ It is, however, an offence to act in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting or procession assembled, or to obstruct the free passage of ambulances, fire brigade vehicles or police vehicles at a public meeting or procession conducted pursuant to a permit.²¹

7.11 The provisions of the 1984 Act operate subject to any directions given under section 52 of the *Police Act*.²² However section 52 provides that instructions given by the Commissioner of Police are not to be given for the purpose of frustrating the holding of a meeting or the conduct of a procession authorised under the 1984 Act.

7.12 The Commission considered whether the provisions of the *Public Meetings and Processions Act 1984* should be integrated with sections 52 and 54A (if retained) in a

¹⁷ Even if this involves a more complex procedure: para 3.30 above.

¹⁸ Criminal Code s 5.

¹⁹ S 5(1).

²⁰ S 4(1).

²¹ *Public Meetings and Processions Act 1984* s 9.

²² Id s 4.

reformed *Police Act* but decided to **recommend** that they not be so integrated. The purposes of the 1984 Act are sufficiently different from those of section 52 to warrant a separate Act. Whereas section 52 deals with obstructions of the streets, the 1984 Act creates a right to obtain a permit to use streets for public meetings and processions.

Chapter 8

BEING UNLAWFULLY ON LAND OR PREMISES AND RELATED OFFENCES

1. BEING UNLAWFULLY ON LAND OR PREMISES

(a) Offences

8.1 The *Police Act* contains several offences which involve being unlawfully on land or premises. They have been added to the Act at different times for different purposes.

(i) *Being found in a place for an unlawful purpose: section 66(8)*

8.2 Section 66(8) provides that:

"Every person being found in or upon any place, stable, or outhouse for any unlawful purpose"

commits an offence.

8.3 This section was originally enacted in Western Australia in 1849¹ and can ultimately be traced back to United Kingdom legislation.² It is limited to particular places - stables, outhouses, and similar places³ - a list which makes obvious the antiquity of the section. It is also limited by the requirement that the defendant be found in the place in question and by the need to show that the defendant was there for an unlawful purpose. The purpose is unlawful when it is related to an intention to do something which, if carried out, would be an offence under the criminal law.⁴ A specific unlawful purpose need not be alleged or proved: the circumstances surrounding the defendant's presence may be such that, in the absence of explanation, a general inference that the purpose was unlawful may be drawn.⁵

¹ *Police Ordinance 1849* s 10.

² *Vagrancy Act 1824(UK)* s 4.

³ Nichols 98 suggests that the *ejusdem generis* rule would be applied to the term "place", so as to limit it to places of a kind similar to stables or outhouses.

⁴ *Hare v Clarey* (1951) 53 WALR 78.

⁵ *Ibid.*

(ii) *Being on premises without lawful excuse: section 66(13)*

8.4 Section 66(13) provides that:

"Any person who is or has been, without lawful excuse, in or upon any premises or the curtilage, whether enclosed or fenced or not, of any premises"

commits an offence.

8.5 Section 66(13) was added to the *Police Act* in 1962.⁶ The debates in Parliament reveal that one of the main purposes of the new section was to deal with peeping toms, who prior to 1962 could only be dealt with under section 43(1).⁷ In such cases it would be difficult to prove the unlawful purpose required by section 66(8). Instead section 66(13) requires proof of the absence of lawful excuse.⁸ This makes it unnecessary to establish a criminal purpose. All that it requires is a judgment by the court that the defendant's presence on the premises is not excusable in all the circumstances of the case (bearing in mind that the defendant is charged with an offence punishable by imprisonment) and that the defendant's conduct may well be innocent or excusable for this purpose though otherwise indefensible.⁹ Section 66(13) is also much wider than section 66(8): there is no requirement that the defendant be found in the place in question, and it applies to any premises or the curtilage of any premises. "Premises" in this context means a building. The curtilage of premises is land which is regarded as part and parcel of the premises,¹⁰ such as a courtyard, garden, field or piece of ground adjoining a building. All buildings, and not just dwelling houses, may have a curtilage.¹¹

8.6 Section 66(13) is a more comprehensive provision than section 66(8). However, charges continue to be brought under both provisions.¹² Section 66(8), because it requires an unlawful purpose, may be seen as the more serious offence.

⁶ By the *Police Act Amendment Act 1962* s 2.

⁷ Western Australian *Parliamentary Debates* (1962) Vol 161, 558. Section 43(1) is dealt with at paras 4.13-4.23 above.

⁸ The burden of proving absence of lawful excuse is on the prosecution: *Wills v Williams* [1971] WAR 29.

⁹ *Hancock v Birsa* [1972] WAR 177.

¹⁰ *Lacey v Cave* (unreported) Supreme Court of Western Australia, 4 September 1991, No 1013 of 1991, 6.

¹¹ *Hislop v Spurr* [1983] WAR 180.

¹² 39 charges were brought under s 66(8) and 294 under s 66(13) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

(iii) *Trespassing on enclosed land: section 82A*

8.7 Section 82A provides that:

"(1) Every person who shall, without lawful excuse, enter into the enclosed land of another person, without the consent of the owner, occupier or person in charge thereof, and shall cause damage or injury to any property such as is mentioned in section eighty-two of this Act shall pay to the party aggrieved the amount of any damage or injury done and shall be liable to a fine not exceeding one hundred dollars.

(2) The owner, occupier or person in charge of enclosed land who shall find a person on the land whom he has just cause to suspect of having entered into the land without consent may demand and require of that person his name and address, and any such person who shall neglect or refuse to give his name and address or who shall give a false name and address when applied to as aforesaid shall upon conviction be liable to a fine not exceeding twenty dollars.

(3) The provisions of this section shall be read and construed as in aid of, and not in derogation from, the provisions of section eighty-two of this Act and not in derogation from the rights of a person at law.

The term "enclosed land" mentioned in this section means any land, either public or private, that is enclosed or surrounded by a fence, wall or other erection, or partly by a fence, wall or other erection, and partly by some natural feature, such as a river or cliff, by which the boundaries thereof may be known or recognized; but does not include any road enclosed with the land."

8.8 Section 82A was inserted in the Act in 1963.¹³ In contrast to sections 66(8) and 66(13) which deal with being unlawfully on premises, section 82A concerns trespass on enclosed land. It appears that section 82A was drafted primarily with rural land in mind.¹⁴ However it is capable of being applied to other kinds of enclosed property (for example industrial premises). The section would not cover a suburban dweller whose property was not bordered by a wall or fence on the road frontage.

8.9 The offence is not committed unless the defendant not only trespasses but also causes damage or injury to property. It therefore appears to add nothing to section 80, under which it is an offence to destroy or damage real or personal property of any kind.¹⁵ It appears that the real purpose of section 82A was to give landowners increased powers to deal with the problem of trespassing. According to the Minister's second reading speech, there was a special

¹³ By the *Police Act Amendment Act 1963* s 3.

¹⁴ See para 8.9 below.

¹⁵ On s 80, see paras 11.1-11.2 below.

problem with trespassers on farms, and in particular with trespassers who entered to pick mushrooms.¹⁶ Under the pre-1963 law the owner of the property had power to arrest any person committing a summary offence on the property.¹⁷ This was insufficient to deal with the problem. It was thought necessary to give the owner power to recover compensation for the damage, and to demand the name and address of the trespasser.¹⁸ Thus, section 82A(2) provides that a name and address may be demanded whenever the owner finds a person on the land whom he or she has just cause to suspect of having entered the land without the owner's consent. It is not necessary that the entrant should also have caused damage to the property. As a sanction, section 82A(2) creates another offence of neglecting or refusing to give a name and address on demand, or giving a false name and address.

8.10 There are a number of peculiarities in the drafting of section 82A.¹⁹ Like many offences in the *Police Act*, no mental element is specified, as respects either the entry or the causing of damage. It is not clear why section 82A is limited to property of a kind dealt with in section 82,²⁰ or why it was necessary to provide in section 82A(3) that section 82A is not to be read in derogation of section 82.

8.11 The Commission has received no information that large numbers of charges are brought under section 82A. Indeed, it seems likely that few charges are brought under the section.²¹ Section 82A was drafted primarily with rural areas in mind and statistics of charges for country areas are not available.

(iv) *Unlawfully remaining on premises: section 82B*

8.12 Section 82B provides that:

"(1) A person shall not, without lawful authority, remain on any premises after being warned to leave those premises -

¹⁶ Western Australian *Parliamentary Debates* (1963) Vol 165, 2590. The problem of persons entering property to discharge firearms was also referred to.

¹⁷ S 49, as to which see para 17.21 below.

¹⁸ Western Australian *Parliamentary Debates* (1963) Vol 165, 2590-2591.

¹⁹ See E K Braybrooke "Review of Legislation" (1964) 6 *UWALRev* 502, 514-515; E K Braybrooke "Some Recent Developments in Statute Law" (1965) 7 *UWALRev* 111, 153-154.

²⁰ S 82 is dealt with at paras 13.31-13.34 below.

²¹ There were none in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

- (a) **in the case of premises occupied by the Crown or a public authority, by a person in charge of the premises or by a member of the Police Force;**
- (b) **in the case of premises other than premises occupied by the Crown or a public authority, by the owner or a person in charge or occupation of the said premises or by a member of the Police Force.**

Penalty: \$500 or 6 months' imprisonment.

(2) A person who for the purposes of and in accordance with subsection (1) of this section warns some other person to leave premises may, at the same time as he gives the warning, indicate to such person that part of the premises which the person concerned is required to leave and in any such circumstances the part of the premises so indicated shall constitute the premises for the purposes of that subsection.

...²²

(4) In this section -

"premises" includes any land, building, structure, or any part thereof;

"public authority" means an authority or body (not being an incorporated company or association) constituted by or under a law of the State or the Commonwealth."

8.13 This section was inserted in the *Police Act* in 1980.²³ According to the Minister's second reading speech,²⁴ the purpose of the amendment was to increase the power of the police to deal with situations where persons enter property and refuse to leave. Under the previous law police officers assisting the owner in removing such persons had no more powers than ordinary citizens. Problems had arisen in particular instances (for example passive occupations of offices and gate-crashing of private parties). It was said that similar offences existed in some form or another in all other States.

8.14 Despite the statements made in Parliament, it seems likely that the primary purpose behind section 82B was to deal with events occurring elsewhere than on ordinary private premises. The section covers not only premises occupied by the Crown or a public authority, but also privately owned premises of every kind, including commercial premises (such as

²² For s 82B(3), see para 8.21 below.

²³ By the *Police Amendment Act 1980* s 6. There were 115 charges under s 82B in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

²⁴ Western Australian *Parliamentary Debates* (1980) Vol 229, 1882.

shopping centres) and industrial premises.²⁵ The definition of premises in section 82B(4) makes it clear that it covers both buildings and land not built on.

(b) Recommendations

8.15 Since new provisions have been tacked on to old ones to deal with emerging problems, there is much overlap between the existing provisions. This review of the *Police Act* provides an opportunity to rationalise them. To do this, the Commission **recommends** that sections 66(8), 66(13), 82A and 82B(1) and (2) be repealed and replaced with the following provision:

- (1) A person who -
- (a) enters the premises of another for an unlawful purpose;
 - (b) enters the premises of another without lawful excuse; or
 - (c) remains on premises, without lawful authority, after being requested to leave by the owner, occupier or person in charge of the premises or, at the request of the owner, occupier or person in charge of the premises, by a police officer,

commits an offence.

Penalty: for an offence under paragraph (a): \$1,000 or imprisonment for 6 months;
for an offence under paragraph (b) or (c): \$500 or imprisonment for 3 months.

- (2) A person who for the purposes of and in accordance with subsection (1)(c) requests some other person to leave premises may, at the same time as he or she makes the request, indicate to such person that part of the premises which the person concerned is required to leave and in any such circumstances the part of the premises so indicated shall constitute the premises for the purposes of that subsection.

²⁵ On the potential application of the offence to industrial premises, reference was made during the debates on the bill to demonstrations at Worsley: Western Australian *Parliamentary Debates* (1980) Vol 230, 2379. Confirming the applicability of the offence in such situations, in *Erlandsen v McIntosh* (unreported) Supreme Court of Western Australia, 16 February 1984, Appeal No 368 of 1983, it was held that the offence was committed by a worker on factory premises during an industrial dispute. On the potential application of the offence to shopping centres, see Western Australian *Parliamentary Debates* (1980) Vol 230, 2387-2388.

(3) In this section, "premises" includes any land, building, structure, or any part thereof.

8.16 This provision deals with conduct at present covered by sections 66(8), 66(13) and 82B. It does not cover section 82A, which requires that the trespasser do damage or injury to property. This is already covered by the offence of damage to property.²⁶

8.17 The provision recommended by the Commission differs from the existing provisions in the following major respects -

1. The term "premises" replaces the outdated phrase "place, stable, or outhouse" in section 66(8) and "premises or the curtilage . . . of any premises" in section 66(13).
2. The "unlawful purpose" offence is not confined to a defendant "found in or upon any place, stable, or outhouse" for an unlawful purpose. Instead the offence is committed if a person enters the premises of another for an unlawful purpose.
3. As the "unlawful purpose" offence involves more serious misconduct than the "without lawful excuse" offence and the "remaining on premises without lawful authority" offence, it carries a greater maximum penalty.
4. The "remaining on premises without lawful authority" offence is narrower than the existing offence in that a member of the Police Force cannot ask a person to leave the premises except at the request of the owner, occupier or person in charge of the premises. A police officer might ask a person to leave the premises but an offence would not be committed unless the owner, occupier or person in charge of the premises wished to have the person leave the premises. It would not prevent the person being dealt with for entering premises for an unlawful purpose or without lawful excuse.

²⁶ Paras 11.1-11.4 below.

5. It does not provide for the owner, occupier or person in charge on enclosed land to recover compensation for any damage caused by the trespasser because this damage can be taken care of by offences dealing with damage to property. Compensation for damage resulting from a criminal offence is now dealt with in the general compensation provision of the *Criminal Code*²⁷ and there is no need for a specific provision of the kind found in section 82A(1).
6. It does not give the owner, occupier or person in charge of enclosed land power to demand the name and address of a person suspected of having entered without consent as is provided by section 82A. This power is useless in practice because it is not possible for the owner to arrest a person who neglects or refuses to give his or her name.²⁸ To enforce it a person would need to call in aid a police officer but such aid would be sought in most cases to apprehend a person for committing the offence proposed by the Commission and the person's name and address would be obtained then by the police officer.²⁹

2. HINDERING LAWFUL ACTIVITIES

8.18 There are two offences which deal with hindering lawful activities, and there is considerable overlap between them. Though trespass on private property is not a necessary element of either offence, they are closely related to the offences dealt with in the previous section of this Chapter, and particularly to section 82B, since they were introduced to deal with the problem of demonstrations.

(a) Offences

(i) *Obstructing licence holders: section 67(4)*

8.19 Section 67(4) provides that:

"Every person who, without lawful authority and with intent -

²⁷ S 719.

²⁸ Since this is not an arrestable offence, the owner cannot exercise the powers of arrest given to citizens by s 564(3) of the *Criminal Code*. The power of arrest given to ordinary citizens at common law is not wide enough to allow for arrest in this circumstance: see fn 5 of Ch 17.

²⁹ For the power to demand a person's name and address see paras 17.35-17.37 below.

- (a) to compel another person to abstain from carrying on any activity which pursuant to any law of the State or of the Commonwealth that person is by virtue of a licence, permit or authorization issued thereunder empowered to do; or
- (b) to prevent such an activity being carried on; or
- (c) to obstruct any such activity,

manifests that intention by doing any act in relation to that other person, the property of that other person or the activity so empowered, or by failing or omitting to do any act in relation thereto which he is lawfully required to do"

commits an offence. The section goes on to provide that:

"it shall be a defence to a charge of an offence contrary to paragraph (4) of this section to show that the intention was manifested in the course of a bona fide trade dispute between an employer and workmen engaged in the activity so empowered, and that the Act, failure or omission complained of was committed by a person who was a party to that dispute."

8.20 Section 67(4) was inserted in the Act in 1978.³⁰ The justification given for this new offence was that it was necessary to prevent coercive interference with the activities of licence holders, and that the Government had a duty to protect licences issued by it.³¹ It appears that the Government was principally concerned about the activities of anti-whaling protesters in Albany.³²

(ii) *Hindering lawful activities: section 82B(3)*

8.21 Section 82B(3) provides that:

(3) A person shall not, without lawful authority, prevent, obstruct, or hinder any lawful activity which is being, or is about to be, carried on upon any premises.

Penalty: \$500 or 6 months' imprisonment.

³⁰ By the *Police Act Amendment Act 1978* s 12.

³¹ See *Western Australian Parliamentary Debates* (1978) Vol 218, 765.

³² *Western Australian Parliamentary Debates* (1978) Vol 219, 966-968.

8.22 This offence (introduced in 1980³³ together with the offence of unlawfully remaining on premises) goes beyond trespass on premises and is potentially very wide. It would appear that there is a considerable overlap between this offence and section 67(4), introduced only two years earlier. The only situation covered by section 67(4) but not by section 82B(3) is one where the activity is not taking place on premises as defined by section 82B.³⁴ In spite of the overlap, no move was made to amend section 67(4) when section 82B(3) was enacted.

(b) Recommendation

8.23 The Commission **recommends** that both section 67(4) and section 82B(3) be repealed for the following reasons -

1. Section 67(4) is drafted in obscure and vague terms.
2. Section 82B(3), with its reference to "lawful activity" in conjunction with "lawful authority", is drafted in very wide terms.
3. Demonstrators can be dealt with by other offences, such as disorderly conduct,³⁵ entering premises for an unlawful purpose or without lawful excuse³⁶ or remaining on premises without lawful authority after being requested to leave.³⁷
4. There are adequate civil remedies, such as an injunction³⁸ and proceedings under the *Trade Practices Act 1974* (Cth),³⁹ to protect lawful activities, particularly commercial activities.
5. There is no equivalent of either provision in the police legislation of any other Australian jurisdiction.

³³ By the *Police Amendment Act 1980* s 6.

³⁴ See paras 8.12-8.14 above.

³⁵ Paras 6.1-6.15 above.

³⁶ Para 8.15 above.

³⁷ Ibid.

³⁸ For causes of action that would support such an injunction see generally the discussion of intentional and unjustified interference with trade and business in R P Balkin and J L R Davis *Law of Torts* (1991) Ch 22 and J G Fleming *The Law of Torts* (7th ed 1987) Ch 30.

³⁹ See s 45D of the Act which relates to secondary boycotts.

6. Few, if any, charges are laid under these provisions.⁴⁰

⁴⁰ There were no charges under s 67(4) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV. Though there were 115 charges under s 82B in the Perth and East Perth Courts of Petty Sessions in 1989 (see Appendix IV), it appears that few, if any, of them were for an offence under s 82B(3).

Chapter 9

PROSTITUTION AND RELATED OFFENCES

1. INTRODUCTION

9.1 This Report does not deal with issues such as the overall policy for the regulation of prostitution. This is because the Commission's terms of reference do not extend to prostitution as such. The Commission's terms of reference are confined to reviewing the offences in the *Police Act*, and in that context it has considered the prostitution-related offences in that Act. Offences in other legislation are not within the scope of the Commission's inquiry and are therefore not dealt with.

9.2 The general issue of prostitution is currently under consideration by the Government, in the light of the *Final Report of the Community Panel on Prostitution* in 1990. One of the Panel's recommendations is to repeal the existing *Police Act* offences. In view of this, the recommendations in paragraphs 9.9 to 9.27 below deal only with changes of a technical or drafting nature which could be made if the Panel's recommendations are not implemented.

(a) The existing policy on prostitution

9.3 Prostitution is not presently unlawful in itself. However certain activities connected with prostitution are criminal offences. Offences in the *Police Act* deal with the keeping of premises for the purposes of prostitution, living on the earnings of prostitution and soliciting and loitering for the purpose of prostitution.¹ Related offences in the *Police Act* involve riotous behaviour by prostitutes in the street, and persistently soliciting or importuning for immoral purposes.² There are also offences relating to prostitution in other legislation, such as those in the *Criminal Code*,³ and in local by-laws.⁴

¹ See paras 9.9-9.27 below.

² See paras 9.28-9.33 below.

³ The keeping of premises for the purposes of prostitution (s 209); the procuring of women or men for the purposes of prostitution (s 191).

⁴ The *Local Government Act 1960* s 206 empowers councils to make by-laws for the suppression and restraint of brothels, and the prohibition of persons from keeping brothels. According to a report of the Local Government Association of Western Australia Prostitution - Government's Proposed Legislation (1988) 1, no council has made any such by-laws and it is doubtful whether any would be held to be valid.

9.4 At present the police regulate prostitution by a policy of "containment and control", under which a limited amount of prostitution-related activity is tolerated and regulated without prosecution under the criminal law.⁵ A number of reports dealing with the practice of prostitution in Western Australia were issued between 1976 and 1988,⁶ and in 1987 the then Minister for Police announced that the Government was contemplating the adoption of a new policy on the regulation of prostitution.⁷ However, in 1988 the Minister for Police announced that the Government had decided not to proceed with its original intention.⁸

9.5 It was against this background that the Discussion Paper examined the prostitution-related offences in the *Police Act*. It looked at these offences from the limited perspective of assessing what changes, if any, could or should be made which would be consistent with the maintenance of the existing policy on prostitution. This meant that in the main the changes canvassed were of a technical or drafting nature, although the Commission did examine the issue of whether the offence of soliciting should be restricted in scope, or extended to include soliciting by clients.

(b) The Report of the Community Panel

9.6 Subsequent to the issue of the Discussion Paper, in March 1990, the Minister for Police appointed a Community Panel on Prostitution with the following terms of reference:

- "1. The Panel is to inform itself of attitudes within the community towards establishing a formal basis for the regulation and control of prostitution within Western Australia;

⁵ See *Report of the Royal Commission into Matters Surrounding the Administration of the Law Relating to Prostitution* (1976) (Norris Report) 17-20.

⁶ Norris Report (1976); *Report of O F Dixon on Allegations of Graft and Corruption Within the Police Force* (1982) (Dixon Report); J Edwards *Prostitution and Human Rights: A Western Australian Case Study* (1986) (Edwards Report); *Report of the Women's Advisory Council to the Minister for Police* (1988) (WAC Report). Reports in other jurisdictions on prostitution referred to in this Chapter are (UK) Criminal Law Revision Committee, Working Paper on *Offences Relating to Prostitution and Allied Offences* (1982) (CLRC Working Paper); (UK) Criminal Law Revision Committee *16th Report: Prostitution in the Street* (1984 Cmnd 9329) (CLRC Report); (Vic) *Final Report of the Inquiry into Prostitution* (1985) (Neave Report).

⁷ *Minister plans change to brothel law* *The West Australian*, 1 August 1987. It appears that the Government was considering a system similar to that contained in the *Victorian Prostitution Regulation Act 1986*, which allows brothels to operate within the law if they comply with licensing and planning requirements.

⁸ *Prostitution law shelved* *The West Australian*, 18 August 1988, 8.

2. The Panel is to report to Government on whether or not, and to what extent changes should be made to the present system of discretionary control exercised by the Commissioner of Police known as "the Containment Policy".

9.7 In September 1990 the Panel submitted its Final Report.⁹ It concluded that the present policy of containment and control was unsatisfactory and that it should be replaced by a system involving decriminalisation with regulation. A Licensing Board should be appointed to register premises used for the purpose of prostitution (whether brothels,¹⁰ escort agencies,¹¹ or premises used by a single operator¹²) and to license the owners or managers of these premises. It was recommended that existing offences relating to prostitution in the *Criminal Code*, the *Police Act* and the *Local Government Act* be abolished, and that the practice of prostitution in or from registered premises should not be an offence. However, the practice of prostitution in other circumstances would continue to be an offence. These issues are still under consideration by the Government in the light of the Panel's Report.

(c) The limits of the Commission's recommendations

9.8 As a result of these developments, consideration of the prostitution-related offences in the *Police Act* in this Report is confined to the following issues:

1. comment on the consequences for the *Police Act* offences if the recommendations of the Community Panel are implemented;
2. recommendations as to the changes of a technical or drafting nature which could be made (consistently with the maintenance of the present policy on prostitution) if the recommendations of the Community Panel are not implemented.

⁹ *Final Report of the Community Panel on Prostitution* (1990).

¹⁰ Keeping a brothel is an offence under s 76F of the *Police Act*, dealt with at paras 9.10-9.12 below.

¹¹ Escort agencies, where there is no meeting of men and women on the premises, which are used simply for the making of arrangements by telephone for men and women to meet elsewhere, are not covered by s 76F: *Powell v Devereaux* (unreported) Supreme Court of Western Australia, 12 June 1987, Appeal No 1053 of 1987.

¹² A woman carrying out prostitution by herself in her own home does not commit an offence under s 76F: *Parker v Jeffrey*, ex parte Parker [1963] QWN 32; *Storey v Wick* [1976] WAR 47. It would be different if she maintained separate premises for the purposes of prostitution, or employed another person to assist her, for example as a receptionist.

**2. BROTHEL KEEPING; LIVING ON THE EARNINGS OF PROSTITUTION:
SECTIONS 76F, 76G**

(a) Offences

9.9 Under the present law prostitution is regulated by the offences of keeping premises for the purpose of prostitution and living on the earnings of prostitution.

(i) Keeping premises for the purpose of prostitution

9.10 Section 76F, added to the *Police Act* in 1902,¹³ provides that:

"Any person who -

(1) keeps or manages, or acts, or assists in the management of any premises for purposes of prostitution; or

(2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises, or any part thereof, to be used for purposes of prostitution; or

(3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same, or any part thereof, or collects the rent with the knowledge that such premises, or some part thereof, are or is to be used for purposes of prostitution, or is a party to the continued use of such premises, or any part thereof, for purposes of prostitution, is liable, on summary conviction -

(a) to a fine not exceeding one hundred dollars, or imprisonment, with or without hard labour, not exceeding six months; and

(b) on a second or subsequent conviction, to a fine not exceeding two hundred dollars, or to imprisonment, with or without hard labour not exceeding twelve months.

It is immaterial whether the premises kept or occupied for prostitution are kept or occupied by one person or more than one person."

9.11 The law relating to this offence was discussed in detail in the Discussion Paper.¹⁴ Keeping premises for the purpose of prostitution is also an indictable offence under section 209 of the *Criminal Code*.¹⁵

¹³ By the *Police Act Amendment Act 1902* s 7.

¹⁴ Paras 9.33-9.34.

9.12 Other Australian jurisdictions generally have similar provisions.¹⁶ The exceptions are -

- * New South Wales, which has abolished the offence of keeping a brothel.¹⁷
- * Victoria, where there is now a statutory scheme under which brothels may be legal if they satisfy licensing and planning requirements.¹⁸
- * Northern Territory, which has retained the offence of keeping a brothel but introduced a statutory scheme for the licensing of escort agencies.¹⁹

(ii) *Living on the earnings of prostitution*

9.13 Section 76G provides that:

"(1) Every person who -

(a) knowingly lives wholly or in part on the earnings of prostitution

...

shall be deemed to have committed an offence against section sixty-six of this Act, and may be dealt with accordingly.

(2) Where a person lives with or is habitually in the company of a prostitute, and has no visible means of subsistence, he shall, unless he can satisfy the

¹⁵ The Murray Report recommended that s 209 should be repealed, since the problem was appropriately dealt with in the context of the *Police Act* offence. It said that charges were invariably laid under the *Police Act* and never under the *Criminal Code*: Murray Report 132. There were 22 charges under s 76F in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

¹⁶ *Summary Offences Act 1953* (SA) ss 28-29; *Police Offences Act 1930* (ACT) ss 18-19; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 8; *Police Offences Act 1935* (Tas) ss 10-11. For similar provisions elsewhere see *Crimes Act 1961* (NZ) s 147; *Sexual Offences Act 1956* (UK) ss 33-36.

¹⁷ The offence was set out in *Summary Offences Act 1970* (NSW) s 32, which was repealed by *Summary Offences (Repeal) Act 1979* s 3. However keeping a disorderly house is still an offence at common law: Neave Report para 6.44, and there is a rarely used statutory power for closing down disorderly houses: *Disorderly Houses Act 1943* (NSW), as to which see *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98. Using massage parlours and the like for the purpose of prostitution is an offence under statute: *Summary Offences Act 1988* (NSW) s 17.

¹⁸ *Prostitution Regulation Act 1986* (Vic) Parts 3 and 4. The licensing requirements have not been brought into force, but under existing legislation keeping a brothel is not a criminal offence where the prostitution in question takes place in a brothel with a permit: *Vagrancy Act 1966* (Vic) s 11. See generally M Neave "The Failure of Prostitution Law Reform" (1988) 21 *ANZJ Crim* 202.

¹⁹ *Prostitution Regulation Act 1992* (NT) Part 2 Divs 1 and 2.

Court to the contrary, be deemed to be knowingly living on the earnings of prostitution."

9.14 The law relating to this offence was discussed in detail in the Discussion Paper.²⁰ Though the section, as originally enacted,²¹ was confined to male persons,²² both men and women may now be convicted of living on the earnings of prostitution.²³ Other Australian jurisdictions have similar provisions.²⁴

(iii) *Effect*

9.15 The effect of these two offences is that, though the act of prostitution itself is not illegal, it is difficult for a prostitute to remain within the law unless she sees clients in her own home.²⁵ She cannot work with other prostitutes or maintain a separate place of business. Nor can she employ other staff, such as receptionists or minders, to assist her. If she lives with a partner, the partner may run the risk of conviction for living on the earnings of prostitution.²⁶

(b) **Possible changes**

9.16 The Community Panel's Report recommended²⁷ that -

²⁰ Paras 9.37-9.38. There were 3 charges for this offence in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

²¹ By the *Police Act Amendment Act 1902* s 8.

²² It was based on the *Vagrancy Act 1898* (UK) s 1. The English legislation is still limited to males: *Sexual Offences Act 1956* (UK) s 30.

²³ The *Police Act Amendment Act 1968* s 2 removed the word "male" from the introductory words of s 76G in accordance with a resolution of the Standing Committee of Commonwealth and State Attorneys General to amend State laws to comply with the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others: see *Western Australian Parliamentary Debates* (1968) Vol 180, 1137.

²⁴ *Summary Offences Act 1953* (SA) s 26; *Police Offences Act 1930* (ACT) s 23(1)(j); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 5(1)(c); *Police Offences Act 1935* (Tas) s 8(1A)(b); *Summary Offences Act 1988* (NSW) s 15; *Vagrancy Act 1966* (Vic) s 10, which will be replaced by *Prostitution Regulation Act 1986* s 12 when that section is proclaimed. In the Northern Territory, however, the offence has been abolished: *Summary Offences Amendment Act 1992* (NT) s 6.

²⁵ Under the law in force in Victoria before 1986 even this was illegal: a woman seeing clients in her own home could be convicted of using premises for habitual prostitution under s 12 of the *Vagrancy Act 1966*: Neave Report para 3.21. S 77 of the *Prostitution Regulation Act 1986* repeals this provision, but that section has not yet been proclaimed. Note also the South Australian offence of receiving money paid in a brothel in respect of prostitution: *Summary Offences Act 1953* s 28(1)(b).

²⁶ For discussion of the points made in this paragraph, see WAC Report 5-6. In principle, the position would be exactly the same for male prostitutes.

²⁷ Para 6.3.

1. "criminal provisions related to prostitution, prostitutes and prostitution related activities be removed from the *Criminal Code*; the *Police Act*; and the *Local Government Act*", and
2. these offences be replaced by a number of new offences including an offence of practising prostitution outside the controls of the Licensing Board.

(i) *Keeping premises for the purposes of prostitution*

9.17 It appears that the Community Panel's intention is to abolish the offence of keeping premises for the purpose of prostitution, rather than providing that the offence is not committed where the premises in question are licensed.²⁸ This interpretation of the Community Panel's intentions is supported by the fact that when the Report refers to the practice of prostitution outside the licensing controls (which it **recommends** should be an offence²⁹), this is a reference to all forms of prostitution including escort agencies and single operator prostitution,³⁰ neither of which are currently covered by section 76F.³¹

9.18 If, on the other hand, the Community Panel's recommendations are not accepted, the maintenance of the current policy regarding prostitution requires the retention of the offence in section 76F, and the Commission so **recommends**. As the Commission said in the Discussion Paper,³² the section is a satisfactory expression of the present policy concerning the keeping of premises for prostitution.

(ii) *Living on the earnings of prostitution*

9.19 Again, it appears that the Community Panel's intention is to abolish the offence of living on the earnings of prostitution, rather than providing that the offence is not committed where the premises in question are licensed.³³ Where prostitution is carried on outside the

²⁸ As the legislation provides in Victoria: *Vagrancy Act 1966* (Vic) s 11.

²⁹ Report para 6.3.

³⁰ Report para 6.2.

³¹ See para 9.7 above.

³² Para 9.42.

³³ The offences has been abolished in the Northern Territory: *Summary Offences Amendment Act 1992* (NT) s 6. In Victoria, the Neave Report para 8.40 recommended the abolition of the offence. However the *Prostitution Regulation Act 1966* (Vic) s 12 (not yet in force) retains the offence but provides that it is not committed where the prostitution in question takes place in a brothel with a permit. This reproduces the

statutory controls, living on the earnings of prostitution may be caught by the proposed new offence of practising prostitution outside the controls of the Board, but much depends on how that offence is drafted.

9.20 If the Community Panel's recommendations are not accepted, the maintenance of the present policy regarding prostitution makes it necessary to retain the offence in section 76G, and the Commission so **recommends**. However, as pointed out in the Discussion Paper,³⁴ this section is defective in a number of technical respects. The Commission **recommends** that the following amendments should be made -

1. The offence should be separated from the offence of persistently soliciting for immoral purposes dealt with in section 76G(1)(b),³⁵ so that the two offences are dealt with in separate sections.
2. Rather than deeming an offence to be committed under section 66, the section should itself state a penalty.
3. Section 76G(2), which reverses the normal onus of proof, and provides that a person who lives with or is habitually in the company of a prostitute, and has no visible means of subsistence, is deemed to be living on the earnings of prostitution unless he can satisfy the court to the contrary, should be repealed.³⁶ Provisions which reverse the onus of proof are generally undesirable,³⁷ and in other contexts in this Report the Commission has recommended that such provisions be abolished.³⁸

3. SOLICITING AND LOITERING

(a) The offence

9.21 Section 59 of the *Police Act* contains an offence of soliciting or loitering for the purposes of prostitution. This offence is close to the major purposes of the *Police Act*,

position currently set out in s 10 of the *Vagrancy Act 1966*, which will be repealed when s 12 of the *Prostitution Regulation Act 1966* is proclaimed.

³⁴ Paras 9.43-9.44.

³⁵ See paras 9.30-9.33 below.

³⁶ This was supported by a majority of the commentators on the Discussion Paper.

³⁷ See para 3.16 above.

³⁸ See para 3.19 above.

because it deals with the public order aspects of prostitution, in particular its impact on activities in streets and other public places.³⁹

9.22 Section 59 provides that:

". . . [A]ny common prostitute who shall solicit, importune or accost any person or persons for the purpose of prostitution, or loiter about for the purpose of prostitution in any street, or place, or within the view or hearing of any person passing therein, . . . shall forfeit and pay on conviction any sum not exceeding forty dollars, or may be committed to gaol for any period not exceeding one calendar month."

This provision is part of a section which also deals with singing obscene songs, writing or drawing indecent or obscene words or pictures, using profane, indecent or obscene language, threatening, abusive or insulting words or behaviour,⁴⁰ and the extinguishing of lights put up for public convenience.⁴¹

9.23 The offence can only be committed by a "common prostitute".⁴² A common prostitute is one who carries on a business or trade as a prostitute - that is, someone who offers herself commonly for lewdness for the purpose of gain.⁴³ The term appears to be confined to women. The section covers both solicitation, importuning and accosting persons for the purposes of prostitution, and loitering about for the purposes of prostitution. Soliciting means an invitation by words, conduct or merely by the woman's presence, to engage in sexual activities for money.⁴⁴ Loitering has the same meaning as in section 43(1) of the *Police Act*,⁴⁵ namely lingering in a particular area without any apparent reason.⁴⁶ It involves a certain persistence

³⁹ There were 33 charges under s 59 for soliciting or loitering in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁴⁰ Dealt with at paras 6.1-6.15 above.

⁴¹ Dealt with at para 11.10 below.

⁴² Only in Tasmania is the legislation in the same terms: see *Police Offences Act 1935* (Tas) s 8(1)(c). For legislative provisions on soliciting in the other jurisdictions see *Police Offences Act 1930* (ACT) s 23(1)(ja); *Summary Offences Act 1988* (NSW) s 19; *Prostitution Regulation Act 1992* (NT) s 10; *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 5(1)(b) and (e); *Summary Offences Act 1953* (SA) s 25; *Prostitution Regulation Act 1986* (Vic) s 5; *Street Offences Act 1959* (UK) s 1; *Summary Offences Act 1981* (NZ) s 26.

⁴³ *Skinner v R* (1913) 16 CLR 336, 341 per Barton ACJ; *R v De Munck* [1918] 1 KB 635.

⁴⁴ See eg *Behrendt v Burridge* [1976] 3 All ER 285.

⁴⁵ Para 4.18 above.

⁴⁶ *Hagan v Ridley* (1948) 50 WALR 112.

or repetition.⁴⁷ The offence must be committed in a street or place, or within the view or hearing of any person passing therein.⁴⁸

(b) Possible changes

9.24 The report of the Community Panel **recommends** that existing offences relating to prostitution be abolished, but that it should be an offence for either a prostitute or a client to solicit in public places.⁴⁹ Soliciting by clients would thus become a criminal offence. At present section 59 is confined to soliciting by prostitutes. It has also been held that the English equivalent of section 76G(1)(b), which deals with persistent soliciting or importuning for immoral purposes,⁵⁰ does not apply where men accost women for the purposes of sexual intercourse.⁵¹

9.25 Soliciting by clients is an offence in some other jurisdictions. The Victorian *Prostitution Regulation Act 1986* contains a provision in the same form as that recommended by the Community Panel, one which treats prostitutes and clients in similar terms.⁵² The Northern Territory *Prostitution Regulation Act 1992* has a similar provision.⁵³ The United Kingdom *Sexual Offences Act 1985* creates two special offences involving clients: it is an offence for a man persistently to solicit a woman for the purpose of prostitution in a street or public place,⁵⁴ or to solicit a woman from a motor vehicle in a street or public place persistently or in such manner or circumstances as to be likely to cause annoyance to the woman in question, or nuisance to other persons in the neighbourhood.⁵⁵ In the Discussion Paper the Commission canvassed the arguments for and against the introduction of an offence of soliciting by clients.⁵⁶

⁴⁷ *Williamson v Wright*, 1924 JC 57, 60 per Lord Anderson.

⁴⁸ The display of an advertisement in the street by a prostitute offering her services does not constitute soliciting or importuning: *Weisz v Monahan* [1962] 1 All ER. 664.

⁴⁹ Report para 6.3.

⁵⁰ See paras 9.30-9.33 below.

⁵¹ *Crook v Edmondson* [1966] 2 QB 81.

⁵² S 5(2). Cf *Summary Offences Act 1988* (NSW) s 20, which creates a new offence of taking part in public acts of prostitution, an offence committed by both prostitute and client. The offence was created to deal with problems occurring in particular suburbs of Sydney, where acts of prostitution were being committed in public places or in motor vehicles in public places: see New South Wales *Parliamentary Debates*, 31 May 1988, 805-806.

⁵³ S 10(2).

⁵⁴ S 2. Prior to this Act, two committees had considered whether there should be any offence covering clients or potential clients of prostitutes: see Home Office Report paras 97-99; CLRC Report paras 36-52.

⁵⁵ S 1.

⁵⁶ See Discussion Paper paras 9.25-9.27. A majority of those who commented on this issue favoured the introduction of an offence of soliciting by clients.

9.26 If the recommendations of the Community Panel are not adopted, retention of the present policy towards prostitution would seem to require the maintenance of the existing soliciting offences in their present form, with only technical changes. In these circumstances, the Commission **recommends** that the soliciting offence in section 59 be retained, subject only to the following changes of a technical nature -

1. The soliciting offence in section 59 should be separated from the other offences in that section and dealt with in a section dealing specifically with soliciting.
2. The penalty under section 59, presently \$40, should be increased to a more realistic figure.

9.27 The offence redrafted in this form would still be unsatisfactory in one particular respect, namely the retention of the description "common prostitute". The Commission would be in favour of removing the adjective "common", so that section 59 referred to "any prostitute". Section 59 would then cover all solicitation for the purpose of prostitution, heterosexual or homosexual, by men or women.⁵⁷

4. RIOTOUS OR INDECENT BEHAVIOUR BY COMMON PROSTITUTES: SECTION 65(8)

9.28 Section 65(8) provides that:

"Every common prostitute wandering in the public streets or highways, or being in any thoroughfare or place of public resort, and behaving in a riotous or indecent manner"

commits an offence.

9.29 This offence was inherited from the United Kingdom *Vagrancy Act 1824*,⁵⁸ and has long been obsolete.⁵⁹ It does not deal with soliciting as such, but is essentially a public order provision, based on the assumption that prostitutes as a group are particularly likely to behave

⁵⁷ See *Poiner v Hans*, ex parte Poiner [1987] 2 Qd R 242.

⁵⁸ S 3.

⁵⁹ There were no charges for this offence in the Perth and East Perth Courts of Petty Sessions in either 1984-1985 or 1989: see Appendix IV.

in a disorderly manner in public places. It is not needed to deal with soliciting, which is dealt with more specifically by section 59. Insofar as it deals with public order, there are other provisions in the *Police Act* which deal generally with such conduct, rather than singling out a particular group.⁶⁰ The Commission **recommends** that this offence be abolished, as it has been in most Australian jurisdictions.⁶¹

5. PERSISTENTLY SOLICITING OR IMPORTUNING FOR IMMORAL PURPOSES: SECTION 76G(1)(b)

(a) The offence

9.30 Section 76G(1) provides that:

"Every person who -

...

(b) **in any public place persistently solicits or importunes for immoral purposes,**

shall be deemed to have committed an offence against section sixty-six of this Act, and may be dealt with accordingly."

9.31 When originally enacted,⁶² this section was confined to male persons, but this limitation was removed in 1968.⁶³ This created an overlap with the soliciting offence in section 59 which originally did not exist. Section 76G(1)(b), unlike section 59, is not limited to common prostitutes, or to solicitation for the purposes of prostitution, but covers soliciting or importuning for immoral purposes. Again in contrast to section 59, it is limited to persistent soliciting or importuning.

⁶⁰ See paras 6.1-6.15 above.

⁶¹ The equivalent provision has been repealed in South Australia, the ACT, the Northern Territory and New South Wales, and also in New Zealand. Apart from Western Australia, the only Australian jurisdiction to retain it is Queensland: *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 5(1)(a).

⁶² By the *Police Act Amendment Act 1902* s 8.

⁶³ See para 9.14 above. The amendment was principally directed at the other offence in s 76G, living on the earnings of prostitution, but also extended the offence of persistently soliciting or importuning (originally designed to be limited to soliciting by men) to women. In England and Tasmania the equivalent offence to s 76G(1)(b) is still confined to males: *Sexual Offences Act 1956 (UK)* s 32; *Police Offences Act 1935 (Tas)* s 8(1A)(c).

(b) Recommendation

9.32 The report of the Community Panel is limited to prostitution. Though section 76G(1)(b) can be used in a case involving soliciting for the purposes of prostitution, it has a much wider ambit. It has been mainly used to deal with homosexual soliciting,⁶⁴ and is also important as a means of dealing with persons who solicit or importune young children for immoral purposes.⁶⁵ The Commission therefore interprets the Community Panel's recommendation for the abolition of existing offences relating to prostitution⁶⁶ as not extending to section 76G(1)(b).

9.33 The Commission **recommends** that -

1. the offence in section 76G(1)(b) should be retained;
2. the penalty applying on conviction for this offence should be set out in section 76G(1)(b) itself, rather than a conviction for the offence being deemed to be a conviction under section 66.

⁶⁴ CLRC Working Paper para 3.32, commenting on the English equivalent, *Sexual Offences Act 1956 (UK)* s 32.

⁶⁵ See paras 4.22-4.23 above. There were 2 charges for this offence in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁶⁶ Report para 6.3.

Chapter 10

GAMING OFFENCES

1. INTRODUCTION

10.1 The *Police Act* 1892 contained comprehensive provisions dealing with gaming, lotteries and cheating at play.¹ The *Police Act Amendment Act 1893* added provisions about betting.² Though these provisions were clearly modelled on earlier United Kingdom legislation,³ they were not incorporated in Western Australian statute law before 1892. The decision to enact such legislation clearly shows the degree of contemporary concern about the evils of gambling. The mood of the times can be gleaned from the debates in Parliament on the 1892 Act and amending Acts in the 1890's.⁴

10.2 The 1892 Act originally prohibited all lotteries, except raffles of works of art or at bazaars for charitable purposes when notice of the raffle had been given to the Attorney General.⁵ The *Police Act Amendment Act 1894*⁶ went further. Aimed at "wiping out those birds of prey - the bookmakers, and also the 'spinning jennies'",⁷ it created a criminal offence of betting or offering to bet by way of wagering or gaming on any racecourse or in any public place.⁸

¹ Ss 85-94. The *Acts Amendment (Betting and Gaming) Act 1982* renumbered the surviving provisions as ss 85-89C. S 90 (penalty for obstructing police), though originally a gaming provision, is now regarded as having a more general import: see Discussion Paper para 5.11.

² Ss 4-12. In 1952 they were inserted in the *Police Act* as ss 84A-84I: *Police Act Amendment Act 1952* s 7 and Schedule.

³ Ss 84I, 85-89, 92, 94 on *Gaming Act 1845*(UK); ss 84A-84G on *Betting Act 1853*(UK); ss 90-91 on *Gaming Houses Act 1854*(UK).

⁴ See Western Australian *Parliamentary Debates* (1892) Vol 2, 239, 335-336 (*Police Act 1892*); Western Australian *Parliamentary Debates* (1893) Vol 3, 245-249, 417-418 (*Police Act Amendment Act 1893*); Western Australian *Parliamentary Debates* (1894) Vol 7, 982-987, 1128-1130 (*Police Act Amendment Act 1894*); Western Australian *Parliamentary Debates* (1898) Vol 12, 995-1002, (1898) Vol 13, 1697-1699 (*Police Act Amendment Act 1898*).

⁵ S 93. In the debates on the *Police Act Amendment Act 1893*, the Attorney General, the Hon S Burt, said: "I cannot understand why, but the whole country seems to have got it into its head that if anyone wants to raffle a pig, or a calf, or a pair of boots, he must ask the Attorney General's permission; and my office is simply littered with letters, chiefly from ladies - who seem to raffle most - who desire permission to raffle all sorts of things, from live sheep down to antimacassars. It is a perfect nuisance to me . . .": Western Australian *Parliamentary Debates* (1892) Vol 3, 247.

⁶ The official short title of this Act is the *Police Act 1892 Amendment Act 1894* (No 2).

⁷ The Hon F T Crowder: Western Australian *Parliamentary Debates* (1894) Vol 7, 1128.

⁸ S 2.

10.3 The attitude to betting and gaming evident in such measures was not universally shared. In 1893 the ban on lotteries was repealed,⁹ and a provision was added to ensure that the operation of totalisator wheels at race meetings under the auspices of the Western Australian Turf Club was not regarded as unlawful gaming.¹⁰ The prohibition on betting was repealed in 1898.¹¹

10.4 From then on, apart from the insertion of sections to deal with new problems such as slot machines,¹² the betting and gaming provisions were not amended in any major respect until 1982. By then it had become apparent that the general attitude to betting and gaming in the 1980's was very different from that in the 1890's. A number of statutes gave official approval to betting and gaming,¹³ and the *Police Act* no longer applied in these cases.

10.5 This change in attitude was recognised by an important series of legislative changes in the 1980's. The *Acts Amendment (Betting and Gaming) Act 1982* effected a major reorganisation of the *Police Act* provisions dealing with betting and gaming, and the new section 84A gave express recognition to the principle that the betting provisions only applied subject to the other legislative provisions about officially recognised betting. The prohibition on recovering wagers contained in section 84I was abolished.¹⁴ This process of reform culminated in the *Gaming Commission Act 1987*, which established a Commission to regulate all aspects of gaming. The *Acts Amendment and Repeal (Gaming) Act 1987*¹⁵ repealed the provisions of the *Police Act* dealing with gaming, slot machines and cheating at play.¹⁶ They were replaced by more modern provisions in the *Gaming Commission Act*.¹⁷ The betting provisions, amended in minor respects, remain in the *Police Act*.

⁹ *Police Act Amendment Act 1893* s 3.

¹⁰ Proviso to s 66(6), added by *Police Act Amendment Act 1893* s 2 (repealed by the *Police Act Amendment Act 1894* s 3).

¹¹ *Police Act Amendment Act 1898* s 2. It appears that the member of Parliament who introduced this amendment was one of the first people to be prosecuted under it: Western Australian *Parliamentary Debates* (1898) Vol 12, 995-6, (1898) Vol 13, 1697.

¹² S 89A, to deal with slot machines, was introduced by the *Police Act Amendment Act 1961* s 2. S 89B, to deal with the use of metal washers in slot machines, was introduced by the *Police Act Amendment Act 1965* s 3.

¹³ Eg *Lotteries (Control) Act 1954*; *Betting Control Act 1954*; *Totalisator Agency Board Betting Act 1960*; *Lotto Act 1981*; *Soccer Football Pools Act 1984*; *Casino Control Act 1984*. The *Soccer Football Pools Act 1984* was repealed and replaced by the *Gaming Commission Act 1987*. Soccer football pools are now governed by the *Lotteries Commission Act 1990*. The *Lotteries (Control) Act 1954* and the *Lotto Act 1981* were repealed and replaced by the *Lotteries Commission Act 1990*.

¹⁴ By the *Acts Amendment (Gaming and Related Provisions) Act 1985* s 5, implementing a recommendation of the Commission in its report on Section 2 of the *Gaming Act* (Project No 58 1977).

¹⁵ Ss 58-60.

¹⁶ Ie ss 85-89C.

¹⁷ Ss 41-45.

2. KEEPING A HOUSE FOR THE PURPOSE OF BETTING: SECTION 84C

10.6 There are now four offences in the *Police Act* which deal with betting.¹⁸ One of these, section 84C, deals with keeping a house for the purposes of betting:

"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting (otherwise than by way of permitted gaming or a lottery authorized pursuant to, and which does not contravene, the *Gaming Commission Act 1987*) with persons resorting thereto, or for the purpose of any money or valuable thing being received (except by way of permitted gaming or a lottery as aforesaid) by or on behalf of such owner, occupier, keeper, or person, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency."

10.7 The Commission **recommends** that section 84C be repealed¹⁹ because the proscribed conduct is now dealt with in the *Gaming Commission Act 1987*²⁰ and the *Betting Control Act 1954*.²¹

10.8 Section 84B of the *Police Act* provides that a place kept for the purposes referred to in section 84C is deemed to be a betting house and therefore is a common gaming house for the purposes of section 41(3) and (6) of the *Gaming Commission Act 1987*. The Commission **recommends** that section 84B be repealed, and consequently that section 41 of the *Gaming Commission Act 1987* be amended so that it expressly includes betting houses.

¹⁸ There were no charges for any of these offences in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

¹⁹ The Office of Racing and Gaming also considered that the matter was adequately covered in the *Gaming Commission Act 1987*.

²⁰ S 41.

²¹ S 27.

3. RECEIVING MONEY ON CONDITION OF PAYING MONEY ON THE EVENT OF ANY BET: SECTION 84D

10.9 Section 84D creates an offence of receiving money on condition of paying money on the event of any bet:

"Any person, being the owner or occupier of any house, office, room or place opened, kept, or used for the purposes referred to in subsection (1) of section 84C²² of this Act, or any of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof who shall receive directly or indirectly any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse race or any other race, or any fight, game, sport, or exercise, or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency commits an offence.

Penalty: \$2 000."

10.10 This section is related to section 84C which the Commission has recommended should be repealed because there are equivalent provisions in the *Gaming Commission Act 1987* and the *Betting Control Act 1954*. There is no equivalent to section 84D in either Act. In the Commission's view this offence is better placed in the *Betting Control Act 1954*, alongside the offence of using premises for unlawful betting.²³ Accordingly, the Commission **recommends** that section 84D be repealed²⁴ and that a similar offence be included in the *Betting Control Act 1954*.

10.11 Section 84E is related to section 84D. It provides that any money or valuable thing received by a person to whom section 84D applies as a deposit on any bet or as the consideration for any assurance, undertaking, promise or agreement to which section 84D applies is deemed to have been received to or for that person's use. Consequent on its

²² Sub-s (2) of s 84C was repealed by the *Acts Amendment and Repeal (Gaming) Act 1987*. The reference in s 84D is therefore a reference to the whole of s 84C.

²³ *Betting Control Act 1954* s 27.

²⁴ The Office of Racing and Gaming agreed.

recommendation as to section 84D, the Commission **recommends** that section 84E also be included in the *Betting Control Act 1954*.

10.12 Section 84F of the *Police Act* provides that nothing in the Act shall extend to stakes held in consequence of permitted gaming or a lottery or to be paid to the winner of any race or lawful sport, game or exercise or to the owner of any horse engaged in any race. The Commission **recommends** that the saving provision in section 84F be included in the *Betting Control Act 1954* if the recommendations relating to sections 84D and 84E are implemented.²⁵

4. ADVERTISING: SECTIONS 84G AND 84H

10.13 Section 84G makes it an offence to advertise betting houses:

"Any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets to which this Division of this Part of this Act applies, or for the purposes of exhibiting lists for betting, or with the intent to induce any person to resort to such house, office, room, or place for the purpose of making bets to which this Division of this Part of this Act applies, or any person who, on behalf of the owner or occupier of any such house, office, room, or place, or persons using the same, shall invite other persons to resort thereto for the purpose of making bets to which this Division of this Part of this Act applies commits an offence.

Penalty: \$2 000."

10.14 Section 84H creates an offence of advertising as to betting or lotteries.²⁶

"(1) Where any letter, circular, telegram, placard, handbill, card or advertisement is sent, exhibited, or published -

(a) whereby it is made to appear that any person either in Western Australia or elsewhere, will, on application, give information or advice for the purpose of or with respect to any bet, or any event or contingency of the kind referred to in this Division of this Part of this Act, or will make on behalf of any other person any bet of the kind referred to in this Division of this Part of this Act; or

²⁵ Another saving provision that may need to be incorporated in the *Gaming Commission Act 1987* and the *Betting Control Act 1954* is s 84A(1) of the *Police Act*.

²⁶ Advertising by bookmakers is controlled by s 21(e) of the *Betting Control Act 1954*.

- (b) **with intent to induce any person, whether any particular person or generally, to apply to any house, office, room, or place, or to any person with the view of obtaining information or advice for the purpose of any bet, or with respect to any event or contingency of the kind referred to in this Division of this Part of this Act;**
- (c) **inviting any person, whether any particular person or generally, to make or take any share in or in connection with any bet, or to take or purchase any share, ticket, or interest in any lottery, or to subscribe money or goods to entitle him to participate in any distribution of money or goods, on the happening of any event or contingency of the kind referred to in this Division of this Part of this Act;**

every person sending, exhibiting or publishing, or causing the same to be sent, exhibited or published, shall be subject to the penalty provided in section 84G of this Act with respect to offences under that section.

(2) In subsection (1) of this section "lottery" does not include a trade promotion lottery within the meaning of that term as defined in section 3 of the *Gaming Commission Act 1987*."

10.15 Sections 84G and 84H do not apply to the Totalisator Agency Board, a licensed casino or gaming, betting or a lottery conducted pursuant to, and which does not contravene, the *Gaming Commission Act 1987*.²⁷

10.16 The Office of Racing and Gaming suggested that sections 84G and 84H should be repealed because "Betting has been recognised as an accepted medium of entertainment and today advertising of betting and betting places is common." However, the sections are directed at unlawful forms of betting and do not prevent the advertising of the "lawful" forms referred to in the previous paragraph. The Commission therefore **recommends** that these sections should be retained and relocated in the *Betting Control Act 1954*. The Commission considers that these sections do not require any substantive amendment. However, the drafting of sections 84G and 84H still adheres very closely to the language of the 19th-century statute on which they were modelled²⁸ and this makes them difficult to understand. Accordingly, the Commission **recommends** that sections 84G and 84H be redrafted in contemporary form. As with the existing offences, they should not apply to conduct referred to in the previous paragraph.²⁹

²⁷ *Police Act 1892* s 84A(2).

²⁸ *Betting Act 1853*(UK).

²⁹ That is, s 84A(2) of the *Police Act* would need to be retained in some form in the *Betting Control Act 1954*.

Chapter 11

OFFENCES INVOLVING DAMAGE TO PROPERTY

1. DAMAGE TO PROPERTY: SECTION 80

11.1 Section 80 provides that:

"(1) Every person who destroys or damages any real or personal property of any kind, whether owned by Her Majesty or any public or local authority or by any other person, is guilty of an offence.

Penalty: A fine not exceeding five hundred dollars or imprisonment for any term not exceeding six months or both.

(2) Subsection (1) of this section does not apply -

- (a) where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of; or**
- (b) where the act complained of was done in the course of hunting or fishing, or in the pursuit of game and was not done with an intention to destroy or damage the property."¹**

11.2 This provision was contained in the South Australian *Police Act 1869*,² which was based on the *United Kingdom Malicious Damage Act 1861*.³ The section was redrafted in modern form in 1970,⁴ without any alterations of substance. At this stage section 80 still required that the destruction or damage should be wilful or malicious. However, the words "wilfully or maliciously" were omitted in 1980.⁵

11.3 Damage to property is also an indictable offence. Section 444 of the *Criminal Code* provides that any person who wilfully and unlawfully destroys or damages any property is guilty of a crime punishable with imprisonment for 10 years if no other punishment is

¹ S 80(3) allows the court to order the payment of compensation by the convicted person. S 80(4) provides that such an order does not affect the right of the injured party to bring civil proceedings for any sum in excess of the amount paid under the order.

² S 68.

³ S 51. Neither the *Police Ordinance 1849* nor the *Police Ordinance 1861* contained an equivalent provision.

⁴ See *Police Act Amendment Act (No 2) 1970* s 7.

⁵ By the *Police Amendment Act 1980* s 5: see para 11.5 below.

provided. Unless the property is destroyed or damaged by fire,⁶ the person charged may elect to be tried summarily by a Court of Petty Sessions if -

- (a) the amount of the injury done does not exceed \$4,000; or
- (b) the amount of the injury done does not exceed \$10,000 and the court, having regard to the nature and particulars of the offence and to such particulars of the circumstances relating to the charges as the court may require from the prosecutor, considers that the charge can be adequately dealt with summarily.⁷

On summary conviction, the offender is liable to imprisonment for 3 years or to a fine of \$12,000. It is clear that section 80 is much used, whereas charges under the Code provisions are far less common.⁸

11.4 The Commission **recommends** that section 80 be redrafted in similar terms to section 444 of the *Criminal Code*. That is, it should provide that:

A person who wilfully and unlawfully destroys or damages any property⁹ commits an offence.

Penalty: \$500 or imprisonment for 6 months.

11.5 As compared with the existing law, this recommendation involves the following major changes -

⁶ If the property is destroyed or damaged by fire, the offender must be tried on indictment and is liable to imprisonment for 14 years: *Criminal Code* ss 444(2) and 465(1).

⁷ Id s 465.

⁸ When Parliament was raising the penalties under s 80 in 1954, it was stated that in the past seven years there had been 1195 convictions under s 80 but none under the Code: Western Australian *Parliamentary Debates* (1954) Vol 138, 577. In 1989 there were 831 charges brought under s 80 in Perth and East Perth Courts of Petty Sessions: see Appendix IV. In 1988-1989 there were 2602 charges of property damage in all Courts of Petty Sessions: Australian Bureau of Statistics (Western Australia) *Court Statistics: Courts of Petty Sessions Western Australia 1988-89* (1991) Table 2. Most of these charges would have been under s 80. There were only 52 charges of property damage in higher courts: Australian Bureau of Statistics (Western Australia) *Court Statistics: Higher Criminal Courts - Western Australia 1988-89* (1990) Table 2. Arson, with 40 charges, is excluded from this figure.

⁹ As is provided in s 1(1) of the *Criminal Code*, property should include "real and personal property and everything, animate or inanimate, capable of being the subject of ownership".

1. It specifies a mental element for the offence. Since 1980 section 80 has specified no mental element. The requirement that the damage should be done "wilfully and maliciously" was abolished in order to deprive persons who destroy or damage property while under the influence of alcohol or drugs of their defence of lack of intent.¹⁰ This appears to have had the desired effect.¹¹ However, the change has also had the effect of making non-intentional damage an offence even where intoxication was not involved. In this circumstance, a defendant would not be criminally responsible "for an event which occurs by accident"¹² but this only applies if there was no negligence. The Commission considers that inadvertent damage to property should not be the subject of a criminal offence. Accordingly the proposed offence specifies the mental element of wilfully destroying or damaging property.¹³ It differs from the offence in section 444 of the *Criminal Code* in that intention to cause a specific result is not an element of the proposed offence.¹⁴ That is, the proposed offence includes a "result not positively desired but foreseen as a likely consequence of the relevant act" or an act "done recklessly".¹⁵ As an "intention to cause a specific result" is not an element of the proposed offence, self induced intoxication is no answer to a charge under it.¹⁶

2. The recommendation does not expressly exclude a case where the alleged offender acted under a fair and reasonable supposition that he or she had a right to do the act which is the subject of the complaint. This provision is no longer necessary because section 22 of the *Criminal Code* provides that, for an offence relating to property, a person is not criminally responsible for an act done or omitted to be done with respect to any property in the exercise of an honest claim of right and without intention to defraud.¹⁷

¹⁰ Western Australian *Parliamentary Debates* (1980) Vol 229, 1882.

¹¹ Self-induced intoxication is no answer to a charge of an offence not involving specific intent: *R v Kusu* [1981] Qd R 136 (a decision of the Queensland Court of Criminal Appeal on the effect of the equivalent in that State of ss 23 and 28 of the (WA) *Criminal Code*).

¹² *Criminal Code* s 23.

¹³ Equivalent offences in all other Australian jurisdictions except two incorporate a mental element: see *Crimes Act 1900* (NSW) s 195; *Summary Offences Act 1966* (Vic) s 9(1)(c); *Criminal Code* (Qld) s 469; *Criminal Law Consolidation Act 1935* (SA) s 85(3); *Crimes Act 1900* (ACT) s 128(1). The exceptions are *Police Offences Act 1935* (Tas) s 37(1) and *Criminal Code* (NT) s 251(1).

¹⁴ See the definition of "wilfully destroy or damage" in s 443(a) of the *Criminal Code*.

¹⁵ *R v Lockwood*, ex parte Attorney-General [1981] Qd R 209, 216 per Lucas ACJ.

¹⁶ Cf *Criminal Code* s 28 3rd para.

¹⁷ For example, where a person does an act in relation to property in the honest but mistaken belief that he or she is the owner of it.

3. An act done in the course of hunting, fishing or the pursuit of game is not excluded.¹⁸ Under the present law, this excuse only applies where the act was not done with an intention to destroy or damage the property. It is unnecessary where the offence is expressly limited to wilful damage,¹⁹ as is the case under the Commission's recommendation.²⁰ In any case, even if the excuse were retained, a charge could be laid under section 444 of the *Criminal Code* which contains no such excuse.
4. The proposed provision does not contain provisions dealing with compensation. These provisions are now redundant in the light of the general provisions for compensation and restitution in the *Criminal Code*.²¹
5. The proposed provision no longer confines the offence to damage to property which belongs to another.

2. DAMAGE TO ANIMALS OR PLANTS IN GARDENS: SECTION 58A

11.6 Section 58A provides that:

"Whoever wilfully or wantonly does or attempts to do any act which may, directly or indirectly, damage, injure, or destroy -

- (a) **any beast, bird, reptile, fish, or other living creature, or any egg or spawn thereof; or**
- (b) **any garden, flower bed, tree, shrub, plant, or flower; or**

¹⁸ The purpose of this excuse appears to have been to protect members of a hunt who entered another's land in pursuit of an animal such as a fox: Nichols 142. Note that Aboriginals may take fauna or flora on any Crown land or other land, not being a nature reserve or wildlife sanctuary, with the consent of the occupier of that land sufficient only for food for themselves and their family: *Wildlife Conservation Act 1950* s 23(1); see also *National Parks and Wildlife Conservation Act 1975* (Cth) s 70(1). Aboriginals may also enter any unenclosed land and unimproved parts of land subject to a pastoral lease "to seek their sustenance in their accustomed manner": *Land Act 1933* s 106(2). See generally *The Aboriginal Land Inquiry Report* (1984) paras 11.1-11.14.

¹⁹ No other jurisdiction retains such a defence, although it was once to be found in the equivalent offences in South Australia, the Northern Territory and the ACT. In each of these jurisdictions the equivalent of s 80 has now been repealed. In South Australia, prior to repeal, the defence was abolished when the offence was redrafted by the *Police Act 1953* s 43.

²⁰ However, those who hunt, fish or shoot could be civilly liable for negligent property damage: see *League Against Cruel Sports Ltd v Scott* [1986] QB 240.

²¹ Ss 717-719.

(c) **any building, structure, or other property,**

in any place maintained and used as a garden for zoological, botanical, or acclimatisation purposes, or for public resort and recreation, is guilty of an offence.

Penalty: A fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months or both."

11.7 Since section 80 only covers damage to property which belongs to another, section 58A was enacted in 1902²² to fill a gap which would otherwise have existed in the law relating to damage to property. Section 58A covers cases where the property would not belong to another, for example damage or injury to or destruction of beasts, birds, reptiles, fish and other living creatures or their eggs or spawn.²³

11.8 As section 58A also covers damage to other kinds of property that would obviously be under ownership, there is a considerable overlap with section 80. The maximum penalty is the same under both sections, but section 58A incorporates a mental element whereas section 80 does not.²⁴ Section 58A is wider than section 80, however, in that it includes attempts. Another overlapping provision is the *Prevention of Cruelty to Animals Act 1920* which makes it an offence to ill-treat any domestic or captive animal²⁵ or needlessly slaughter or mutilate animals or subject them to unnecessary pain or suffering.²⁶ The penalty is \$5,000 or 12 months' imprisonment.

11.9 The Commission **recommends** that section 58A be repealed because -

1. The gap in the law that made necessary the enactment of section 58A is now very narrow because the *Wildlife Conservation Act 1950*²⁷ provides that property in "fauna",²⁸ until lawfully taken, is vested in the Crown.

²² By the *Police Act Amendment Act 1902* s 10.

²³ Conduct of this kind is also prohibited under a number of by-laws, eg National Parks Board By-laws 1963 by-laws 13-16; *Kings Park By-laws* by-law 5; *Rottnest Island By-laws 1966* by-law 3; *Zoological Gardens By-laws 1975* by-laws 9-10.

²⁴ Before 1980, s 80 also contained a mental element: see para 11.2 above. Even then the sections were inconsistent in the words used to convey the mental element.

²⁵ See the definitions of "domestic animal" and "captive animal" in s 3 of the Act.

²⁶ *Prevention of Cruelty to Animals Act 1920* s 4(1)(a) and (f).

²⁷ S 22(1).

²⁸ S 6(1) of the Act provides that "fauna" means:

"(a) any animal indigenous to any State or Territory of the Commonwealth or the territorial waters of the Commonwealth;

2. Section 58A would overlap to a considerable extent with the proposed redrafted section 80 and section 444 of the *Criminal Code*. This is because both apply to "any property" (that is, "real and personal property and everything, animate or inanimate, capable of being the subject of ownership"²⁹). These provisions would cover -
- * the items set out in paragraphs (b) and (c) of section 58A,
 - * most, if not all,³⁰ of the living creatures whether *domitae naturae*³¹ or *ferae naturae*³² in paragraph (a).
3. The fact that section 58A is wider than section 80 in that it includes attempts is not a cogent reason for retaining it. It is preferable to review the law relating to attempt to commit a simple offence³³ to determine whether an attempt to commit a simple offence should be an offence either generally or in relation to particular classes of offences.
4. Few charges are laid under the section.³⁴
5. There is no equivalent offence in the police legislation of any other Australian jurisdiction.

-
- (b) any animal that periodically migrates to and lives in any State or Territory of the Commonwealth or the territorial waters of the Commonwealth; and
 - (c) any animal declared as fauna pursuant to subsection (2) of this section, and includes in relation to any such animal-
 - (d) any class or individual member thereof;
 - (e) the eggs, larvae or semen;
 - (f) the carcass, skin, plumage or fur thereof,
- but does not include any prescribed animal or prescribed class of animal".

²⁹ *Criminal Code* s 1(1).

³⁰ The only one not covered may be spawn.

³¹ Ie animals generally found tame. Full property rights can exist in these animals.

³² Ie animals usually found at liberty or "wild" animals. A qualified property interest may exist in these by taming or reclaiming them. Property is lost if the animal attains its natural liberty. While a property interest exists they are as much under the protection of the law as if they were owned absolutely: *R v Drinkwater* (1981) 27 SASR 396, 399.

³³ Generally it is not an offence to attempt to commit a simple offence unless the offence is a simple offence under the *Criminal Code*: *Criminal Code* s 555A.

³⁴ There were only 2 charges under s 58A in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

3. EXTINGUISHING WANTONLY ANY LIGHT SET UP FOR PUBLIC CONVENIENCE: SECTION 59

11.10 Extinguishing wantonly any light set up for public convenience is one of a number of offences set out in section 59.³⁵ The section also deals with other matters such as singing obscene songs, using indecent language, soliciting and using threatening, abusive and insulting words or behaviour. It is difficult to envisage any common ground between such offences and wantonly extinguishing lights. If any light were deliberately extinguished it would usually be by way of some physical activity which would constitute the offence of damage to property³⁶ because property is damaged when it is rendered inoperative³⁷ or imperfect.³⁸ In order to constitute damage, it is unnecessary "to establish such definite or actual damage as renders the property useless, or prevents it from serving its normal function".³⁹ The Commission **recommends** that the section 59 offence of wantonly extinguishing lights be repealed because -

1. It is covered by other offences (for example section 444 of the *Criminal Code* and the proposed redrafted section 80 of the *Police Act*).
2. It has been abolished in other jurisdictions.⁴⁰
3. Few charges are laid for the offence.⁴¹

³⁵ S 59 is quoted in para 6.2 above. It was modelled on s 59 of the *Police Act 1869*(SA).

³⁶ Paras 11.1-11.3 above.

³⁷ For example, where an amber safety lamp was extinguished without actually causing physical damage to the lamp.

³⁸ *R v Zischke* [1983] 1 Qd R 240. It is not essential to establish that expenditure of money was required to restore property in order to prove damage, though, of course, such expenditure may afford "evidence of the fact and extent of the imperfection created": id 246.

³⁹ *Samuels v Stubbs* (1972) 4 SASR 200, 203.

⁴⁰ It has been abolished in South Australia and also in the ACT, where the provision was modelled on the South Australian provision. It is retained in the Northern Territory: *Summary Offences Act* (NT) s 52.

⁴¹ There were no charges for this offence in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

Chapter 12

OFFENCES INVOLVING POSSESSION OF CRIME-RELATED PROPERTY

1. INTRODUCTION

12.1 In Chapters 12, 13 and 14 the Commission deals with a number of offences the common element of which is a dishonest intent.

- * Chapter 12 considers offences involving the possession of crime-related property.
- * Chapter 13 deals with offences akin to stealing.
- * Chapter 14 deals with offences involving fraud and deception.

12.2 Chapter 12 deals with offences of possessing weapons, protective jackets and vests, implements to facilitate the unlawful driving of a motor vehicle, drugs, housebreaking implements and explosives. These offences involve conduct preparatory to the commission of some other offence, usually either burglary or stealing. They are essentially offences of a preventative nature.¹

12.3 Much of the ground covered by these offences is also covered by section 407 of the *Criminal Code*, which provides indictable offences involving the possession of crime-related property:

"Any person who is found under any of the circumstances following, that is to say: -

- (a) Being armed with any dangerous or offensive weapon or instrument, and being so armed with intent to enter a place, and to commit a crime therein;
- (c) Having in his possession by night without lawful excuse, the proof of which lies on him, any instrument of housebreaking;

¹ Cf Ch 4 above, dealing with the more general preventative offences in the Act.

- (d) Having in his possession by day any such instrument with intent to commit a crime; or
- (e) Having his face masked or blackened or being otherwise disguised, with intent to commit a crime;

is guilty of a crime, and is liable to imprisonment with hard labour for three years.

If the offender has been previously convicted of a crime relating to property, he is liable to imprisonment with hard labour for 7 years.

Summary conviction penalty: Imprisonment for 2 years, or a fine of \$8 000."

The defendant may be tried summarily if the court considers that, having regard to the nature and particulars of the offence and the circumstances of the charge, the charge can adequately be dealt with summarily and the defendant so elects.² On summary conviction the defendant is liable to imprisonment for 2 years or a fine of \$8,000.

12.4 The Murray Report³ in its discussion of section 407 noted that the sections of the *Police Act* being discussed in this Chapter complemented the various offences in section 407. It suggested that both the Code and the *Police Act* offered only partial coverage of the ground, and recommended that section 557 of the Code (at present limited to explosives) should be redrafted as a general preparation offence, with section 407 being repealed. The Report contemplated that even if a general preparation offence were incorporated in the Code the more specific offences in the *Police Act* would be retained. These recommendations in the Murray Report have not yet been implemented.

2. WEAPONS: SECTIONS 65(4) AND 65(4a)

(a) Offences

12.5 Under section 65(4):

"Every person found in possession of any weapon or instrument or thing capable of being used for the purpose of disguise, who being thereto required, shall not give a good account of his means of support, and assign a valid and satisfactory reason for such possession"

² *Criminal Code* s 5.

³ 262-263.

commits an offence. Section 65(4) has been in the Act since 1892.

12.6 In 1956 section 65(4a) was added.⁴ This section provides that an offence is committed by

"Every person who, without lawful excuse, carries or has on or about his person or in his possession any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon or truncheon, or any other article made or adapted for use for causing injury to the person, or intended by him for such use by him."

(b) Recommendations

(i) *Section 65(4)*

12.7 The Commission **recommends** that section 65(4) be replaced by an offence limited to the possession of any article of disguise. The provision might be as follows:

A person who, without lawful excuse, is found in possession of an article of disguise commits an offence.

Penalty: \$500 or imprisonment for 6 months.

This replacement is recommended because -

1. Section 65(4) has been superseded by section 65(4a), which regulates the carrying of weapons.⁵
2. The interpretation of section 65(4) is unclear.⁶
3. It is out of step with contemporary society and general criminal law principles.⁷

⁴ By the *Police Act Amendment Act 1956*.

⁵ There were 151 charges under s 65(4a) in the Perth and East Perth Courts of Petty Sessions in 1989, but only 11 under s 65(4): see Appendix IV.

⁶ It is drafted in very vague terms and its meaning is uncertain: Nichols 72-74.

⁷ It can be criticised on the ground that the defendant, once found in possession of the articles in question, must not only "assign a valid and satisfactory reason for such possession" but also "give a good account of his means of support". The Commission has already suggested that offences couched in such terms are undesirable: para 4.3 above. It has also drawn attention to the fact that where offences are drafted in this

12.8 Adoption of the Commission's recommendation would mean that the Act would then provide separate offences dealing with offensive weapons and articles of disguise. This is the position in most other Australian jurisdictions.⁸ Though all Australian jurisdictions once had provisions similar to section 65(4), Western Australia is the only jurisdiction which retains it in the original form.

12.9 As with the existing section, the provision recommended by the Commission applies to possession of the article of disguise whether or not in a public place.⁹ This is necessary because the offence is directed at conduct preparatory to the commission of some other offence and the police may need to intervene even though the person is not in a public place. Those who possess an article of disguise for an innocent purpose, such as attendance at a fancy dress ball, would be protected by the requirement for the absence of a lawful excuse.

(ii) *Section 65(4a)*

12.10 Section 65(4a) was added to the *Police Act* because of the need for an offence to deal with the carrying of weapons.¹⁰ It was redrafted in its present form to make it clear that it covered weapons carried for defensive as well as offensive purposes.¹¹ The scope of the section is now very wide. It is not confined to possession of a weapon in a public place but includes possession in a home. It applies not only to the particular weapons listed but also to ". . . any other article made or adapted for use for causing injury to the person, or intended by him for such use by him". This is wide enough to include a short metal bar if it is intended to be used for self defence because this involves an intention to use it for causing injury.¹² The fact that a person had possession of a weapon for self defence may not amount to a "lawful excuse" to a charge under section 65(4a). In England it has been held that ". . . it may be a reasonable excuse for the carrying of an offensive weapon that the carrier is in anticipation of

form the onus on the prosecution is much less exacting than the normal principle under which all the elements of the offence must be proved beyond reasonable doubt: para 4.3 above.

⁸ See for example *Vagrancy Act 1966* (Vic) s 6(1)(e) and (f); *Summary Offences Act 1953* (SA) s 15(1)(a) and (c); *Summary Offences Act* (NT) s 56(1)(d) and (e).

⁹ See generally Nichols 72-74. In England, a similar offence applies only to persons who are not in their place of abode: *Theft Act 1968* (UK) s 25. However, there is no requirement for the absence of a lawful excuse.

¹⁰ *Western Australian Parliamentary Debates* (1956) Vol 144, 1372.

¹¹ By the *Police Act Amendment Act (No 2) 1975* s 31, following the decision in *Chadbourne v Ansell* [1975] WAR 104.

¹² *Evans v Hughes* [1972] 3 All ER 412.

imminent attack and is carrying it for his own personal defence".¹³ It was never intended to "...sanction the permanent or constant carriage of an offensive weapon merely because of some constant or enduring supposed or actual threat or danger to the carrier".¹⁴ If this construction also applies to the defence of "lawful excuse" in section 65(4a), those who keep a weapon such as a firearm, or even a cricket bat, in their home for protection without a fear of imminent attack would commit an offence under the section.

12.11 A different approach has been adopted in Victoria. There, possession of an offensive weapon or instrument for self defence is a "valid and satisfactory reason" for possession of the object¹⁵ ". . . provided that the defendant did not anticipate a fight, that is, did not go looking for trouble".¹⁶ This is because the defence of self defence ". . . is not available if the defendant can be said to be looking for trouble".¹⁷

12.12 The Commission considers that it is anomalous that self defence is a general defence to a criminal charge but that it is an offence to possess an object that can be used for that purpose. To ensure that section 65(4a) does not preclude possession of an object for self defence, the Commission **recommends** that the section be redrafted to provide:

A person who, without a valid and satisfactory reason,¹⁸ carries or has on or about his or her person or in his or her possession any article made or adapted for use for causing injury to the person, or intended by him or her for such use by him or her commits an offence.

Penalty: \$500 or imprisonment for 6 months.

¹³ Id 415. See *Eades v Van de Ven* (unreported) Supreme Court of Western Australia, 8 May 1992, Appeal No 1222 of 1991 where a claim of a lawful excuse based on the possession of a rifle for self-protection was rejected on the facts.

¹⁴ *Evans v Hughes* [1972] 3 All ER 412, 415.

¹⁵ S 6(1)(e) of the *Vagrancy Act 1966* provides that:

"Any person who -

is found armed with an offensive weapon or instrument unless such person gives to the court a valid and satisfactory reason for his being so armed;

shall be guilty of an offence."

¹⁶ Law Reform Commission of Victoria *Offensive Weapons* (Report No 29 1989) 16, citing *Tapai v Kelly* (unreported) Supreme Court of Victoria O/R No 7723, 15 July 1980.

¹⁷ *Ibid.*

¹⁸ In the case of a firearm, it should make no difference whether the firearm is licensed or unlicensed. However, possession of an unlicensed firearm is an offence: *Firearms Act 1973* s 19.

3. PROTECTIVE JACKETS AND VESTS: SECTION 65(4aa)

12.13 Section 65(4aa) provides that:

"Every person who, not being an exempt person, has in his possession any protective jacket, vest, or other article of apparel designed to resist the penetration of a projectile discharged from a firearm . . ."

commits an offence.¹⁹

12.14 Members of the police and armed forces, persons who have permission from the Commissioner of Police,²⁰ and those who have possession only for the purpose of delivering the article to such persons are exempt persons for the purposes of the section.

12.15 The section was inserted in the *Police Act* in 1983,²¹ because concern had been expressed at the Police Commissioners' Conference, supported by various governments throughout Australia, that if bullet-proof vests became available police would be deprived of an advantage when confronted with armed and dangerous offenders.²² Though no other Australian police legislation contains a similar offence, the Commission **recommends** that section 65(4aa) be retained.²³ However, as the provision stands at present, it is unsatisfactory because those aggrieved by a refusal of permission to possess a protective jacket (such as those who work in the security industry or for financial institutions, jewellers and chemists) who might feel vulnerable without the security provided by a jacket have no right of appeal against a decision of the Commissioner of Police.²⁴ The Commission **recommends** that a person refused permission to possess a protective jacket or vest should be able to appeal to a stipendiary magistrate against the decision as is the case with firearms, the possession of which requires a licence issued by the Commissioner of Police.²⁵

¹⁹ There were no charges under s 65(4aa) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

²⁰ The only persons who have been given permission under this provision are merchants promoting particular makes of protective jackets or vests and visiting dignitaries.

²¹ By the *Police Amendment Act 1983* s 4.

²² *Western Australian Parliamentary Debates* (1983) Vol 243, 2699.

²³ Nine of the 15 commentators on this matter, including the Police Department and the Police Union, favoured retention of the offence. The Police Department did so because police officers would be deprived of an advantage when confronted with armed and dangerous offenders.

²⁴ Judicial review by way of one of the prerogative writs or by declaration or injunction may be available but this does not allow for a review of the merits of a decision.

²⁵ Cf *Firearms Act 1973* s 22 which provides for an appeal to a stipendiary magistrate by a person aggrieved by a decision made by the Commissioner of Police under the Act. The magistrate may confirm, vary or set aside the decision appealed against and may make such order as he or she thinks fit.

4. IMPLEMENTS TO FACILITATE UNLAWFUL USE OF MOTOR VEHICLES: SECTION 65(4b)

12.16 Section 65(4b) provides that:

"Every person who, without lawful excuse, carries or has in his possession any jumper leads, silver paper, wire hooks, cutting implements or other implement or device to facilitate the unlawful driving or use of a motor vehicle"

commits an offence.²⁶

12.17 This section was inserted in the *Police Act* in 1972.²⁷ According to the Minister's second reading speech, there had been an increasing incidence in the unlawful use of motor vehicles, and persons with jumper leads in their possession had been interviewed by police at late hours.²⁸ No other Australian police legislation contains a similar offence.

12.18 It has been suggested that under the present wording of section 65(4b) the *ejusdem generis* rule would apply, thus requiring that the other implements or devices be of a similar nature to the jumper leads, silver paper and so on.²⁹ On this view, other means of facilitating the unlawful use of a motor vehicle, for example, by using a dipstick, would not be within the section. To ensure that these other means are caught, the Commission **recommends** that section 65(4b) be redrafted to provide:

A person who, without lawful excuse, carries or has in his or her possession any implement or device capable of being used to facilitate the unlawful driving or use of a motor vehicle commits an offence.

Penalty: \$500 or imprisonment for 6 months.

²⁶ There were 9 charges under s 65(4b) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

²⁷ By the *Police Act Amendment Act 1972* s 3.

²⁸ Western Australian *Parliamentary Debates* (1972) Vol 193, 424.

²⁹ Nichols 77.

5. DELETERIOUS DRUGS: SECTION 65(5)

12.19 Section 65(5) provides that:

"Every person having in his possession, without lawful excuse, the proof of which excuse shall be on such person, any deleterious drug"

commits an offence.

12.20 Section 65(5) has been in the *Police Act* since 1892. There is no definition of what is meant by a deleterious drug. However it has been held in Victoria that a deleterious drug is one which, unless used with care and with special knowledge of its propensity to do harm, may cause substantial injury to the life or health of the user.³⁰ The burden of proving the existence of a lawful excuse is specifically placed on the defendant: on most occasions in which this element appears in the *Police Act*, absence of a lawful excuse must be established by the prosecution.³¹

12.21 Prosecutions under the section are not frequent.³² It appears that in the past the section has been used to prosecute for glue sniffing. However the Supreme Court has now held that it is not appropriate to regard glue as a deleterious drug, and that even if it were the sniffing of glue is not in itself a criminal offence.³³ A contrary holding would have meant that any persons found in possession of glue would have the onus cast on them to prove a lawful excuse.

12.22 The Commission **recommends** that section 65(5) be redrafted in the following manner:³⁴

(1) A person who, without a valid and satisfactory reason, has in his or her possession any disabling substance commits an offence.

Penalty: \$500 or imprisonment for 6 months.

³⁰ *McAvoy v Gray* [1946] VLR 442. The drug involved in this case was cocaine.

³¹ For the only other exceptional case, see s 66(4), considered in paras 12.24-12.27 below.

³² There were only 3 charges under s 65(5) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

³³ *Patton v Mounsher* (unreported) Supreme Court of Western Australia, 16 September 1988, Appeal No 1269 of 1988.

³⁴ This draft is based on s 202A of the *Crimes Act 1961(NZ)*.

(2) In subsection (1) “disabling substance” means any anaesthetising or other substance produced for use for disabling persons, or intended by any person having it with him or her for such use.

12.23 This redraft of the section -

1. Uses the term "disabling substance" instead of "deleterious drug" to make it clear that it is an offence dealing with conduct preparatory to the commission of some other offence. It would catch someone in possession of a drug that could be used to stupefy or overpower a person, such as chloroform, or otherwise facilitate the commission of an offence.³⁵
2. Ensures that a person may have possession of a disabling substance for self defence.³⁶
3. Removes the burden of proof from the defendant.³⁷

³⁵ For example, a substance such as "Mace" or "Body Guard" (made from vegetables such as peppers and chillies) which can be used to disable a person. The term "deleterious drug" may be too narrow in view of the decision in *McAvoy v Gray* because some disabling drugs may not cause substantial injury unless used with care and special knowledge. On the other hand, comments of Nicholson J in *Patton v Mounsher* (unreported) Supreme Court of Western Australia, 16 September 1988, Appeal No 1269 of 1988 suggest that the term "deleterious drug" could apply in wider circumstances, particularly if the onus of proof of a lawful excuse for possession of the drug were removed from the defendant. He said:

"... the words 'without lawful excuse' when read in conjunction with the words 'deleterious drug' suggest to my mind that the substances in issue must be so clearly deleterious drugs that a lawful excuse must be shown to justify their possession. Because the subsection has no regard to the conduct which results from use of the substance and is directed only to possession and because it places the onus of proof of lawful excuse for possession on the person found to possess it, it is not in my mind directed to the substance here in issue, that is Selley's glue. A person found in possession of Selley's glue could not be said to be in possession of a deleterious drug where the subsection itself does not put in issue the effects of the substance on the control of that person's body."

Mace, because of its nature and purpose, could be seen as a deleterious drug or substance requiring that a lawful excuse to possess it be shown. However, the use of the term "disabling substance" should remove any doubt on the matter.

Note that s 293 of the *Criminal Code* provides that stupefying in order to commit an indictable offence is a crime.

³⁶ See paras 12.11 and 12.12 above.

³⁷ For a general discussion of the burden of proof see paras 3.15-3.19 above.

6. HOUSEBREAKING IMPLEMENTS AND EXPLOSIVE SUBSTANCES: SECTION 66(4)

12.24 By section 66(4):

"Every person having in his custody or possession without lawful excuse (the proof of which excuse shall be on such person), any picklock, key, crow, jack, bit, or other implement of housebreaking or any explosive substance"

commits an offence.³⁸

12.25 Section 66(4) was one of the original provisions in the *Police Act 1892* and can be traced back to the *United Kingdom Vagrancy Act 1824*.³⁹ Originally it was limited to implements of housebreaking, but explosive substances were added in 1962.⁴⁰ The section does not expressly state any mental element.

12.26 Like section 65(5), but unlike other sections of the Act which use the phrase "without lawful excuse", section 66(4) places the proof of the excuse on the defendant. There is a similar provision in the equivalent offence in section 407(c) of the *Criminal Code* which is limited to the possession of housebreaking implements by night. Section 407(d) makes it an offence to have possession of housebreaking implements by day but, unlike section 407(c), requires proof of intent to commit a crime.

12.27 The Commission **recommends** that this offence be retained but that it be reformulated to provide that:

A person who, without lawful excuse, has in his or her custody or possession any implement of housebreaking or explosive substance commits an offence.

Penalty: \$1,000 or imprisonment for 12 months.

This reformulation -

³⁸ There were only 11 charges under this section in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

³⁹ S 4.

⁴⁰ By the *Police Act Amendment Act 1962* s 2.

1. Simplifies the existing provision by removing the list of housebreaking implements which might be read under the *ejusdem generis* rule to exclude other implements which were not similar to those listed.
2. Removes the reversal of the burden of proof, thus making the provision consistent with other possession offences in the *Police Act* and the general principle of common law, adopted in the *Criminal Code*, that it is for the prosecution to prove all the elements of the offence beyond reasonable doubt.⁴¹

⁴¹ Para 3.15 above.

Chapter 13

OFFENCES AKIN TO STEALING

1. INTRODUCTION

13.1 This Chapter is concerned with a number of simple offences in the *Police Act* akin to stealing or involving the stealing of specific items of property. These offences are in addition to stealing offences in the *Criminal Code*,¹ for some of which a defendant may elect summary trial.² The existence of these offences is a factor which needs to be considered in deciding whether the simple offences akin to stealing should be retained:

1. On the one hand, the offences could perhaps be regarded as a valuable alternative to the Code provisions.
2. On the other hand, the use of these simple offences would deprive the defendant of the right to a jury trial.
3. In any case, a special simple offence may no longer be justified because it duplicates other provisions.

2. BEING SUSPECTED OF HAVING OR CONVEYING STOLEN GOODS: SECTIONS 69 AND 71

(a) The offences

13.2 Section 69 provides that:

"Every person who shall be brought before any Justice charged with having on his person or in any place, or conveying, in any manner any thing which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such Justice how he came by the same, shall be liable to a penalty of not more than two thousand dollars, or in the discretion of the

¹ S 378.

² *Criminal Code* ss 426 (summary trial of stealing) and 426A (summary trial of burglary).

Justice may be imprisoned, with or without hard labour, for any term not exceeding two years."

13.3 Section 71 provides that:

"When any person shall be brought before any Justice charged with having or conveying anything stolen or unlawfully obtained, and shall declare that he received the same from some other person, or that he was employed as a carrier, agent, or servant, to convey the same for some other person, such Justice is hereby authorized and required to cause every such person, and also if necessary every former or pretended purchaser or other person through whose possession the same shall have passed, to be brought before him and examined, and to examine witnesses upon oath touching the same; and if it shall appear to such Justice that any person shall have had possession of such thing and had reasonable cause to believe the same to have been stolen or unlawfully obtained every such person shall be deemed guilty of a misdemeanour; and the possession of a carrier or agent or servant shall be deemed to be the possession of the person who shall have employed him to convey the same; and every such person shall on conviction be liable to a penalty of not more than one thousand dollars, or to be imprisoned, with or without hard labour, for any term not exceeding twelve calendar months."

13.4 The *Police Ordinance 1861*³ derived these sections from provisions of the United Kingdom *Metropolitan Police Courts Act 1839*,⁴ provisions which have since been repealed.⁵ They survive in unchanged form in the present Act, save for increases in penalties. Every other Australian jurisdiction has an equivalent of section 69.⁶ However, there have been some modifications in New South Wales, the Australian Capital Territory⁷ and the Northern Territory.⁸ Some jurisdictions never adopted an equivalent of section 71,⁹ and besides Western Australia only Queensland retains it.¹⁰

13.5 Under section 69 the prosecution must prove that -

- (i) the defendant had the property on his or her person, or in any place, or was

³ Ss 41, 43.

⁴ Ss 24, 26.

⁵ S 24 of the *Metropolitan Police Courts Act 1839 (UK)* was repealed by the *Criminal Law Act 1977 (UK)* s 65 and Schedule 12, and s 26 by the *Theft Act 1968 (UK)* s 33(3) and Schedule 3. Neither section was replaced.

⁶ *Summary Offences Act 1966 (Vic)* s 26; *Vagrants, Gaming, and Other Offences Act 1931 (Qld)* s 25(1); *Summary Offences Act 1953 (SA)* s 41; *Police Offences Act 1935 (Tas)* s 39.

⁷ Two jurisdictions in which comprehensive reform of *Police Act* provisions has taken place.

⁸ See *Crimes Act 1900 (NSW)* s 527C; *Crimes Act 1900 (ACT)* s 527A; *Summary Offences Act (NT)* s 61.

⁹ South Australia, Northern Territory, ACT.

¹⁰ *Vagrants, Gaming, and Other Offences Act 1931 (Qld)* s 25(2).

conveying it in any manner - in short, that the property was in the defendant's possession; and

- (ii) that the property was reasonably suspected of being stolen or unlawfully obtained.

Reasonable suspicion means something more than mere imagination or conjecture. It must be the suspicion of a reasonable person warranted by facts from which inferences can be drawn, though falling short of legal proof.¹¹ It is either sworn to in court or inferred from conduct. The suspicion must attach to the property itself, and not the person in whose possession it was found,¹² though the behaviour of the person in relation to the property may give rise to suspicion.¹³ Once the elements of possession and suspicion have been established,¹⁴ the onus shifts to the defendant, who must give an account to the satisfaction of the court how he or she came by the property.

13.6 The elements of the offence in section 71 are generally similar. The prosecution must prove that a person brought before the court under the provisions of the section had possession of the property and had reasonable cause to believe that it was stolen or unlawfully obtained. However the section says that if these elements are proved the defendant is deemed guilty of a misdemeanour.¹⁵ There is no express requirement that the defendant should give a satisfactory account of how he or she came by the property.

(b) Recommendations

(i) Section 69

13.7 The justification for the offence seems to be that there will be occasions on which the police find on suspected persons, or in places where they are searching, property which they

¹¹ *Hughes v Dempsey* (1915) 17 WALR 186.

¹² *Yeo v Capper* [1964] SASR 1.

¹³ *Forrest v Normandale* (1973) 5 SASR 524.

¹⁴ In accordance with general principle the prosecution must prove possession beyond reasonable doubt. However, it is inappropriate to speak of the reasonableness of the suspicion being established beyond reasonable doubt: *Woolley v Bomford* [1969] Tas SR 127, 134-135 per Burbury CJ; *Tepper v Kelly* (1988) 47 SASR 271.

¹⁵ Like ss 41(1) and 41(7) (see para 5.1 above), this is a misdemeanour which is triable summarily. In the *Metropolitan Police Courts Act 1839 (UK)* and the *Police Ordinance 1861*, the equivalents of ss 69 and 71 were both referred to as misdemeanours. The drafter of the 1892 Act removed the reference from s 69 but not from s 71.

have reasonable grounds for suspecting to be stolen, without having or being able to procure sufficient evidence to justify a charge of stealing or receiving against the person under whose control the property is found.¹⁶ It has been suggested that in such cases it is not unreasonable to ask that person to give some explanation of how he or she came by the property.¹⁷

13.8 The major argument for repealing¹⁸ or modifying section 69 is that it is wrong in principle that a person who in fact came by the property honestly should be at risk of being convicted of an offence. There may be situations in which the defendant in fact came by the property honestly but is unable to produce evidence of this sufficient to satisfy the court. Section 69 is especially unfair when, on a charge of stealing, whether on indictment or tried summarily, the general principles of criminal law apply and the prosecution has to prove all the elements of the offence.¹⁹

13.9 Notwithstanding these arguments, the Commission recognises that there is a need for an offence relating to possession of property which may be reasonably suspected of being stolen or otherwise unlawfully obtained, to deal with cases in which the evidence is insufficient to justify a charge of stealing or receiving.²⁰ However, the offence should be redrafted so that it does not require the defendant to give a satisfactory account of how the property was acquired. Following an approach adopted in New South Wales and the

¹⁶ The offence should not be used to deal with acts summarily when the evidence is capable of supporting a charge for the indictable offences of stealing or receiving. In *O'Brien v Reitze* [1972] WAR 152, 155 Wickham J quoted words used by the Supreme Court of South Australia in *Lenthall v Newmann* [1932] SASR 126, 132:

"We have no doubt that it is an abuse of the provisions of the section to use the procedure for the purpose of presenting the defendant for a summary trial, and punishment, in respect of a definite offence; and we do not think that the prosecution ought to withhold evidence, or to use the general suspicion contemplated by the section, merely for the purpose of depriving the defendant of his right to a trial in the ordinary course, or a punishment appropriate to the offence. We should regard that as an abuse, and not as the fair use, of the enactment . . . and in a proper case we think that the Court would be justified in protesting and might even be required to interfere for the purpose of affording a remedy."

Wickham J emphasised that the prosecution should carefully consider before laying a charge under s 69 whether the complaint should not more properly be one for the Code offences of stealing or receiving. The difference between the offences is underlined by the fact that an acquittal under s 69 is not a bar to a charge of stealing or receiving, and vice versa: *R v Cleary* [1914] VLR 571; *Harrison v Trotter* [1937] SASR 7.

¹⁷ *Unlawful Possession* The Magistrate, 31 May 1935, 37; cf Nichols 112.

¹⁸ Most commentators (except the Police Department and the Police Union) were of the view that s 69 should be repealed.

¹⁹ See paras 3.15-3.19 above.

²⁰ Use is undoubtedly made of s 69. There were 169 charges under the section in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

Australian Capital Territory, the Commission **recommends** that section 69 be repealed and replaced by a provision in the following terms:²¹

- (1) A person who -
 - (a) has any thing in his or her custody;
 - (b) has any thing in the custody of another person;
 - (c) has any thing in or on premises,²² whether belonging to or occupied by the person or not, or whether that thing is there for the person's own use or the use of another; or
 - (d) gives custody of any thing to a person who is not lawfully entitled to possession of the thing,

which, on reasonable grounds, is believed to be stolen or otherwise unlawfully obtained commits an offence.

Penalty: \$10,000 or imprisonment for 2 years.²³

- (2) It is a sufficient defence to a prosecution for an offence under subsection (1) if the defendant satisfies the court that he or she had no reasonable grounds for believing that the thing referred to in the charge was stolen or otherwise unlawfully obtained.

The proposed offence does not require the defendant to give a satisfactory account. Instead it provides that the offence is established if, at the time of the hearing, possession and belief that the thing is stolen or otherwise unlawfully obtained are established by the prosecution beyond a reasonable doubt.²⁴ It is a good defence if the defendant satisfies the court that he or she had no reasonable grounds for believing that the property was stolen or otherwise unlawfully obtained.

²¹ This provision is based on the modernised version of the unlawful possession offence now in force in New South Wales: see *Crimes Act 1900* (NSW) s 527C, inserted in that Act in 1979. There are similar offences in the ACT and the Northern Territory: see fn 8 above.

²² The definition of "premises" should include a vessel.

²³ This is the maximum penalty provided for possession of gold, pearl or uncut diamonds under s 76A of the *Police Act*: para 13.14 below. It is recommended as the maximum penalty for this offence only because the Commission recommends that s 76A (and ss 76B-76E and 76I) be repealed: para 13.21 below. Charges which otherwise would have been brought under s 76A should be laid under the proposed s 69.

²⁴ *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351, 356.

(ii) *Section 71*

13.10 The primary purpose of section 71 appears to be to cover cases where property has been entrusted to a person as a custodian or carrier, and that person has reasonable cause to believe it to have been stolen or unlawfully obtained. It also covers former or pretended purchasers through whose possession the property has passed. This is potentially a more far-reaching extension, since it allows the section to cover persons who had possession but have it no longer, if they had reasonable cause to believe that the property was stolen or unlawfully obtained. Presumably the reasonable cause must exist at the time of possession and not subsequently.

13.11 The Commission **recommends** that section 71 be repealed for the following reasons -

1. It is grounded on an outdated inquisitorial notion of examination by justices, in which the defendant has no right to remain silent. The language of the section was perhaps appropriate when it was first drafted in 1839: until the reforms effected by the Jervis Acts,²⁵ preliminary examinations were much more inquisitorial in nature.²⁶ This explanation underlines how out of date the ideas behind section 71 are.
2. As with section 69 of the *Police Act*, it is wrong in principle that a person who came by the property honestly should be at risk of being convicted of an offence.²⁷
3. The conduct dealt with by section 71 would in many cases be covered by the redraft of section 69 recommended by the Commission.²⁸ The redraft, like the present section 69, is based on the fact that the defendant was unlawfully in possession of goods at the time in question. In the cases listed in section 71 where property is entrusted to a person as a custodian or carrier, this requirement is satisfied.

²⁵ *Indictable Offences Act 1848 (UK)* and *Summary Jurisdiction Act 1848*, enacted in Western Australia by 14 Vic Nos 4 and 5 (1850).

²⁶ See J H Langbein *Prosecuting Crime in the Renaissance* (1974) 5-125. For an example of preliminary examination in the early 19th century, see Charles Dickens *The Pickwick Papers* (1836-37) Ch 25.

²⁷ Para 13.8 above.

²⁸ Para 13.9 above.

4. In so far as section 71 extends beyond unlawful possession of goods at the time in question to unlawful possession at some time in the past, as in the case of former or pretended purchasers through whose possession the property has passed, it is inappropriate. It may be very difficult for a person charged with having had unlawful possession at some time in the past to assemble the necessary evidence to satisfy the court that he or she had no reasonable grounds for believing that the property was stolen or unlawfully obtained.
5. With the exception of Queensland, the section 71 offence was either not adopted in the other Australian jurisdictions or has since been repealed.²⁹
6. Few charges are laid under it.³⁰

3. POSSESSION OF GOLD, PEARL OR UNCUT DIAMOND SUSPECTED OF BEING STOLEN: SECTIONS 76A, 76C AND 76D

(a) The offences

13.12 Sections 76A to 76E of the *Police Act* were first enacted in 1902.³¹ In their original form they dealt only with stolen gold. They were extended to pearl in 1907,³² and uncut diamonds in 1981.³³

13.13 These sections were originally enacted at a time when gold stealing was rampant on the Goldfields, and there was a need for legislation to stamp it out which, to be effective, had to be "thorough and searching and stringent".³⁴ A more particular reason for the enactment of

²⁹ Para 13.4 above.

³⁰ There were only 2 charges under it in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

³¹ As ss 2-6 of the *Police Act Amendment Act 1902*. The sections were inserted in the *Police Act 1892* by the *Police Act Amendment Act 1952* s 7 and Schedule.

³² By the *Police Act Amendment Act 1907*.

³³ By the *Police Amendment Act 1981*.

³⁴ *Western Australian Parliamentary Debates* (1902) Vol 21, 1565. "A Royal Commission in 1905 reported that gold stealing provided an income for a large proportion of the goldfield's population. It was an insidious offence, difficult to detect and involving a large class of receivers as well as the families of most of the miners. An experienced force of police (partly financed by the mining companies) had failed to achieve many convictions. Clearly a goldfield's jury would be very reluctant to convict, as it was almost certain to include some participants in the 'industry'." Russell 236.

the legislation was the decision in *R v Hahn*,³⁵ which exposed a gap in section 69. In that case gold ore was found in a water closet on premises owned by the defendant but occupied by a tenant. It was held that no offence had been committed because the gold could not be shown to be in the defendant's possession.

13.14 Instead of amending section 69, Parliament enacted a special section, section 76A, dealing with the unlawful possession of gold suspected of being stolen:

"Any person who -

- (1) is charged before any stipendiary magistrate with having -**
 - (a) on his person or on any animal, or in any cart or other vehicle or in any boat or vessel; or**
 - (b) in his possession on any premises of which he is the tenant or occupier, or reputed tenant or occupier,**
- any gold, pearl or uncut diamond reasonably suspected of being stolen or unlawfully obtained; and**
- (2) does not prove to the satisfaction of the magistrate that such gold, pearl or uncut diamond was lawfully obtained,**

is liable, on summary conviction, to a fine not exceeding \$10,000, or to imprisonment, with or without hard labour, for any term not exceeding 2 years."

13.15 The drafting of section 76A is clearly based on section 69, but instead of being limited to having property on the person or in any place it makes it clear that the offence can be committed by the defendant having possession of property on any premises of which the defendant is a tenant or owner. Any doubts about whether the defendant is in possession of such property are avoided by section 76B, which provides:

"Any person being the reputed tenant or occupier of any premises at the time when any gold, pearl or uncut diamond reasonably suspected of being stolen or unlawfully obtained is found thereon and seized by any police officer shall be deemed to have been in possession of such gold, pearl or uncut diamond until the contrary is proved."

³⁵ (1901) 3 WALR 78.

13.16 Sections 76C and 76D create further offences. Under section 76C, presence on the scene at the time the gold is found, coupled with failure to give a satisfactory explanation, is an offence:

"(1) Any person who -

- (a) is charged before any stipendiary magistrate with being present at the time when any gold, pearl or uncut diamond reasonably suspected of being stolen or unlawfully obtained is found and seized by any police officer on any premises; and**
- (b) is unable to give an account of his presence there to the satisfaction of the magistrate,**

is liable, on summary conviction, to a fine not exceeding \$10,000 or to imprisonment, with or without hard labour, for any term not exceeding 2 years.

(2) A person may be convicted under this section notwithstanding that no charge is laid or conviction obtained against the tenant or occupier or reputed tenant or occupier of the premises."

13.17 Assistance in the commission of the offence, coupled with failure to give a satisfactory account, is an offence under section 76D, which also sets out particular situations in which persons are deemed to have been giving assistance:

"(1) Any person charged before any stipendiary magistrate with having assisted in the commission of an offence under section seventy-six A of this Act, who is unable to give an account of himself to the satisfaction of the magistrate, is liable to a penalty of not more than \$5,000, or to imprisonment, with or without hard labour, for any term not exceeding one year.

(2) For the purpose of this section any person proved -

- (a) to have been watching or patrolling outside and in the vicinity of any premises on or about which any gold, pearl or uncut diamond reasonably suspected of being stolen or unlawfully obtained is found and seized by any police officer; or**
- (b) to have been accompanying any person having on his person, or on any animal, or in any cart or vehicle, any gold, pearl or uncut diamond reasonably suspected of being stolen or unlawfully obtained and, which is seized by any police officer,**

shall be deemed to be a person who has assisted in the commission of an offence under subsection one, unless the contrary is proved to the satisfaction of the magistrate."

13.18 The reason for extending these provisions to pearl stealing in 1907 was the prevalence on the north-west coast of Western Australia and in the pearling grounds of stealing and illicit dealing in pearls. Owing to the nature of the pearling business it was impossible to keep a check on pearls obtained.³⁶ The words "or in any boat or vessel" were added to section 76A(1)(a) at this point. More recently, in 1981, it was deemed appropriate to extend the legislation to diamonds. This followed the *Diamond (Ashton Joint Venture) Agreement Act 1981*,³⁷ as a result of which it was contemplated that diamond mining would become a major commercial enterprise in Western Australia.³⁸

13.19 The *Police Act* retains the separate definition section of the original Act (now section 76I), which contains a definition of "gold" plus definitions of "police officer" and "premises". As section 76I states, these definitions are only for the purposes of sections 76A to 76H,³⁹ though the latter two terms are also used elsewhere in the Act. Definitions of "pearl" and "uncut diamond" are tacked on to section 76E, which gives the court a power of restitution.

(b) Recommendations

13.20 The essence of section 76A, like section 69 on which it was modelled, is that it creates an offence relating to persons who are in possession of property under suspicious circumstances but cannot be charged with stealing. It is quite clear, both from the debates in Parliament on the legislation which eventually became section 76A,⁴⁰ and from the authorities on its interpretation,⁴¹ that it was designed as a section creating an offence of being in possession of goods at the time the suspicion in question was formed.⁴² The rationale is that the police would naturally question the defendant as soon as they formed the suspicion, and the person would be required to justify his or her actions immediately, not at some time previously. This makes the offence difficult to establish⁴³ unless a person in possession of

³⁶ Western Australian *Parliamentary Debates* (1907) Vol 32, 992.

³⁷ Renamed the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* in 1983.

³⁸ Western Australian *Parliamentary Debates* (1981) Vol 236, 6296.

³⁹ Ss 76F and 76G deal with prostitution offences. They are included because they were also originally enacted by the *Police Act Amendment Act 1902*. S 76H was repealed in 1979 but s 76I was not amended.

⁴⁰ Western Australian *Parliamentary Debates* (1902) Vol 21, 1587-1588.

⁴¹ *McArthur v McGee* (1907) 9 WALR 218; *Dunleavy v Dempsey* (1916) 18 WALR 90; cf *McDonald v Webster* [1913] VLR 506.

⁴² See generally *Police Department v Capelli* (unreported) Kalgoorlie Court of Petty Sessions, 7 November 1986, Charge No 1963-69 of 1986.

⁴³ Since July 1986 there have been 22 charges of unlawful possession of gold in Western Australia. In about 75% of cases the defendant entered a plea of not guilty. Of these about 75% resulted in an acquittal.

gold is apprehended while on or leaving the site of a gold mine.⁴⁴ Otherwise, the possession is only likely to be discovered some time after the person has disposed of the gold, for example, by an examination of the records of a gold buyer. The private ownership of gold is now unrestricted and gold may readily be purchased and exchanged.⁴⁵ In such circumstances it is more difficult for the prosecution to establish a reasonable suspicion that the gold has been stolen.

13.21 The Commission **recommends** that section 76A, and sections 76B-76E and 76I, be repealed⁴⁶ for the following reasons -

1. One basis for the introduction of section 76A, that section 69 applied only when the property in question was shown to be in the defendant's possession,⁴⁷ no longer applies. *R v Hahn*,⁴⁸ which had decided that section 69 applied only in this limited situation, was held by the Full Court in *Kavanagh v Claudius*⁴⁹ to have been wrongly decided. Accordingly, a charge can be laid under section 69 where a person has a thing "in any place", that is, "deposited in any place".
2. The redraft of section 69 recommended by the Commission⁵⁰ also applies to property which is not simply in the defendant's possession and therefore makes redundant the offence in section 76A.
3. Section 76A, like the present section 69, places the burden of proof on the defendant⁵¹ once the prosecution has proved possession of the property in question and that it was reasonably suspected of being stolen or unlawfully obtained.⁵² There are similar provisions in sections 76C and 76D.

⁴⁴ But in these cases charges under the *Criminal Code* of stealing (s 378) or receiving (s 414) could be laid.

⁴⁵ Restrictions on the private ownership of gold were lifted in 1976: see Western Australian *Parliamentary Debates* (1976) Vol 213, 2196.

⁴⁶ Most of those who commented, including the Police Union, favoured repealing these sections. The Police Department favoured retention of the sections.

⁴⁷ Para 13.13 above.

⁴⁸ (1901) 3 WALR 78.

⁴⁹ (1907) 9 WALR 55, 58.

⁵⁰ Para 13.9 above.

⁵¹ Though s 76A does not expressly say so, the standard of proof is presumably on the balance of probabilities.

⁵² In this respect s 76A probably gives the defendant a harder task than s 69. Under s 76A the defendant must prove to the satisfaction of the court that the property was lawfully obtained (presumably by the defendant, although the section does not expressly say so). However under s 69 the defendant must give a satisfactory account of how the property was obtained.

- * Under section 76C, once presence at the material time is proved, the defendant has to give an account of the presence there to the satisfaction of the court.
- * Under section 76D a person charged with assisting in the commission of an offence under section 76A has to give a satisfactory account.

In addition there are the deeming provisions in sections 76B and 76D.

- * Under section 76B reputed tenants and occupiers are deemed to be in possession of stolen property found on the premises until the contrary is proved.
- * Under section 76D persons watching or patrolling premises, or accompanying the person who has possession of the stolen property in question, are deemed to have assisted in the commission of the offence unless the contrary is proved.

The redraft of section 69 recommended by the Commission, consistently with the general principles of criminal law, places the onus of proving all the elements of the offence on the prosecution.

4. The redraft of section 69 recommended by the Commission is wider than section 76A in that it is not necessary for the possession or custody of the property and the suspicion that the property are stolen to be co-existent.⁵³ What is required is that the court be satisfied beyond reasonable doubt (at the time the charge is being heard for the purpose of being disposed of) that it is then proper to entertain a reasonable belief that the thing was stolen or unlawfully obtained.⁵⁴
5. No other Australian jurisdiction has a similar provision.

⁵³ See *R v Abbrederis* [1981] 1 NSWLR 530, 538-539.

⁵⁴ See *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351, 356 on a similar provision.

4. UNLAWFULLY TAKING OR USING ANIMALS: SECTION 79A

13.22 Under section 79A:⁵⁵

"Whosoever takes and works or otherwise uses or takes for the purpose of working or using any cattle or dog the property of another person, without the consent of the owner or person in lawful possession thereof, or who takes any such cattle or dog for the purpose of secreting the same or obtaining a reward for the restoration or pretended finding thereof or for any other fraudulent purpose, shall be guilty of a misdemeanour, and on conviction before two Justices shall be liable to imprisonment for a term not exceeding twelve months, or to pay a fine not exceeding one thousand dollars."

The term cattle is defined as including any camel, horse, mare, gelding, colt, foal, filly, ass, mule, bull, cow, ox, steer, heifer, calf, wether, ram, ewesheep, lamb, pig, goat, deer, alpaca, llama, or vicuna, and every hybrid or cross thereof.⁵⁶

13.23 Section 79A covers a variety of different kinds of conduct. They are analysed by Nichols⁵⁷ as follows:

1. Taking and working
2. Otherwise using for the purpose of working
3. Otherwise taking for the purpose of working
4. Taking for the purpose of secreting for reward
5. Taking for the purpose of obtaining a reward for the restoration or pretended finding of the property
6. Taking for any other fraudulent purpose.

⁵⁵ This section was first enacted by s 14 of the *Police Act Amendment Act 1893*, the purpose of which was to add a number of provisions that had been left out of the 1892 Act. Parliament noted that the provision was found in other Australian jurisdictions: *Western Australian Parliamentary Debates* (1892) Vol 3, 417.

⁵⁶ The Police Department noted that the definition did not include antelope and suggested that they be added.

⁵⁷ 138.

Though the sidenote reads "unlawfully taking or branding animals" there is no mention of branding as such.

13.24 The concept of "taking" will obviously include some cases in which the defendant could be charged with stealing.⁵⁸ In these cases section 79A gives the alternative of a summary prosecution.⁵⁹ There is thus a danger that section 79A could be used where a charge of stealing would be more appropriate. However, section 79A is not limited to "taking" and covers a number of cases where a charge of stealing would not be appropriate. It is really the equivalent for animals of the former Code offence of unauthorised use of a vehicle.⁶⁰

13.25 Section 79A is very similar to section 428 of the *Criminal Code*. Section 428 provides that:

"Any person who unlawfully uses or takes for the purpose of using, a horse, mare, gelding, ass, mule, camel, bull, cow, ox, ram, ewe, wether, goat, pig, or dog, or the young of any such animal, without the consent of the owner, or of the person in lawful possession thereof, and any person who takes any such animal, for the purpose of secreting the same, or obtaining a reward for the restoration or pretended finding thereof or for any fraudulent purpose, is guilty of an offence, and is liable on summary conviction to imprisonment with hard labour for one year, or to a fine of \$100 for every animal so used or taken."

13.26 There is no need for both offences. The Commission prefers the simpler formulation of the offence in section 428 of the *Criminal Code* - "any person who unlawfully uses or takes for the purpose of using" - to that in section 79A of the *Police Act*. However, the animals to be covered should be referred to by a compendious expression, rather than having a long list of particular animals, with the possibility that some which ought to be included are not. As regards the location of the offence, it is preferable for relatively minor offences such as unlawfully using animals to be in the *Police Act* or the proposed *Summary Offences Act*, rather than the *Criminal Code*. Accordingly, the Commission endorses the recommendation in the

⁵⁸ Though "takes" does not necessarily mean the same as "takes" in the definition of stealing in s 371 of the *Criminal Code*, and may simply mean "catching": Nichols 139.

⁵⁹ The offence is categorised as a misdemeanour. The Murray Report 283 recommends that s 79A should be amended to make it clear that it is creating a simple offence.

⁶⁰ *Criminal Code* s 390A, which defined the offence in terms of unlawfully using or taking for the purpose of using, or driving or otherwise assuming control of any vehicle. S 390A was repealed by s 18 of the *Criminal Law Amendment Act 1991*. A new provision (s 371A) provides that a person who unlawfully uses a motor vehicle, takes a motor vehicle for the purpose of using it or drives or otherwise assumes control of a motor vehicle is said to steal that vehicle.

Murray Report that section 428 of the *Criminal Code* be repealed.⁶¹ If section 428 is repealed, the Commission **recommends** that a provision modelled on section 428 be inserted in the proposed *Summary Offences Act* in place of section 79A of the *Police Act*.⁶² The new provision might read:

- (1) A person who -
 - (a) unlawfully uses, or takes for the purpose of using, any domestic animal or captive animal without the consent of the owner or person in lawful possession;
or
 - (b) takes any domestic animal or captive animal for the purpose of secreting it, or obtaining a reward for its restoration or pretended finding or for any unlawful purpose,

commits an offence.

Penalty: \$1,000 or imprisonment for 12 months.

- (2) In subsection (1) -

"domestic animal" means any animal which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man; and

"captive animal" means any animal (not being a domestic animal) which is in captivity, or confinement, or which is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement.

⁶¹ The Murray Report was critical of s 428, saying that in many cases the conduct involved would amount to stealing or fraudulent obtaining, and any other cases were not worth having in the Code. Mindful of the existence of s 79A of the *Police Act*, the Report recommended the repeal of s 428: Murray Report 283.

⁶² There were no charges under s 79A in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV, but this is not significant as the offence is one likely to be committed mainly in country areas, for which statistics are not available. In 1985-1986 there was a total of 211 reported cases involving animals valued at a total of \$300,000: Annual Report of the Commissioner of Police 1986, 23, though many of these would have involved legislation other than the *Police Act*.

If, however, section 428 of the *Criminal Code* is retained, the Commission **recommends** that section 79A of the *Police Act* be repealed.

5. UNLAWFUL USE OF A BOAT OR TAKING A BOAT OR ANY BOAT FITTING: SECTION 81

13.27 Section 81 provides that:

"A person who takes, uses, or assumes control of any boat, flat, or barge or any fitting or equipment, including any motor, thereon without previously obtaining the consent of the owner or person in charge thereof is liable to a fine of two thousand dollars or imprisonment for two years and in addition, on conviction, shall forfeit and pay to the party aggrieved such a reasonable sum as shall appear to the convicting Justice to be compensation for any loss of work, or loss of time, or damage sustained by the owner or person in charge of such vessel or fitting or equipment, by reason of such unauthorized removal or use thereof."

13.28 Section 81 is an old offence. It can be traced back to section 32 of the *Police Ordinance 1849*, which expressly referred to the fact that "great loss and inconvenience has been sustained by the owners of boats, from the removal and use, without their knowledge or assent, of such boats or parts of the furniture thereof". An amendment to the section in 1970⁶³ recognised the fact that boats might now be powered by motors, and also eliminated the requirement that the removal had to take place "in any waters of the State", which had caused the courts to hold that no offence was committed where the boat was not in public waters.⁶⁴

13.29 As with section 79A, there would be some cases under section 81 in which a charge of stealing could also be laid. However the real purpose of section 81 is to provide an offence of unauthorised use of boats. A recommendation in the Murray Report that the former section 390A (which made the unauthorised use of a vehicle an offence)⁶⁵ be replaced by a more general offence of unauthorised use of a conveyance, including vessels,⁶⁶ has not been implemented.

13.30 Irrespective of whether a more general offence of unauthorised use of a conveyance is provided in the *Criminal Code*, the Commission **recommends** that section 81 be retained in

⁶³ By the *Police Act Amendment Act 1970* s 4.

⁶⁴ *Wills v Williams* [1971] WAR 29.

⁶⁵ See fn 60 above.

⁶⁶ 248.

order to provide a simple offence in this area.⁶⁷ The Commission **recommends**, however, that the provisions as to compensation be repealed because they are unnecessary in the light of the general compensation provisions in the Code⁶⁸ and that the drafting of the offence be modernised by removing the reference to "boat, flat, or barge" and replacing it with the term "vessel".⁶⁹ It might provide as follows:

A person who takes, uses, or assumes control of any vessel or any fitting or equipment, including any motor, of a vessel without previously obtaining the consent of the owner or person in charge of it commits an offence.

Penalty: \$2,000 or imprisonment for 2 years.

6. DESTROYING PROPERTY WITH INTENT TO STEAL, OR RETAINING OR DISPOSING OF PROPERTY: SECTION 82

13.31 Section 82 provides that:

"Every person who shall commit any of the next following offences as to any articles of property in this section mentioned (or who shall receive any of the same knowing them to have been stolen or unlawfully come by), shall on conviction for the first offence be liable to the punishment, and for any second or subsequent offence to double the amount of punishment hereinafter specified in each case:-

- (1) Every person who shall steal, or damage with intent to steal any part of any live or dead fence, or any post, pale, or rail, set up or used as a fence, or any stile or gate, or any part thereof respectively, shall pay to the party aggrieved the value of the property stolen, or the amount of the damage done, and shall also be liable to a fine not exceeding one hundred dollars, or to be imprisoned, with or without hard labour, for a term not exceeding one calendar month:**
- (2) Every person who shall steal or shall cut, break, root up, or otherwise destroy or damage, with intent to steal the whole or any part of any growing tree, sapling,**

⁶⁷ It is difficult to judge what use is made of s 81. Boat theft is a problem (*Boat Theft Soars in WA* The Road Patrol, June-July 1988, 40, reported that according to police figures 301 boats were stolen and 767 thefts from boats were reported in Western Australia between July 1986 and June 1987), yet the Commission's statistics revealed only 2 charges brought under this section in Perth and East Perth Courts of Petty Sessions in 1984-1985 and only 4 charges under this section in these courts in 1989: see Appendix IV. In 1988-1989 there were 11 charges of "theft or illegal use of a boat" in Courts of Petty Sessions in Western Australia: Australian Bureau of Statistics: *Court Statistics: Courts of Petty Sessions Western Australia 1988-89* Table 2. In most such cases offenders are presumably charged with theft.

⁶⁸ Ss 717-719.

⁶⁹ As provided in s 1 of the *Criminal Code*, "vessel" includes "a ship, a boat, and every other kind of vessel used in navigation."

shrub, or underwood, or any growing fruit, mushroom or other fungus or vegetable production, or any growing cultivated root or plant, shall (in case the value of the property stolen, or the amount of the damage done, shall not exceed ten dollars) pay to the party aggrieved the value of the property stolen, or the amount of the injury done, and shall be liable to a fine not exceeding one hundred dollars, or to be imprisoned, with or without hard labour, for any term not exceeding one calendar month:

- (3) Every artificer, workman, journeyman, apprentice, or other person who shall unlawfully dispose of or retain in his possession without the consent of the person by whom he shall be hired, retained, or employed, any goods, wares, work or materials committed to his care or charge (the value of such goods, wares, work, or materials, not exceeding the sum of twenty dollars), shall pay to the party aggrieved such compensation as the convicting Justice shall think reasonable, and shall also be liable to a fine not exceeding two hundred and fifty dollars, or to be imprisoned, with or without hard labour, for a term not exceeding three calendar months; and any person to whom any such property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, is hereby authorized to arrest without a warrant, and with all convenient speed, cause to be delivered into the custody of a constable, the person offering the same, together with such property to be dealt with according to law; and in every such case any such stolen property shall by order of the Justice by whom such case shall be heard and determined, be delivered over to the rightful owner, if known, or if the rightful owner shall not be known, the same shall be retained and sold, and the proceeds thereof applied in like manner as any penalties awarded under this Act."

13.32 Section 82 provides a means of prosecuting summarily a person who steals specified kinds of property, or damages the property in question with intent to steal it. In the case of subsections (2) and (3), the ambit of the offence is severely restricted by the requirement that the value of the property stolen (or in subsection (2), the amount of the damage done) shall not exceed \$10 and \$20 respectively.

13.33 This section was copied from the South Australian *Police Act 1869*,⁷⁰ which was in part based on provisions in the United Kingdom *Larceny Act 1861*.⁷¹ The object of the section seems to be to make it unnecessary to prosecute on indictment persons who commit minor offences of stealing or damage to property of specified kinds. It seems clear from the objects specified in section 82 that it was drafted with rural conditions particularly in mind.

13.34 The Commission **recommends** that section 82 be repealed for the following reasons -

⁷⁰ S 69.

⁷¹ Sub-ss (1) and (2) are based on ss 34 and 32. The source of sub-s (3) is not clear.

1. All of the matters mentioned in section 82 could be prosecuted either as stealing⁷² or as damage to property. As regards stealing, in certain cases the charge may be dealt with summarily before a Court of Petty Sessions.⁷³ As regards damage to property, it would be possible to bring a prosecution under section 444 of the *Criminal Code*⁷⁴ which may, in some cases, be dealt with summarily,⁷⁵ or section 80 of the *Police Act*,⁷⁶ which the Commission has recommended be retained in a redrafted form.⁷⁷
2. In South Australia, and in the Australian Capital Territory and the Northern Territory, which also copied the offence from South Australia, the equivalent of section 82 has been repealed.
3. Few, if any, charges are laid under the section.⁷⁸

⁷² *Criminal Code* s 378.

⁷³ Id s 426.

⁷⁴ See para 11.3 above.

⁷⁵ See para 11.3 above.

⁷⁶ Para 11.1 above.

⁷⁷ Para 11.4 above.

⁷⁸ There were no charges under s 82 in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

By contrast, there were 831 charges under s 80 in the Perth and East Perth Courts of Petty Sessions in 1989 and 52 charges of property damage in higher courts in 1988-1989: see fn 8 in Ch 11.

Chapter 14

OFFENCES INVOLVING FRAUD AND DECEPTION

1. INTRODUCTION

14.1 The *Police Act* contains a number of miscellaneous offences which deal with fraud and deception. These offences are dealt with in this Chapter. They include the passing of valueless cheques, obtaining unemployment benefits without entitlement and fortune telling.

14.2 Much of the ground covered by these offences is also covered by section 409 of the *Criminal Code*, which provides for indictable offences involving fraud and deception:

"(1) Any person who, with intent to defraud, by deceit or any fraudulent means -

- (a) obtains property from any person;
- (b) induces any person to deliver property to another person;
- (c) gains a benefit, pecuniary or otherwise, for any person;
- (d) causes a detriment, pecuniary or otherwise, to any person;
- (e) induces any person to do any act that the person is lawfully entitled to abstain from doing; or
- (f) induces any person to abstain from doing any act that the person is lawfully entitled to do,

is guilty of a crime and is liable to imprisonment for 7 years.

Summary conviction penalty (subject to subsection (2)): Imprisonment for 2 years or a fine of \$8 000.

(2) If the value of -

- (a) property obtained or delivered; or
- (b) a benefit gained or a detriment caused;

is more than \$4 000 the charge is not to be dealt with summarily.

(3) It is immaterial that the accused person intended to give value for the property obtained or delivered, or the benefit gained, or the detriment caused."

A summary conviction penalty is provided for cases where the defendant elects to be tried summarily in a Court of Petty Sessions.

2. VALUELESS CHEQUES: SECTION 64A

14.3 Section 64A provides that:

"(1) Any person who obtains any chattel, money or valuable security by passing a cheque within a period of sixty days from and commencing on the day of the opening of the bank account on which the cheque is drawn, which cheque is not paid on presentation, shall unless he proves -

(a) that he had reasonable grounds for believing that that cheque would be paid in full on presentation; and

(b) that he had no intent to defraud;

be liable on summary conviction -

(c) where the cheque was drawn for an amount not exceeding one hundred dollars, to a fine of five hundred dollars or to imprisonment for a term of six months; or

(d) where the cheque was drawn for an amount exceeding one hundred dollars, to a fine of one thousand dollars or to imprisonment for a term of twelve months,

notwithstanding that there may have been some funds to the credit of the account on which the cheque was drawn, at the time it was passed.

(2) No prosecution for the offence defined in this section shall be commenced without the written consent of the Commissioner of Police or a Commissioned Officer of Police, authorized for the purpose in writing by the Commissioner of Police."¹

14.4 This section was enacted in 1959² to deal with cases where a person opens an account at a bank with a small sum of money and then deliberately draws cheques far exceeding the amount deposited. It was pointed out in Parliament that in cases where the cheque was returned marked "no account" the offender could be charged with the *Criminal Code* offence

¹ There were only 2 charges under the section in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

² By the *Police Act Amendment Act 1959* s 3.

of false pretences.³ However in cases where the cheque was returned marked "insufficient funds" it was said to be impossible to prove the intention to defraud required for that offence.⁴ Section 64A attempts to solve this problem by placing the burden on defendants to prove that they had reasonable grounds for believing that the cheque would be paid in full on presentation and that they had no intent to defraud.

14.5 The reversal of the burden of proof in this section is a departure from the general principles of criminal law,⁵ although it is limited to -

1. Obtaining any chattel, money or valuable security.⁶
2. Cases where the cheque deemed valueless is passed within sixty days of the opening of the account.⁷

A further qualification on this section is that the consent of the Commissioner of Police must be obtained before a prosecution can be commenced. These qualifications have the effect that section 64A is narrower than equivalent provisions in other jurisdictions,⁸ which cover the obtaining, by means of a valueless cheque, of any credit, benefit or advantage,⁹ so extending to the obtaining of services by deception, and impose no limits as to the length of time for which the account has been open. Except for Victoria, no special consent to prosecution is required.

14.6 The only advantage of section 64A over the fraud offence in section 409 of the *Criminal Code* is that section 64A makes it easier to obtain a conviction by placing the burden of proof on the defendant. This, however, is contrary to the general criminal law principle that it is for the prosecution to prove the elements of the offence beyond reasonable doubt.

³ S 409, revised in 1990 and now dealing generally with offences involving fraud: see para 14.2 above.

⁴ Western Australian *Parliamentary Debates* (1959) Vol 152, 841-842.

⁵ See para 3.15 above.

⁶ The most common form of the offence is the purchase of goods by means of a cheque that is subsequently dishonoured.

⁷ It was thought that an honest person would be able to keep the account in order for this period. It was said in Parliament that most deliberate offenders operate quickly and could not afford to wait for any considerable time before operating: Western Australian *Parliamentary Debates* (1959) Vol 152, 842.

⁸ *Crimes Act 1900* (NSW) s 178B; *Summary Offences Act* (NT) s 60; *Summary Offences Act 1953* (SA) s 39; *Summary Offences Act 1966* (Vic) s 37.

⁹ Except in New South Wales, where the legislation (like s 64A of the *Police Act*) is limited to the obtaining of any chattel, money or valuable security and the Northern Territory, where the legislation covers not only the obtaining of any credit, benefit or advantage, but also the discharge or attempted discharge of any debt or liability.

14.7 It has been suggested that section 64A enables a prosecution to be undertaken where a cheque is returned marked "insufficient funds" because, unlike section 409 of the *Criminal Code*, it is not necessary for the prosecution to prove intent to defraud. However, in the Commission's view it is not impossible for the prosecution to prove under section 409 that the defendant had an intent to defraud in such a case.¹⁰ A defendant's intention may be inferred from the evidence,¹¹ including the defendant's statement and the circumstances surrounding the defendant's act, so long as the circumstances leave no reasonable doubt as to the defendant's intent to defraud. In the typical case involving fraud arising from the use of cheques, that intent could be inferred from the fact that the defendant opened a cheque account with a small deposit, say five dollars, and made no further deposits yet wrote a large number of cheques on the account in a short space of time for a sum far in excess of five dollars, even if the defendant opened the account in his or her own name. Such an inference could be more readily drawn if the defendant used a false name. It might be argued that a defendant could secure an acquittal by tendering evidence that he or she had a reasonable expectation that funds were to be deposited in the account but that the deposit had not in fact been made, thus catching the prosecution by surprise. However a safeguard against false evidence being tendered in this way is that those responsible could be prosecuted for perjury,¹² fabricating evidence,¹³ attempting to pervert the course of justice¹⁴ or conspiracy to defeat the course of justice.¹⁵

14.8 The Commission **recommends** that section 64A be repealed¹⁶ because -

1. Contrary to the general principles of the criminal law, it places the burden of proof on the defendant.

¹⁰ In fact, it is not uncommon for charges to be laid under s 409 in these circumstances at present and for a conviction to be obtained.

¹¹ In doing so, a jury are entitled:

". . . to take into account their experience of life and to consider what intention would normally be inferred from such words or actions, but that they must realise that it is the intention of the particular accused which is in issue, not that of some hypothetical average or reasonable man": *R v Olasiuk* (1973) 6 SASR 255, 263.

¹² *Criminal Code* ss 124-125.

¹³ *Id* s 129.

¹⁴ *Id* s 143.

¹⁵ *Id* s 135.

¹⁶ It has been suggested in Victoria by the Law Reform Commission that a similar offence there be repealed: *Summary Offences Act 1966* and *Vagrancy Act 1966: A Review* (Discussion Paper No 26 1992) 59.

2. It is not impossible to obtain a conviction under section 409 of the *Criminal Code* when a cheque is returned marked "insufficient funds".

3. IMPOSITION UPON CHARITABLE INSTITUTIONS OR PRIVATE INDIVIDUALS: SECTION 66(2)

14.9 Section 66(2) provides that:

"Every person imposing or endeavouring to impose upon any charitable institution or private individual, by any false or fraudulent representation, either verbally or in writing, with a view to obtain money or any other benefit or advantage"

commits an offence.

14.10 The ambit of the conduct covered by section 66(2) is uncertain.¹⁷ However it has been suggested that it should not be given its widest literal meaning because Courts of Petty Sessions would then have unlimited jurisdiction to try offences involving false pretences.¹⁸

14.11 The Commission **recommends** that section 66(2) be repealed because -

1. The proscribed conduct is dealt with by section 409 of the *Criminal Code*,¹⁹ an offence which can be tried summarily in some circumstances²⁰ unless the value of the property obtained or delivered or a benefit gained or a detriment caused exceeds \$4,000. Section 66(2) is therefore redundant.
2. Few charges are laid under the section.²¹
3. The equivalent offence has been abolished in those jurisdictions, New South Wales and the Australian Capital Territory, where a general review of "Police

¹⁷ See Nichols 86-87. According to Isaacs CJ and Gavan Duffy J in *Hansen v Archdall* (1930) 44 CLR 265, 270, "imposing" means cheating or wilfully deceiving.

¹⁸ *Hansen v Archdall* (1930) 44 CLR 265, 275-276 per Rich J (dissenting on the facts of the case).

¹⁹ Para 14.2 above.

²⁰ See *Criminal Code* s 5.

²¹ There were only 3 charges under this subsection in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

Act" offences has been carried out, and also in Tasmania,²² though it remains in force elsewhere.²³

4. OBTAINING UNEMPLOYMENT BENEFITS WITHOUT ENTITLEMENT: SECTION 66(2a) AND (2b)

14.12 Section 66(2a) provides that:

"Any person who, by wilfully making any false statement or representation -

- (a) as to any sum or sums of money being his own personal property then in his possession or power; or**
- (b) as to any property real or personal then owned by him; or**
- (c) as to any sum of money then receivable by him by way of income, gift, or allowance; or**
- (d) as to any sum of money received by him as salary or wages over any period; or**
- (e) as to any employment in which he was engaged over any period; or**
- (f) as to any sustenance relief received by him over any period; or**
- (g) as to the number of persons then dependent on his earnings; or**
- (h) as to the financial position of persons then dependent on his earnings,**

obtains or attempts to obtain under any scheme for the relief of unemployed destitute or indigent persons any work or employment or any benefit in money or money's worth either for himself or for any other person"

commits an offence.

14.13 Section 66(2b) provides that an offence is also committed by

²² Tasmania, however, has a more general offence of imposing on any person by a false or fraudulent representation: *Police Offences Act 1935* (Tas) s 8(1B).

²³ *Vagrancy Act 1966* (Vic) s 7(1)(b); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(xv); *Summary Offences Act 1953* (SA) s 37; *Summary Offences Act* (NT) s 57(1)(c); cf sections dealing with soliciting, gathering or collecting alms, subscriptions or contributions by any false pretence: *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(xiv); *Police Offences Act 1935* (Tas) s 8(1)(b); *Summary Offences Act 1981* (NZ) s 15.

"Any person continuing to receive or attempting to receive any such work, employment, or benefit after he shall to his knowledge have become disentitled to receive the same."

14.14 These sections were inserted in the *Police Act* in 1933²⁴ to deal with problems arising out of measures that had been taken in consequence of the economic depression then prevailing.²⁵ The Government had made available funds for the relief of unemployment, and sections 66(2a) and (2b) sought to prevent people from claiming or receiving or continuing to receive sustenance from these funds when not entitled to do so.²⁶

14.15 Today benefits for those who are unemployed are provided by the Commonwealth Government under the *Social Security Act 1991*. Assistance from the State Government is also available under the *Welfare and Assistance Act 1961*. Both Acts provide offences relating to making false statements in connection with a claim for a benefit or assistance.²⁷ The types of relief mentioned, such as "sustenance relief", are no longer available and it is not clear whether other more recent forms of relief would constitute a "scheme for the relief of unemployed destitute or indigent persons".²⁸ As the sorts of scheme contemplated by sections 66(2a) and 66(2b) and brought about by the economic conditions of the 1930's are no longer in existence the provisions are obsolete.²⁹ Accordingly, the Commission **recommends** that these sections be repealed.³⁰

5. FORTUNE TELLING: SECTION 66(3)

14.16 Section 66(3) provides that:

"Every person pretending to tell fortunes, or using any subtle craft, means, or device, to deceive and impose upon any person"

²⁴ By the *Police Act Amendment Act 1933* s 2.

²⁵ By 1933, nearly one in four in Perth was unemployed, and another one in four was on short time: Stannage 339. See also G C Bolton *A Fine Country to Starve In* (1972).

²⁶ Western Australian *Parliamentary Debates* (1933) Vol 90, 595, where a number of instances are given of the problems which had arisen.

²⁷ *Social Security Act 1991* (Cth) s 1344; *Welfare and Assistance Act 1961* s 21.

In 1988-1989 there were 656 charges under social welfare legislation in Courts of Petty Sessions in Western Australia: Australian Bureau of Statistics (Western Australia) *Court Statistics: Courts of Petty Sessions (Western Australia)* (1988-89) Table 2.

²⁸ The only authority is *Police Commissioner v Curran* (unreported), Court of Petty Sessions, 1973, referred to in Nichols 90-91, in which it was held that ss 8 and 10 of the *Welfare and Assistance Act 1961* set up a scheme of the kind covered by ss 66(2a) and (2b).

²⁹ There were no charges under either of these sections in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

³⁰ Most of those who commented, including the Police Department and the Police Union, agreed that the sections should be repealed.

commits an offence.

14.17 This is a very old offence which can be traced back to the United Kingdom *Witchcraft Act 1735*.

14.18 Under section 66(3) fortune telling per se is an offence.³¹ The only limitation is that the conduct must be directed to individuals: newspaper astrologers, whose columns are directed at the public generally, do not commit the offence.³² Using any subtle craft, means or device to deceive and impose upon a person refers to conduct of the same general character as fortune-telling, and cannot be extended to card tricks and the like which do not have a supernatural element.³³

14.19 The fact that defendants maintain that they are not pretending³⁴ to tell fortunes, and have an honest belief in their power to tell fortunes, has been held to be immaterial.³⁵ However, there was no argument in these cases that section 24 of the *Criminal Code*, which excuses defendants in certain circumstances where they have an honest and reasonable but mistaken belief in a state of things, might apply. There is no express requirement of intent to defraud in section 66(3), although the requirement that the defendant pretend to tell fortunes or use any subtle craft "to deceive and impose upon any person" would seem to import some sort of mental element.

14.20 Prosecutions for this offence are rare.³⁶ It appears that it is the practice of the police to prosecute only where persons are telling fortunes for money.³⁷

14.21 The Commission does not consider that fortune telling per se and the like should be within the province of the criminal law. It is not a sufficient justification for the imposition of a criminal penalty that those who avail themselves of the service provided are induced to part with their money, or that those who believe what they are told may suffer emotionally as a

³¹ *Stonehouse v Masson* [1921] 2 KB 818.

³² *Barbanell v Naylor* [1936] 3 All ER 66.

³³ *Monck v Hilton* (1877) 2 ExD 268, 276 per Cleasby B.

³⁴ The word "pretending" can be used in two senses. At the present day it is generally used to mean feigning or offering as true something which is not, but the word was once used to mean professing or claiming.

³⁵ *Isherwood v O'Brien* (1920) 23 WALR 10; *Zahradnik v Bateman* (unreported) Supreme Court of Western Australia, 30 November 1982, No 265 of 1982.

³⁶ There was only one charge in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

³⁷ *P W Nichols Clairvoyance No Help* (1983) 26 JPWA Journal No 7, 8.

result. Where fortune telling is associated with fraudulent conduct, that conduct can be dealt with under section 409 of the *Criminal Code*. Provisions similar to s 66(3) have been repealed without replacement in New South Wales, the Australian Capital Territory and England. Accordingly, the Commission **recommends** that section 66(3) be repealed.³⁸

6. FRAUDULENTLY MANUFACTURING OR SELLING ADULTERATED METALS OR SUBSTANCES: SECTION 66(12)

14.22 Section 66(12) provides that:

"Any person fraudulently manufacturing or aiding in the manufacture of any spurious or mixed metal or substance, and any person fraudulently selling or fraudulently offering for sale, as unmanufactured gold, or as gold in its natural state, any metal or mixed or adulterated metal or other substance, whether partly composed of gold or not"

commits an offence.

14.23 Section 66(12) was included in the *Police Act* in 1892. Its remoter origins are not clear: it is not found in the South Australian *Police Act 1869*, on which the 1892 Act was based, nor in the United Kingdom *Vagrancy Act 1824*.

14.24 The Commission **recommends** that section 66(12) be repealed because -

1. Insofar as it covers fraudulent selling or fraudulent offering for sale, it has been made redundant by the enactment of section 409 of the *Criminal Code*.
2. Insofar as it covers the making of counterfeit money it has been made redundant by the enactment of section 6 of the *Commonwealth Crimes (Currency) Act 1981* relating to making counterfeit money. The fraudulent manufacture of other materials can be dealt with when the real harm is done, that is, when it is sold fraudulently.

³⁸ 13 of the 24 commentators on this matter agreed that s 66(3) should be repealed. 4 commentators favoured retention of the section and 7 favoured replacing it with a provision along the lines of that in New Zealand where it is an offence for a person, with intent to deceive, to purport to act as a spiritualist or medium or to exercise powers of telepathy, clairvoyance or other similar powers: *Summary Offences Act 1981* s 16(1)(a).

3. It has been retained in only two other Australian jurisdictions: Queensland³⁹ and Victoria.⁴⁰
4. Few, if any, charges are laid under the section.⁴¹

³⁹ *Vagrants, Gaming, and Other Offences Act 1931*(Qld) s 4(1)(xi).

⁴⁰ *Vagrancy Act 1966* (Vic) s 7(1)(j).

⁴¹ There were no charges in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

Chapter 15

OTHER OFFENCES IN PARTS V AND VI

1. INTRODUCTION

15.1 In this Chapter a number of offences are considered which do not fall into any of the categories already examined.

2. WILFUL NEGLECT OF DUTY BY POLICE: SECTION 47

15.2 Section 47 provides that any person may apprehend any reputed common prostitute, thief, or loose, idle or disorderly person who commits an offence under the *Police Act* and must deliver the person to any constable or police officer to be taken before a justice to be dealt with according to law. A constable or police officer who:

". . . shall refuse or wilfully neglect to take such offender into custody, or to take and convey him before a Justice, or who shall not use his best endeavours to apprehend and to convey him before a Justice, shall be deemed guilty of neglect of duty and shall, on conviction, be punished in such manner as herein directed."

15.3 The Commission **recommends** that the provision that a constable is deemed guilty of neglect of duty be repealed¹ for the following reasons -

1. It does away with a police officer's common law discretion as to whether to arrest offenders.
2. It is inappropriate to create a police disciplinary offence in a section conferring a limited power of arrest on citizens. It is also unnecessary, since the *Bail Act 1982* imposes a duty on a police officer or other person who arrests a person for an offence either to grant bail (if empowered to do so) or to bring the person arrested before a court so that the person's case for bail can be

¹ All but one of the commentators, including the Police Department and the Police Union, agreed that the offence should be repealed. The Commission also recommends that the power of arrest conferred by s 47 should be repealed: paras 17.19-17.20 below.

considered.² The *Bail Act 1982* also creates an offence of failing to bring the arrested person before a court or person able to grant bail as soon as is practicable.³

3. The provision was originally a reference to section 24, which created an offence of misconduct by constables. Section 24, along with section 23 which dealt with misconduct by non-commissioned officers, was repealed in 1978,⁴ and in their place the new section 23 sets out disciplinary measures which do not constitute criminal offences. However section 47 was not consequentially amended.⁵ There are no other neglect of duty offences in the Act to which it can apply. The only operation which it could have is if section 47 is regarded as itself creating the offence, with a penalty being provided by the general penalty provision in section 124.

4. Few, if any, charges are laid under the section.⁶

3. MAD DOGS: SECTION 51

15.4 Section 51 provides that:

"Any officer or constable of the Police Force may destroy any dog or other animal reasonably suspected to be in a rabid state, or which has been bitten by any dog or animal reasonably suspected to be in a rabid state, and the owner of any such dog or animal who shall permit the same to go at large after having information or reasonable ground for believing it to be in a rabid state or to have been bitten by any dog or other animal in a rabid state, shall on conviction be liable to a penalty of not more than twenty dollars."

15.5 This provision was first enacted in the *Police Ordinance 1861*⁷ and was then carried over into the 1892 Act. The draftsman of the 1861 Ordinance derived it from the United

² S 6.

³ S 61. This offence replaces s 570 of the *Criminal Code*, which imposed a duty to take an arrested person before a justice, and s 140, under which it was an offence wilfully to delay in taking an arrested person before a justice - provisions which likewise made the offence in s 47 unnecessary.

⁴ By the *Police Act Amendment Act 1978* s 7.

⁵ S 47 is not the only section that was left undisturbed when s 24 was repealed. S 33G(1)(b) still contains a reference to s 24 which is now redundant. It also contains a reference to s 23 which may now be inappropriate.

⁶ There were no charges under the section in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

⁷ S 63.

Kingdom *Metropolitan Police Act 1839*.⁸ The wording of the present section is exactly the same as the 1839 Act in all essential respects.

15.6 The Commission **recommends** that section 51 be repealed⁹ because it has been superseded by other legislation.¹⁰ As regards dogs, the *Dog Act 1976* makes it an offence for a dog to be out of control, whether or not in a public place¹¹ - for example a dog that is in a public place other than a dog exercise area or a rural area must be held or securely tethered.¹² A dog that is in a place in contravention of the Act may be seized,¹³ and if by reason of the savagery of the dog, repeated evasion of attempts at seizure or other sufficient cause, it is dangerous or impracticable to seize it, a member of the police force or other authorised person may destroy it.¹⁴ These provisions make section 51 redundant as far as dogs are concerned, since dogs, rabid or not, are no longer allowed to "go at large". The maximum penalty under section 51, \$20, is grossly inadequate when compared with a maximum penalty of \$200 imposed by the *Dog Act*.

15.7 As regards animals reasonably suspected to be in a rabid state, the *Health Act 1911*¹⁵ gives public health officials power to destroy animals known or suspected to be infected, and the *Local Government Act 1960*¹⁶ allows municipalities to make by-laws authorising the killing of an animal which has a contagious or infectious disease and which is in a street or other public place. A Commonwealth statute, the *Quarantine Act 1908*, provides for the quarantine of dogs and other animals.¹⁷

4. NEGLIGENT OR FURIOUS DRIVING: SECTION 57

15.8 Section 57 provides that:

"Every person who shall ride or drive in any street so negligently, carelessly, or furiously, that the safety of any other person might thereby be endangered, shall,

⁸ S 61.

⁹ All commentators, including the Police Department and the Police Union, agreed.

¹⁰ There were no charges under s 51 in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

¹¹ Ss 31, 32, 33 and 33A.

¹² S 31.

¹³ S 29(3).

¹⁴ S 29(13).

¹⁵ S 251(4).

¹⁶ S 243(1)(b).

¹⁷ Part V.

on conviction, be liable to a penalty of not more than one hundred dollars, except where the offence is in respect of so riding or driving a vehicle that is a vehicle within the meaning of the *Road Traffic Act 1974*, in which case like provisions shall apply to the offender as apply under that Act."

15.9 This provision was derived from the South Australian *Police Act 1869*,¹⁸ but the earlier Western Australian Police Ordinances had both included somewhat similar provisions.¹⁹ The section must be seen against the background of a society where people travelled by riding horses (or bicycles) or driving in horse drawn vehicles. The use of the adjective "furiously" helps to convey the context. As a member of Parliament said in a debate in 1975, when urging the abolition of the section: "We can almost hear the swish of the crinolines".²⁰

15.10 Originally section 57 was the only provision required for the control of road traffic.²¹ With the advent of the motor vehicle, first the *Traffic Act 1919*²² and then the *Road Traffic Act 1974*²³ enacted more up to date offences. Section 57 now provides that where the offence is in respect of riding or driving a vehicle that is a vehicle within the meaning of the *Road Traffic Act 1974*, like provisions shall apply as apply under that Act. The definition of "vehicle" in the *Road Traffic Act* includes every conveyance (except trains, vessels and aircraft) and every object capable of being propelled or drawn, on wheels or tracks, by any means, and, where the context permits, an animal being driven or ridden.²⁴ However, the offences of reckless driving, dangerous driving and careless driving²⁵ are all confined to motor vehicles.

15.11 Regulation 1306 of the *Road Traffic Code 1975* provides that a person shall not, on any road or place to which the public is permitted to have access, drive or ride an animal or bicycle recklessly or without due care and attention. Regulation 1305 also provides that a person shall not ride on a road a roller skate or any vehicle (such as a skateboard) that is mounted on small wheels or rollers and not fitted with an efficient mechanism for braking. Failure to comply with these regulations is an offence carrying a maximum penalty of \$400 for a first offence and \$800 for a subsequent offence.²⁶

¹⁸ S 56.

¹⁹ *Police Ordinance 1849* s 19; *Police Ordinance 1861* s 59(5), based on *Metropolitan Police Act 1839 (UK)* s 54(5).

²⁰ *Western Australian Parliamentary Debates* (1975) Vol 209, 228 (T A Hartrey).

²¹ Apart from provisions in Part VII of the *Police Act 1892* such as s 96(5), (6) and (13), all now as outdated as s 57: see Ch 16 and Appendix III.

²² S 26 (reckless driving).

²³ Ss 60 (reckless driving), 61 (dangerous driving), 62 (careless driving).

²⁴ S 5(1).

²⁵ See fn 23 above.

²⁶ *Road Traffic Code 1975* reg 1901.

15.12 The Commission **recommends** that section 57 be repealed²⁷ because -

1. It has been superseded by other legislation.
2. It was not designed with motor vehicles in mind, and in cases involving the use of a motor vehicle the same penalty applies as under the *Road Traffic Act*. It is hard to see a complaint ever being laid under the *Police Act* in such a case.²⁸
3. Cases other than those involving a motor vehicle are covered by regulations 1305 and 1306 of the *Road Traffic Code*, and the penalty is the same as that provided by section 57.
4. Of the other Australian jurisdictions, only the Northern Territory and New South Wales retain an equivalent section.²⁹

5. RESTRICTION ON GAMES ON CERTAIN DAYS: SECTION 61

15.13 Section 61 provides that:³⁰

"(1) Any person who, in any room or place, keeps by way of trade or business any billiard table or amusement machine, or any person having the care or management of any such room or place or in any manner assisting in conducting the business thereof who shall permit or suffer any person to play a game of the kind referred to in subsection (3), or any such machine, on Christmas Day or Good Friday, or on any other day except during the permitted hours referred to in subsection (2), commits an offence.

Penalty: \$1 000.

(2) For the purposes of subsection (1) of this section the following are the permitted hours -

²⁷ All commentators, including the Police Department and Police Union, agreed.

²⁸ There was only one charge under s 57 in the Perth and East Perth Courts of Petty Sessions in 1984-85 and none in 1989: see Appendix IV. (1971) 135 *JPJ* 2 refers to a charge of furious driving in England. The defendant was charged under the *Offences Against the Person Act 1861* (UK) s 35. The Chairman of the Nottingham Quarter Sessions said that it was unusual to employ against a motorist a statute framed before cars were invented.

²⁹ *Summary Offences Act* (NT) s 49; *Police Offences Act 1901* (NSW) s 99.

³⁰ There was only one charge under this section in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

- (a) **between eight o'clock in the forenoon and midnight on any day other than a Sunday, Christmas Day or Good Friday;**
- (b) **between ten o'clock in the forenoon and eight o'clock in the afternoon on any Sunday, not also being Christmas Day; or**
- (c) **such other hours as may be authorized pursuant to a gaming permit issued under the *Gaming Commission Act 1987*.**

(3) In subsection (1) of this section "billiard table" means any table used or designed for the use for the playing of billiards, snooker, pool of any kind, skittle, or any like game."

15.14 Section 61, as originally drafted, was a Sunday observance provision. Its importance is reflected in the fact that in the Police Ordinances 1849 and 1861 the Sunday observance provisions were placed before all the other offences.³¹ As originally drafted, it -

1. prohibited the owners of public billiard rooms or places of amusement from permitting the playing of games on Sunday, Christmas Day or Good Friday;
2. gave the police powers to disperse persons gathering together for such purposes, and to seize property used for gaming; and
3. made gambling or playing games for money on the prohibited days an offence.

15.15 In 1972 amusement machines were added to the section, and as a result of representations made by youth groups and the proprietors of amusement centres³² the section was altered so as to permit opening on Sundays between 10.00 am and 6.00 pm.³³ This change effected a fundamental alteration in the purpose of the section. No longer was it primarily concerned with Sunday observance: it was now essentially a provision regulating trading hours, similar to the provisions now found in the *Retail Trading Hours Act 1987*. The permitted hours were extended in 1975.³⁴

³¹ Ss 6-7 of the *Police Ordinance 1849* and ss 16-17 of the *Police Ordinance 1861* were the equivalents of ss 60-61 of the *Police Act 1892*. S 60 (to cause the Lord's Day to be observed) which regulated shop opening hours on Sundays, was repealed by the *Factories and Shops Act 1963* s 4 and First Schedule.

³² Western Australian *Parliamentary Debates* (1972) Vol 193, 424.

³³ *Police Act Amendment Act 1972* s 2.

³⁴ By the *Police Act Amendment Act* (No 2) 1975 s 27.

15.16 The *Acts Amendment and Repeal (Gaming) Act 1987*³⁵ made further important amendments to the section by abolishing the offence of gambling or playing games for money outside the permitted hours, and the seizure and dispersal provisions. Section 61 as it now stands makes it an offence for persons who keep by way of trade billiard tables (as defined) and amusement machines (not defined), or their managers or assistants, to permit or suffer the playing of the specified games or of amusement machines outside the permitted hours.

15.17 Representations have been made to the Government on behalf of the proprietors of amusement centres requesting the amendment of section 61 to expand the hours during which amusement machines may be played.³⁶ This matter has been referred to the Commission as part of its review of the offences in the *Police Act*.

15.18 The Commission does not believe that it is necessary to retain section 61 for the purpose of regulating trading hours of amusement centres. If that is thought to be desirable, it should be done under legislation such as the *Retail Trading Hours Act 1987*. Apart from regulating trading hours, section 61 is also said to play a role in controlling the congregation of large groups of people late at night.³⁷ However it is anomalous that the section does not apply to any other place in which this may occur such as theatres, bowling alleys, roller and ice skating rinks and restaurants. The question of whether young people are at risk in amusement centres was recently examined by the Department for Community Services. A survey for the Department³⁸ found that the frequenting of amusement centres does not place young people at risk, and that the centres are safe and well-regulated. In 1988 the State Government announced a code of ethics for amusement leisure centres³⁹ which includes requirements that appropriate supervision is to be available at all times, young children are not to be permitted on the premises after 8.00 pm unless accompanied by an adult, unlawful behaviour is to be reported to the police and schoolchildren are not to be permitted in leisure centres during school hours. Each leisure centre must display a code of behaviour notice in a

³⁵ S 49.

³⁶ See letter from Minister for Police to Attorney General dated 27 November 1986, referred to the Commission by the Attorney General.

³⁷ This is the view of the Commissioner of Police as to the purpose of the section: see letter from Minister for Police referred to in fn 36 above. It may also be one reason for the regulation of the hours which licensed premises are allowed to remain open under the *Liquor Licensing Act 1988*.

³⁸ Department for Community Services *Report on Pinball Parlours and Amusement Centres* (1988).

³⁹ Media Statement from Department of Premier and Cabinet, 19 December 1988.

prominent position and enforce it.⁴⁰ It can therefore no longer be argued cogently that amusement centres have a detrimental effect on the habits of young people. For these reasons, the Commission **recommends** that section 61 be repealed.⁴¹

6. TAKING A DOG INTO PUBLIC GARDENS: SECTION 63

15.19 Section 63 provides that:

"Every person who shall knowingly bring or take any dog into any public garden, declared such by notice published in the *Government Gazette*, or shall suffer any dog to remain in any such garden, shall for every such offence be liable on conviction to a penalty of not more than one dollar."

15.20 This section was originally inserted in the *Police Ordinance 1861*⁴² and continued (with minor amendments) in the 1892 Act. Its remoter origins are unknown. There are no equivalent provisions in any other Australian Police Act.

15.21 The Commission **recommends** that section 63 be repealed⁴³ because -

1. It has been superseded by by-laws. Local authorities have power under the *Dog Act 1976* to make by-laws specifying places where dogs are prohibited,⁴⁴ and in practice this is the means by which the presence of dogs in particular places is regulated.⁴⁵
2. In any case, the section only prohibits the taking of dogs into public gardens so declared by notice published in the *Government Gazette*. No such notices are in force and it appears that none have ever been issued.
3. The fine, \$1, has remained unaltered since 1892 (when it was increased from five to ten shillings) and in present day conditions is a trifling amount.

⁴⁰ The code of ethics of *Timezone* provides amongst other things that unaccompanied young children are not permitted on the premises after 8pm, children spending excessive time at the premises should be encouraged by the staff to return home and unlawful behaviour should be reported to the Police.

⁴¹ There is no equivalent legislation in the other Australian jurisdictions.

⁴² S 60.

⁴³ All who commented agreed.

⁴⁴ S 51(b).

⁴⁵ There were no charges under s 63 in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

7. BEGGING: SECTION 65(3)

15.22 Section 65(3) provides that:

"Every person wandering abroad, or from house to house, or placing himself in any public place, street, highway, court, or passage to beg or gather alms, or causing, or procuring, or encouraging any person to do so, or begging or gathering alms in any other place and not quitting such place whenever thereto bidden or requested"

commits an offence.

15.23 This offence is one of the oldest in the *Police Act*. Begging was one of the original concerns of the English vagrancy laws from medieval times onwards.⁴⁶ The offence was introduced into Western Australian law by the *Police Ordinance 1849*,⁴⁷ which drew it from the *United Kingdom Vagrancy Act 1824*.⁴⁸ Because social conditions are very different from those of medieval England and the social security system seeks to meet the needs of those without sufficient means to support themselves begging is much less common than it used to be.⁴⁹

15.24 The Commission **recommends** that section 65(3) be repealed because -

1. If a particular instance of begging is sufficiently ill-mannered to annoy or insult persons faced with it sufficiently deeply to warrant the interference of the criminal law it can be dealt with under the offence of disorderly conduct.⁵⁰ Persistent begging on private premises could also be dealt with by the offence of remaining on premises, without lawful authority, after being requested to leave by the owner or occupier of the premises.⁵¹

⁴⁶ See Home Office Working Paper Appendix A.

⁴⁷ S 9.

⁴⁸ S 3.

⁴⁹ See Home Office Working Paper paras 56-58. There were only 4 charges under s 65(3) in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁵⁰ Para 6.5 above.

⁵¹ Para 8.15 above.

2. In jurisdictions which have undertaken major reforms of their police legislation, such as New South Wales, New Zealand and the Australian Capital Territory, the offence has been abolished.⁵²
3. Abolition of the offence of begging will not allow those charged with breaches of the street collections rules⁵³ to claim that they are begging and not collecting. The definition of "collection"⁵⁴ is wide enough to include begging, since it includes "the soliciting of funds".

8. WILFUL NEGLECT: SECTION 66(10)

15.25 Section 66(10) provides that:

"Every person leaving without lawful means of support his or her wife or husband, and any parent wilfully refusing or neglecting to maintain either wholly or in part his or her child"

commits an offence.

15.26 This again is a very old offence. It can be traced back to the provisions of the English Poor Law in the 16th century.⁵⁵ In Western Australia the offence dates back to the *Police Ordinance 1849*.⁵⁶

15.27 The Commission **recommends** that section 66(10) be repealed⁵⁷ because other legislation deals with the maintenance of spouses and their children.⁵⁸

* The *Commonwealth Family Law Act 1975* provides that a party to a marriage is liable to maintain the other party, to the extent that the first party is reasonably

⁵² An English committee recommended, however, that the offence should be reformulated rather than repealed. They suggested that the offence should be persistent begging, in a public place or by going from house to house: Home Office Report paras 13-18, and see Home Office Working Paper paras 62-69. The recommendation has not been implemented.

⁵³ *Street Collections (Regulation) Act 1940*.

⁵⁴ Id s 2.

⁵⁵ See Home Office Working Paper Appendix A.

⁵⁶ S 9.

⁵⁷ All but one of those who commented, including the Police Department and the Police Union, agreed.

⁵⁸ There were no charges under s 66(10) in the Perth and East Perth Courts of Petty Sessions in 1984-1985 or 1989: see Appendix IV.

able to do so, if that other party is unable to support herself or himself adequately;⁵⁹ parents of a child have the primary duty to maintain the child.⁶⁰

- * The *Western Australia Child Welfare Act 1947*⁶¹ provides that it is an offence for any person, either by wilful misconduct or habitual neglect, or by any wrongful or immoral act or omission, to cause or suffer any child to become or to continue to be a child in need of care and protection.
- * Section 262 of the *Criminal Code* provides that a person must provide the necessaries of life for any other person in his or her charge who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause, to withdraw from such charge and who is unable to provide himself or herself with the necessaries of life. Another section of the Code, section 263, provides that a head of a family must provide a child under 16 years in his or her charge and in his or her household with the necessaries of life.

9. REPEATED OFFENCES: SECTIONS 66(1) AND 67(2)

15.28 Section 66(1) provides that every person who commits an offence against section 65, having been previously convicted of an offence against that section, commits an offence under section 66. Section 67(2) provides that every person who commits an offence against section 66, having been previously convicted of an offence against that section, commits an offence under section 67.

15.29 The *Police Act* still incorporates the old scheme of the United Kingdom *Vagrancy Act 1824*, under which a number of offences are classified into three categories of advancing seriousness, reflected in the penalties provided for each category. To provide a higher penalty for a second conviction for an offence in a particular category, sections 66(1) and 67(2) provide that the second conviction constitutes the commission of an offence in the next category.

⁵⁹ S 72. Part VIII contains detailed provisions on maintenance of spouses.

⁶⁰ 66B. Part VII Division 6 contains detailed provisions on maintenance of children.

⁶¹ S 31A(1).

15.30 The Commission has recommended that many of the offences in sections 65, 66 and 67 be repealed.⁶² Others are retained, sometimes in a modified or modern form.⁶³ Those offences retained should have their own maximum penalty, as is the normal practice. It should be high enough for both first offenders and for those with previous convictions for the same offence or other offences. Sections 66(1) and 67(2) would then serve no purpose and should be repealed.⁶⁴ The Commission **recommends** accordingly.

10. PERSONS SELLING ADULTERATED OR UNWHOLESOME ARTICLES OF FOOD: SECTION 83

15.31 Section 83 provides:

"Every person who shall commit any of the next following offences shall, on conviction before any two Justices, be liable to the punishments hereafter specified in each case:-

- (1) Every person who shall sell, or offer for sale, as food for human consumption, any grain, flour, meat, fish, fruit, or vegetable, which shall, in the whole or in part be unfit for human consumption, or in any manner adulterated, shall forfeit the same, to be disposed of as such Justices shall direct, and shall also be liable to a fine not exceeding two hundred dollars, or be imprisoned for a term not exceeding two calendar months with or without hard labour.**

- (2) Every person who shall exhibit for sale any unwholesome or fraudulently prepared provisions, meat or other food of any kind for man or beast, or shall practise any deceit or fraud in respect to the quality of any such provisions or food, shall forfeit all such provisions, to be disposed of as such Justices shall direct, and shall be liable to a fine not exceeding two hundred dollars or to be imprisoned, with or without hard labour, for any term not exceeding two calendar months; and any Justice may seize, or cause to be seized, any of the articles hereinbefore lastmentioned as to which any such offence shall have been committed."**

15.32 Section 83 was contained in the South Australian *Police Act 1869*⁶⁵ which was used as a model for the 1892 Act. The wording has remained unchanged since then except for increases in the penalties.

⁶² Paras 4.2-4.12, 5.1-5.3, 6.19-6.20, 8.18-8.23, 14.9-14.24 and 15.22-15.30 above.

⁶³ Paras 5.6-5.8, 6.21-6.26, 8.2-8.17, 12.5-12.27 above.

⁶⁴ All who commented, including the Police Department and the Police Union, agreed.

⁶⁵ S 70. This section has now been repealed. Except for the Northern Territory (*Summary Offences Act* (NT) s 65), no other Australian jurisdiction has an equivalent.

15.33 The Commission **recommends** that section 83 be repealed⁶⁶ because it has been superseded by the *Health Act 1911* and the *Veterinary Preparations and Animal Feeding Stuffs Act 1976*.⁶⁷ The *Health Act 1911* contains comprehensive provisions about the sale of food. The present law is set out in Part VIII, comprehensively revised in 1985.⁶⁸ Section 246L makes it an offence to sell food which is unfit for human consumption, adulterated or damaged, deteriorated or perished. Selling includes, inter alia, offering or exposing for sale.⁶⁹ Subsequent provisions set out offences relating to the preparation and packaging of such food,⁷⁰ and further provisions create offences of false packaging, labelling and advertising.⁷¹ Health inspectors are given comprehensive enforcement powers, including powers of seizure.⁷²

⁶⁶ All who commented, including the Police Department and the Police Union, agreed.

⁶⁷ There were no charges under the section in the Perth and East Perth Courts of Petty Sessions in 1984-1985 and only 2 in 1989: see Appendix IV.

⁶⁸ By the *Health Amendment Act 1985* s 7.

⁶⁹ S 3(1).

⁷⁰ Ss 246M and 246N.

⁷¹ Ss 246P, 246Q and 246R.

⁷² Division 5 of Part VIII.

Chapter 16

OFFENCES IN PART VII

1. INTRODUCTION

16.1 The offences in Part VII deal with public nuisances of various kinds. They are summarised in Appendix III.¹ Unlike the other offences in the *Police Act*, those in Part VII are not offences of general application. They do not apply where similar provisions are made in by-laws by local authorities.

16.2 Most of the Part VII provisions can be traced back to the New South Wales *Police Act 1833*, which was passed to make provision for the maintenance of public peace and good order and the removal and prevention of nuisances and obstructions in the town and port of Sydney.² The Western Australia *Police Ordinance 1849*, a statute with a similar object, which applied only in Perth, Fremantle, Albany and other towns to which it might be extended, took from the New South Wales Act many of the provisions now found in Part VII. They were re-enacted in the *Police Ordinance 1861*, which again only applied in parts of the colony to which it was extended.³

16.3 The *Police Act 1892* covered a much wider range of offences, the majority of which were to apply throughout Western Australia, but incorporated the offences in the New South Wales Act and some others in Part VII. The South Australian *Police Act 1869*, on which the 1892 Act was based, had perpetuated the philosophy of the New South Wales legislation by providing that the Part VII offences, unlike the rest of the Act, were only to apply in particular areas.⁴ The 1892 Act makes a slightly different distinction: it provides that the Part VII offences cease to have effect where by-laws or regulations for effecting the same or a similar object are lawfully made.⁵

¹ They have been fully dealt with in a research paper prepared for the Commission. The research paper gives a detailed section by section analysis of the provisions in Part VII. Copies are available from the Commission's office.

² The early Police Acts dealt with the government of towns and cities: see para 3.3 above.

³ See s 75.

⁴ S 77.

⁵ S 95. The problems surrounding the interpretation of this provision are considered in fn 41 below.

2. THE GENERAL NATURE OF PART VII

16.4 Burt CJ summed up Part VII when he said extra-judicially:

"It is often said that history is best to be found in the rubbish tips. The *Police Act* is an active tip within which layer upon layer of the social history of our society can be found."⁶

16.5 To read Part VII is to step back into the world of the early 19th century. Animals are fed, shod or exercised in the street,⁷ or tethered or depastured or allowed to stray.⁸ The driving of cattle through the street, perhaps to market, is a problem solved by allowing it to be done only at night and along defined routes.⁹ All the vehicles are horse drawn,¹⁰ but traffic problems can be solved by a few provisions which regulate such activities as riding on the shafts of wagons, or the driver being at such a distance from the carriage that he cannot have the government and control of the horses or cattle pulling it.¹¹ Hackney carriages, carts and barrows cause obstructions if they stand longer than is necessary for loading and unloading.¹² Another provision has a special exemption for bath chairs and perambulators.¹³ Children (presumably) are amusing themselves by flying kites, using shanghais¹⁴ and ringing doorbells¹⁵ to the annoyance of others. The rolling of casks,¹⁶ the burning of cork,¹⁷ the slacking of lime,¹⁸ the laying of coal¹⁹ and the beating of carpets (except door mats before the hour of eight in the morning)²⁰ are all deemed worthy of regulation. In the absence of deep sewerage or even of septic tanks, privies are emptied between the hours of 11.30 at night and 5 o'clock in the morning.²¹ The performance of this task at other hours,²² or the casting of offensive matter into the streets through the overturning of carts,²³ are serious social problems

⁶ Nichols v.

⁷ S 96(1).

⁸ S 96(11).

⁹ S 96(3). In Perth in the mid 19th century the town herd of cows would be driven through the streets out to the commonage to the west of the town: Stannage 130.

¹⁰ There were over 1200 horses stabled in the Perth district in the mid 19th century: Stannage 133.

¹¹ S 96(5).

¹² S 96(6).

¹³ S 96(13).

¹⁴ S 96(10).

¹⁵ S 96(9).

¹⁶ S 96(14).

¹⁷ S 96(15).

¹⁸ Ibid.

¹⁹ S 96(16).

²⁰ S 96(17).

²¹ S 109.

²² Ibid.

²³ S 108. On the problems of night soil removal in the 19th century, see Stannage 176, 181, 252, 278-279.

- so serious that in the latter case all citizens have a power to arrest offenders.²⁴ A wide variety of other offences of a similar kind include allowing offensive matter to run into the street from dunghills,²⁵ keeping pigsties,²⁶ regulating butchers' shambles and slaughter houses,²⁷ throwing rubbish into public sewers, watercourses, drains or canals,²⁸ and washing clothes and animals at public fountains.²⁹ Bathing between the hours of six in the morning and eight in the evening, near to or within view of places of public resort, must be performed in proper bathing costume.³⁰ In order to control noise, street musicians can be sent packing,³¹ and cannons and other firearms must not be discharged near dwelling houses to the annoyance of the inhabitants - unless the weapons are not of greater calibre than a common fowling piece.³²

3. RECOMMENDATION

16.6 The Commission **recommends** that the whole of Part VII should be repealed, for the following reasons:

(a) Outdated nature of provisions

16.7 The provisions in Part VII were nearly all drafted to deal with the prevailing conditions of the town and port of Sydney in the early 1830s.³³ Most were adopted in Western Australia in 1849 with very little amendment and there has been virtually no change

²⁴ S 108.

²⁵ S 96(17).

²⁶ S 100. In 1876 pigsties were common in the centre of Perth and the Medical Officer said that he regarded them as injurious to health: Stannage 174. The Perth City Council finally banned pigsties in 1886: id 270.

²⁷ Ss 101-102. The slaughter houses in the centre of Perth were causing concern in 1847: Stannage 50. In the 1850s butchers were prevented from slaughtering animals within six miles of the town centre, but could use the Government slaughterhouse at Claisebrook: id 131. There were complaints about contravention of the rule as late as 1874: id 170.

²⁸ S 106.

²⁹ S 107.

³⁰ S 104. There were complaints about bathing off the Perth jetties in 1873: Stannage 166.

³¹ S 98. The source of this section is the *Metropolitan Police Act 1864 (UK)*, which was a Private Member's Bill which passed its second reading in the House of Commons at 1.45 am on 10 June 1864. Mr Bass, the member in question, was continually disturbed in his efforts to read "The Times" by a succession of street bands. Sir Robert Peel also supported the Bill, which he described as one "for putting down the abominable nuisance of street organs", one of which apparently played Psalm 100 ("O be joyful in the Lord, all ye lands; serve the Lord with gladness, and come before His presence with a song") continually every Saturday morning next door to his house. See *Parliamentary Debates*, 3rd series, 10 June 1864, vol 175 columns 1529-1533 (information supplied by the English Law Commission).

³² S 99.

³³ Other provisions in the *Police Act 1833 (NSW)*, from which Part VII was drawn, required seamen in streets or public houses and convicts in the streets at night to carry a pass.

since then. They are seriously out of date and grossly inadequate for modern social conditions.

(b) Duplication by other provisions in the *Police Act*

16.8 There is much duplication and overlap within Part VII - probably because the provisions were assembled from more than one source and the draftsman either did not see the duplication or thought it safer not to cut out the duplicate provisions.³⁴ There is also much duplication as between Part VII and other offences elsewhere in the *Police Act*.³⁵

(c) Duplication by other legislation

16.9 The provisions of Part VII are, in almost all instances, duplicated by other legislation. Offences in the *Local Government Act 1960*, the *Health Act 1911* and a number of other Acts cover much of the ground. The other provisions, in almost all instances, are more up to date and better drafted than those in the *Police Act*. The *Police Act* provisions, therefore, have been superseded and are no longer needed.³⁶

(d) No scope for operation

16.10 There are practically no circumstances in which the offences in Part VII come into operation. This is because of section 95, which provides:

"This Part of this Act shall cease to have any force or effect wherever any by-law or regulations for effecting the same or a similar object are lawfully made by any Municipality, Council of a Shire, or Board of Health."

³⁴ Eg s 117, which repeats earlier provisions in s 96(15), (16) and (19), and s 106, which duplicates s 96(17). In the latter instance the overlap was noted during the debates in Parliament but nothing was done about it: see Western Australian *Parliamentary Debates* (1892) Vol 2, 353.

³⁵ Eg between ss 96(2) and 51; ss 96(9) and 59; ss 96(18), 97 and 58A; and ss 102 and 83. A number of particular provisions on damage to property are duplicated by the more general offence in s 80: eg ss 96(7), 96(18), 105 and 107.

³⁶ The fact that Part VII has been superseded by the other provisions outlined above is underlined by the lack of cases, reported or otherwise, brought under its provisions. The only charges brought under any provision in Part VII in the Perth and East Perth Courts of Petty Sessions in 1984-85 were 2 charges under s 96(8), one for discharging an arrow and the other for discharging another missile: see Appendix IV. There were no charges under Part VII in these courts in 1989: *ibid*.

16.11 Though the section refers to by-laws or regulations lawfully made by any Municipality, Council of a Shire,³⁷ or Board of Health, the references to "Council of a Shire" and "Board of Health" are now redundant. According to the *Local Government Act 1960*,³⁸ a Municipality is a city, a town or a shire, and the executive body of a Municipality is the council. The reference to "Municipality" therefore covers all local authorities including the Council of a Shire. Boards of Health³⁹ have been abolished.⁴⁰ The effect of the section, therefore, is that Part VII ceases to apply where there are no applicable by-laws made by a municipality effecting the same or a similar object.⁴¹

16.12 Practically all areas of Western Australia are within the jurisdiction of municipalities.⁴² Municipalities have powers to make by-laws under the *Local Government Act 1960*,⁴³ the *Health Act 1911*⁴⁴ and certain other Acts. Their by-law making powers cover almost all the provisions in Part VII. If a local authority has power to make by-laws on a particular subject, and that subject is presenting problems within its area, it will make by-laws to deal with the problem. Thus, the Part VII provisions will hardly ever come into operation. If a particular

³⁷ The section originally referred to "Road Boards". S 4(3) of the *Local Government Act 1960* (added 1961) provided that references in statutes to a "Road Board" were to be read as references to a "Council of a Shire". The *Police Act* was altered in conformity with this provision when it was reprinted in 1962.

³⁸ S 9.

³⁹ First set up under the *Public Health Act 1886* and later provided for under the *Health Act 1911* s 20.

⁴⁰ By the *Acts Amendment and Repeal (Statutory Bodies) Act 1985* s 12.

⁴¹ There is some difficulty in determining exactly when Part VII ceases to operate. One possible interpretation is that Part VII stands or falls as a whole. If a municipality makes by-laws having the same or a similar object to Part VII, Part VII ceases to apply. The object of the provisions in Part VII is the removal and prevention of nuisances and obstructions in the places to which it applies. (These are the terms in which the objectives of the legislation are expressed in the preambles of the *Police Act 1833* (NSW) and the *Police Ordinance 1861* (WA).) It is possible to argue, therefore, that once a local authority has by-laws dealing with nuisances and obstructions in streets, Part VII ceases to apply within its boundaries. An alternative interpretation of s 95 is that, despite the reference to this Part of the Act ceasing to have application, what is meant is that a particular section shall cease to apply in a particular locality if the municipality has a by-law effecting the same or a similar object as that of the section in question. Some support for this interpretation is perhaps provided by the reference to "by-law" in the singular in the latest reprint of the Act. The original provision, however, referred to "by-laws" in the plural and the rendering in the reprint is a misprint.

⁴² The only known examples of areas that are not within the jurisdictions of municipalities are King's Park and Rottnest Island (which however both have their own authority and their own by-laws) and the Abrolhos Islands: Western Australia Year Book 1986, 126 and information supplied by Mr C Berry, Department of Geography, University of Western Australia.

In a case in 1989 two nude bathers on Port Beach, Fremantle, were charged under s 104 of the *Police Act*. The prosecution case was that since the Port Beach is under the control of the Fremantle Port Authority it was not under the control of any municipality. The court however agreed with the defence submission that the beach, though under the control of the Port Authority, remained within the jurisdiction of the Fremantle City Council. The defendants could therefore have been charged under the Council by-laws (which included requirements as to bathing costumes) but not under s 104: see "Nude beach victory" *The West Australian*, 19 April 1989, 6.

⁴³ Part VIII.

⁴⁴ Ss 134, 158, 172, 199, 207 and 220.

offence is needed, it would be better not to make it dependent on the absence of by-law provisions.

(e) The position in other jurisdictions

16.13 Police legislation in most Australian jurisdictions has, at one time or another, adopted provisions of the kind now found in Part VII, usually following the example of the New South Wales *Police Act 1833*. At the present day, these provisions are to be found only in the Northern Territory, Victoria and New South Wales.⁴⁵ In the Northern Territory there has never been any general review of the Act, despite the change of name from Police and Police Offences Ordinance to *Summary Offences Act in 1979*. In New South Wales, despite the substantial changes of 1970, 1977 and 1988,⁴⁶ the provisions under examination survive because the *Police Offences Act 1901* was not repealed.

16.14 More significant is the fact that in jurisdictions where there has been a general review of the police legislation, almost all of the Part VII provisions have been repealed. This has happened in South Australia and the Australian Capital Territory. In South Australia, nearly all the Part VII provisions were repealed when the Act was redrafted in 1953.⁴⁷ In a thoroughgoing reform of the Australian Capital Territory *Police Offences Ordinance 1930* in 1983, a few provisions of the Part VII were removed to the *Crimes Act*⁴⁸ and the rest were repealed. Also, in New Zealand, most of the Part VII provisions were omitted from the *Summary Offences Act 1981*.⁴⁹

⁴⁵ *Summary Offences Act* (NT) ss 74-91; *Summary Offences Act 1966* (Vic) ss 4-10; *Police Offences Act 1901* (NSW) ss 64-98. There are also a few provisions in Tasmania: *Police Offence Act 1935* (Tas) ss 15-18.

⁴⁶ See para 2.18 above.

⁴⁷ At the present day the only provisions in Part VII of the Western Australian Act with an equivalent in the South Australian *Summary Offences Act 1953* are s 96(7) (affixing placards), s 96(8) (discharging firearms and fireworks), s 96(9) (ringing doorbells), s 96(10) (playing games to the annoyance of others) and s 110 (stock dying on the highway).

⁴⁸ The equivalents of s 96(7) (affixing placards), s 106 (damaging watercourses) and s 113 (covering entrances to cellars): see *Crimes Act 1900* (ACT) ss 544, 545 and 546. S 546 has since been repealed.

⁴⁹ The only survivors are the equivalents of s 96(7) (affixing placards) and s 96(8) (discharging firearms and fireworks).

Part III - Powers

Chapter 17

ARREST AND RELATED POWERS

1. POWERS OF ARREST: INTRODUCTION

17.1 The *Police Act* contains a number of provisions giving powers of arrest to the police and, in some cases, to ordinary citizens.¹ The Commission deals with these powers in this report for the reasons stated in Chapter 3.²

17.2 Apart from the arrest powers in the *Police Act*, there are comprehensive arrest provisions in the *Criminal Code*.³ There are also arrest powers in the *Justices Act 1902*⁴ and under the common law.⁵ Many statutes also give the police (and sometimes private citizens) powers to arrest in particular circumstances.⁶

¹ For general discussion of the law of arrest in Australia, see R W Harding *The Law of Arrest in Australia* in D Chappell & P Wilson *The Australian Criminal Justice System* (2nd ed 1977) 243-262; G A Flick *Civil Liberties in Australia* (1981) 1-40; J B Bishop *Criminal Procedure* (1983) 42-62; E Campbell & H Whitmore *Freedom in Australia* (2nd ed 1973) 32-50; New South Wales Law Reform Commission *Criminal Procedure: Police Powers of Detention and Investigation After Arrest* (LRC 66 1990) 1-27; J M Herlihy and R G Kenny *An Introduction to Criminal Law in Queensland and Western Australia* (1990 3rd ed) 33-42.

² Paras 3.32-3.34 above.

³ Ss 564 and 569: paras 17.3-17.6 below.

⁴ S 58 empowers a justice to issue a warrant for the arrest of -

1. a person suspected of having committed an indictable offence within the limits of the jurisdiction of the justice;
2. a person charged with having committed any such offence elsewhere in Western Australia who is suspected of being within those limits;
3. a person charged with having committed an indictable offence outside Western Australia, of which offence cognisance may be taken by the courts of Western Australia, who is suspected of being within those limits.

S 59 gives a justice power to issue a warrant for arrest on complaint of a simple offence.

⁵ At common law, police officers (and ordinary citizens) can arrest where treason or felony has actually been committed or has been attempted; where treason or felony is reasonably suspected to have been committed (provided the offence has in fact been committed and the person making the arrest has reasonable cause for suspecting the person arrested to have committed it); and where a breach of the peace has actually been committed in the presence of the arrestor or is reasonably apprehended. In addition, the common law gives the police power to arrest without warrant where they reasonably suspect treason or felony to have been committed, even if no offence has in fact been committed. In addition, police had power to arrest under a warrant, which further extended their arrest powers as compared with those of ordinary citizens.

⁶ See the Commission's *Working Paper and Survey on Privacy and Statutory Powers of Intrusion* (Project No 65 1981) paras 2.12-2.13 and Survey Part 5.

17.3 The most important of these arrest provisions are those in the *Criminal Code*. Prior to 1985, the arrest provisions in the *Criminal Code* distinguished between offences for which a person could be arrested only on obtaining a warrant, offences for which a person could be arrested only with a warrant unless the person was found committing the offence, and offences for which arrest could be made without warrant. It was therefore necessary to know into which category a particular offence fell. According to the Murray Report,⁷ the provisions were full of illogicalities and led to confusion and uncertainty as to what powers were available in any given situation.

17.4 The Murray Report recommended that these rules should be replaced by new rules which would distinguish between offences which were punishable by imprisonment and those which were not. The *Criminal Law Amendment Act 1985* implemented this recommendation. The old Code provisions were replaced by a new section 564 which provided that in certain circumstances an arrest could be made without warrant for an "arrestable offence". The section provides :

"(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."⁸

17.5 Another provision enacted in 1985, section 569, deals with the arrest of persons offering stolen property for sale. It provides :

⁷ 354.

⁸ S 564(6), which deals with assisting a person believed to be a police officer to effect an arrest, has been omitted.

"It is lawful for any person to arrest without warrant any person who offers to sell, pawn or deliver any property to him, if the first person has reasonable grounds to suspect that the property has been acquired by means of the commission of an offence."

17.6 The powers of arrest in these two sections are of general application. They are not limited to offences created by the Code.

2. POWERS OF ARREST: RECOMMENDATIONS

(a) Introduction

17.7 Although the police have been given extensive powers of arrest, it is not necessary to arrest a person in order to commence criminal proceedings: they can be commenced by summons, whether or not there is a power of arrest in a particular case.

17.8 It has been suggested that police often favour arrest over summons,⁹ because it avoids the time-consuming procedure involved in taking out a summons, and gives certain other advantages such as the right to take fingerprints and other particulars¹⁰ and to search the suspected person's premises.¹¹ But considerations such as these should not be allowed to obscure the very real disadvantages of arrest, not only for the arrested person but also for the state. The Australian Law Reform Commission in its report on Criminal Investigation¹² said:

"Our society quite rightly puts a premium on freedom of movement. Arrest is the complete negation of freedom. As a result it casts a considerable onus on those who would justify it. Further, arrests cost the state a considerable amount of money, both in absolute terms and as compared to other ways of bringing people to court. Innumerable man-hours are spent in transporting, guarding and processing the arrestee. American experience suggests that an arrest costs the state on average five times the cost of a summons. As well, American, Canadian, English and Australian studies have

⁹ For information as to police practice, see Australian Law Reform Commission *Criminal Investigation* (Report No 2 1975) paras 22-24 and (on British police practice) Royal Commission on *Criminal Procedure Arrest, Charge and Summons: Current Practice and Resource Implications* (Research Study No 9 1980). In cases involving children, it appears that the police in Western Australia proceed by arrest rather than summons in between 64 and 80 per cent of cases: E J Edwards *The Treatment of Juvenile Offenders* (Department for Community Welfare 1982) para 3.1.1; M E Rayner *Fending for Yourself* (Case Study undertaken for the Report of the National Inquiry into Homeless Children 1988) para 7.8. Figures on the ratio of arrests to proceedings initiated by summons in Western Australia are not available.

¹⁰ See paras 17.42-17.45 below.

¹¹ See paras 18.23-18.24 below.

¹² Report No 1 1975 para 28 (footnotes omitted).

all shown that the eventual outcome of a case is markedly affected according to whether or not the accused is in custody before the trial or comes to court by way of release on bail or a summons proceeding. A partial causal connection at least has been claimed. One further disadvantage of arrest which it is appropriate to mention is the fact that there is strong disapproval, in many parts of society, of anyone who has an arrest record."

17.9 During the past few years concern about the use of arrest in preference to summons has been frequently voiced - among others, by this Commission in its report on Bail¹³ and by the Australian Law Reform Commission in its report on Criminal Investigation.¹⁴ Recently, the Western Australian Report of the Interim Inquiry into Aboriginal Deaths in Custody¹⁵ recommended that the Government's legislative endorsement of the principle that imprisonment is the sentencing option of last resort¹⁶ should be equally reflected in regard to the use of arrest.¹⁷ Any form of custody should be avoided when the protection of the community is not a consideration. The Interim Report of the Royal Commission into Aboriginal Deaths in Custody¹⁸ commented that the discretion to proceed by way of summons was too often not receiving the consideration it merited by arresting police officers, and recommended that police officers should not arrest for a minor offence unless there are reasonable grounds for believing that the option of proceeding by summons is inappropriate, because of demonstrable evidence that the offender will, if not arrested, commit further offences or be a catalyst for the commission of offences by others. The National Report of the Royal Commission into Aboriginal Deaths in Custody¹⁹ recommended that all police services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders.

17.10 Some Australian jurisdictions have dealt with the preference for arrest over summons by incorporating in legislation a direction that proceedings should be commenced by summons rather than arrest unless arrest is necessary. The Commonwealth *Crimes Act 1914*,²⁰ for instance, provides that a constable may arrest a person without warrant where the

¹³ Project No 64 1979 paras 9.2-9.5.

¹⁴ Report No 1 1975 paras 22-29.

¹⁵ (1988) 60-62.

¹⁶ See Ministerial Statement by Attorney General, Western Australian *Parliamentary Debates* (1987) Vol 267, 5209-5214. A number of the reforms referred to have already been implemented by the *Criminal Law Amendment Act 1988*.

¹⁷ According to Lord du Parc in *Christie v Leachinsky* [1947] AC 573, 600, arrest is the beginning of imprisonment.

¹⁸ (1988) para 6.2.

¹⁹ (1991) Vol 3 42.

²⁰ S 8A.

constable has "reasonable ground to believe . . . that proceedings against the person by summons would not be effective."²¹

17.11 Section 352 of the Australian Capital Territory *Crimes Act 1900* contains a similar provision. After providing that any person may arrest a person in the act of committing, or immediately after having committed, an offence,²² it provides:

"A police officer may, without warrant, arrest a person for an offence against a law of the Territory if the police officer believes on reasonable grounds that:

- (a) the person has committed or is committing the offence; and
- (b) proceedings by way of summons against the person in respect of the offence would not achieve one or more of the following purposes:
 - (i) ensuring the appearance of the person before the court in respect of the offence;
 - (ii) preventing the continuation of, or a repetition of, the offence or the commission of some other offence;
 - (iii) preventing the concealment, loss or destruction of evidence of, or relating to, the offence;
 - (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
 - (v) preventing the fabrication of evidence to be given or produced in proceedings in respect of the offence;
 - (vi) preserving the safety or welfare of the person."²³

²¹ Compare s 55 of the *Police Offences Act 1935* (Tas), under which police are given power to arrest for particular offences, and are placed under a duty to exercise those powers unless they have reasonable grounds for believing that the purposes of the Act conferring the power will be adequately served by proceeding by summons. The *Criminal Code* (Tas) adopts a different principle: s 27, after listing the circumstances in which it is lawful for a police officer to arrest for an indictable offence, provides that in every case in which it is lawful for a police officer to arrest any person it is his duty to do so: s 27(9).

²² S 352 also allows any person to arrest a person who has committed an offence punishable by imprisonment for five years or more, being an offence for which he has not been tried.

²³ A similar provision was recommended for the *Crimes Act 1914* (Cth) in the Review of Commonwealth Criminal Law Fifth Interim Report (1991) Draft Bill cl 6. A broadly similar provision appears in s 25 of the *Police and Criminal Evidence Act 1984* (UK). S 458(1)(a) of the *Crimes Act 1958* (Vic) is slightly different: the conditions are imposed not on the extended powers of arrest conferred only on police, but on the basic power to arrest persons found committing any offence given to both police and ordinary citizens.

(b) The Commission's preferred approach

17.12 The Commission prefers the Australian Capital Territory approach to that taken in section 564 of the *Criminal Code* because of its emphasis on the use of a summons unless arrest is necessary as a means of enforcement in the particular situation.²⁴ The Commission suggests that section 564(1)-(4) be replaced²⁵ with a provision directing that proceedings should be commenced by summons rather than arrest unless proceedings by way of summons would not achieve specified purposes. The existing provision in the *Criminal Code* (which provides that certain offences, those punishable with imprisonment, are "arrestable offences") is also undesirable because there may be circumstances when arrest without warrant is justified for an offence which is not "arrestable". As pointed out by the Australian Law Reform Commission²⁶ some non-trivial offences are punishable only by a fine.²⁷ On the other hand, there are a great many trivial offences which are punishable by imprisonment.²⁸

(c) Arrest provisions in the *Police Act* that should be repealed

(i) Introduction

17.13 Whether or not the Commission's preferred approach is adopted, it is necessary to consider a number of arrest provisions in the *Police Act*. The Act has always contained a number of provisions on arrest. This is a result of the fact that when it was enacted, in the days before the *Criminal Code*, it was seen as a statute dealing with criminal procedure as well as criminal law. Today, however, it is unnecessary for the *Police Act* to contain rules relating to arrest because the matter is comprehensively dealt with by the *Criminal Code*. This would continue to be the case if the Commission's preferred approach to arrest were adopted.

- * Some of the *Police Act* provisions on arrest are general in their terms, but they are inconsistent with the general principle adopted by the *Criminal Code*.

²⁴ See Australian Law Reform Commission *Criminal Investigation* (Report No 2 Interim 1975) 15.

²⁵ S 564(5) would remain. Consequential amendments to s 564(6) would be required.

²⁶ Australian Law Reform Commission *Criminal Investigation* (Report No 2 Interim 1975) 15.

²⁷ Eg a first offence of dangerous driving (*Road Traffic Act 1974* s 61), careless driving (id s 62) and a first offence of driving under the influence (id s 63) and trespassing on enclosed land and causing damage to property (*Police Act* s 82A).

²⁸ Eg sleeping rough (paras 4.6-4.8 above) or knowingly permitting drunkenness in a house of public resort (paras 6.27-6.28 above).

- * Some of the *Police Act* provisions dealing with arrest in relation to specific offences are redundant.
- * A few arrest provisions in the *Police Act* should be retained because of their special value but should be transferred to the Code.²⁹

(ii) *Powers to arrest for any offence: sections 43(1) and 41(1)*

17.14 Section 43(1) gives an officer or constable of the police force power to arrest without warrant for a number of specific offences, some dealt with elsewhere in the *Police Act* and others not.³⁰ It also gives an officer or constable power to arrest without warrant "all persons whom he shall have just cause to suspect of having committed or being about to commit any offence."³¹

17.15 This provision allows the police to exercise a power of arrest for any offence.³² It therefore permits the police to arrest for offences which have been expressly declared by the *Criminal Code* to be non-arrestable.³³ To allow the provision to remain on the statute book would be inconsistent with the Commission's preferred approach because section 564 of the Code as amended will allow the police to arrest for any offence, but only where proceedings by way of summons will not achieve one or more of a number of listed purposes.³⁴ If this approach is not adopted, and section 564 of the Code is retained in its present form, the provision in section 43(1) should still not be allowed to remain because it defeats the intention

²⁹ See paras 17.31-17.34 below.

³⁰ See paras 4.13-4.23 above.

³¹ It appears that being suspected of having committed or being about to commit an offence are themselves offences: see paras 4.16-4.17 above.

³² The arrest power given by s 43(1) is wider than the arrest powers in some other Australian jurisdictions. Arrest powers are more limited than in Western Australia in the ACT, Victoria, Queensland and Tasmania: see *Crimes Act 1900* (ACT) s 352 (referred to in para 17.11 above); *Crimes Act 1958* (Vic) s 458; *Criminal Code* (Qld) s 546; *Police Offences Act 1935* (Tas) s 55, *Criminal Code* s 27. On the other hand, New South Wales, South Australia and the Northern Territory have arrest powers which are as wide as those in Western Australia: see *Crimes Act 1900* (NSW) s 352(2)(a); *Summary Offences Act 1953* (SA) s 75; *Police Administration Act* (NT) s 123.

The arrest powers given by ss 43(1) and 41(1) are also wider than the powers of arrest given to the British police by the *Police and Criminal Evidence Act 1984*, a statute which considerably extended police powers. See generally M Zander *The Police and Criminal Evidence Act 1984* (1985). The Act allows the police to arrest without warrant for arrestable offences (generally, offences carrying a sentence of imprisonment for five years, and some other listed offences): s 24. For other offences, the police may arrest without warrant only if one of a number of "general arrest conditions" is satisfied: s 25.

³³ See para 17.4 above.

³⁴ Paras 17.12-17.13 above.

of Parliament in enacting the present Code provisions to confine the arrest power to arrestable offences.³⁵ The Commission therefore **recommends** that the power to arrest for non-arrestable offences in section 43(1) be repealed.³⁶

17.16 Section 41(1) gives the police a similar power in relation to ships. If an officer or senior constable in charge of a police station has reasonable or probable cause to suspect that any offence has been or is about to be committed on board ship, that officer or constable may stop and detain the ship, enter, search and inspect it and arrest all persons suspected or being concerned in such offences. The section also provides that these powers may be exercised when the police have reasonable or probable cause to suspect that a person who has committed an offence rendering the person liable to apprehension, with or without warrant, or against whom a warrant has been issued, is harboured, secreted or concealed on board.³⁷

17.17 Again, this provision allows the police to exercise a power of arrest for any offence, and not just for offences which are arrestable offences under the *Criminal Code*. Again, the continued existence of this power is not compatible either with the Commission's preferred approach to arrest powers or with the current Code provision, and the Commission therefore **recommends** that it should be repealed. However, it should be made clear that police, in order to exercise the arrest powers given to them by the Code, may enter ships as well as other premises. This matter is further dealt with in the context of entry powers in Chapter 18 below.³⁸

17.18 Apart from the more general arrest power dealt with above, section 43(1) gives the police power to arrest for a number of specific offences, some of which are offences under

³⁵ The Attorney General in his second reading speech (see Western Australian *Parliamentary Debates* (1985) Vol 257, 3212-3213) emphasised the importance of the new provisions. He said that it was proposed to adopt clear rules to enable people to know in advance when there was a power of arrest without warrant. Such a power would exist when offences were punishable with imprisonment. This rule was designed to ensure that a person should not be taken into custody with respect to the commission of an offence for which, if found guilty, he or she would not be liable to imprisonment.

³⁶ Any particular difficulties that might result from repeal could be met by specific legislative provisions. A possible example would be the offence of driving under the influence of alcohol, which by s 63 of the *Road Traffic Act 1974* is punishable by imprisonment only for a second or subsequent conviction. A specific provision could be enacted to give a power to arrest a person for a first such offence if this were thought desirable. For other offences punishable only by a fine see fn 27 above.

As to the other arrest powers in s 43(1), see para 17.18 below. For its recommendations as to the offences created by the section, see paras 4.13-4.23 above.

³⁷ Resisting arrest and concealing suspected persons are offences, dealt with at paras 5.1-5.5 and 5.11-5.12 above.

³⁸ Paras 18.12-18.54. For the Commission's recommendations as to the offences created by s 41(1) see paras 5.1-5.5 above.

other provisions of the Act and some of which have been held to be offences under section 43(1) itself.³⁹ All the offences in question are arrestable offences.⁴⁰ It would therefore be possible to arrest without warrant under section 564(2) of the *Criminal Code*. If the Commission's preferred approach⁴¹ is adopted, it will likewise be possible to arrest without warrant in all these cases. The specific arrest provisions in section 43(1) are therefore redundant.

(iii) *Powers to arrest for offences under the Police Act: sections 46 and 47*

17.19 Two sections of the *Police Act* give general powers to arrest for offences under the *Police Act*.

- * Section 46 gives the police power to arrest persons who offend against the Act in view of a police officer and whose name and address are unknown and cannot readily be ascertained.
- * Section 47 gives to any person a power to arrest any reputed common prostitute, thief or loose, idle or disorderly person who within view of that person offends against the Act.⁴²

17.20 The Commission **recommends** that these sections be repealed for the following reasons -

1. Section 46 is redundant in the light of section 50 of the *Police Act*, under which the police have power to demand a person's name and address if they suspect that that person has committed an offence.⁴³
2. Section 47 is undesirable in that it singles out people according to their status. They may be arrested for an offence against the *Police Act* whereas others are immune.

³⁹ See paras 4.13-4.23 above.

⁴⁰ By virtue of s 124 of the *Police Act*, offences under s 43(1) are punishable by imprisonment.

⁴¹ Paras 17.12-17.13 above.

⁴² Refusal by a constable to take the arrested person into custody is an offence: see para 15.2 above.

⁴³ See paras 17.35-17.39 below.

3. Section 47 is also out of date in continuing to refer to idle or disorderly persons. This reference was not removed from the section when other such references were deleted in 1975.⁴⁴
4. These matters apart, sections 46 and 47 authorise arrest for non-arrestable offences and are therefore inconsistent with section 564 of the *Criminal Code*. Since most *Police Act* offences are arrestable offences, the police could exercise powers of arrest under section 564. If the Commission's preferred approach to arrest⁴⁵ is adopted, it would be possible to arrest without warrant for any *Summary Offences Act* offences, where proceedings by way of summons would not achieve one or more of a number of listed purposes.

(iv) *Power to arrest for any offence punishable in a summary manner: section 49*

17.21 Section 49 gives to the police or to affected citizens a power to arrest without warrant any person found committing any offence punishable in a summary manner. Unlike sections 46 and 47, this provision is not confined to offences under the *Police Act*. Again, it confers a power of arrest for many offences which are classified by the Code as non-arrestable (except under a warrant) because they do not carry a prison sentence. Under the Commission's preferred approach to arrest without warrant,⁴⁶ both police and other persons would be able, without warrant, to arrest a person in the act of committing or immediately after having committed an offence. The Commission therefore **recommends** that the arrest power in section 49 be repealed.

(v) *Section 42*

17.22 Section 42, which gives the police power to enter premises kept for theatrical or public entertainments, exhibitions or shows, and to remove common prostitutes, reputed thieves and other loose, idle or disorderly persons found there, gives power to arrest such persons if they refuse to leave. Since the section makes such refusal punishable by imprisonment, it is an arrestable offence as defined by section 564(1) of the Code and there would be power to arrest without warrant under section 564(2). The arrest power in section 42 is therefore redundant.

⁴⁴ By the *Police Act Amendment Act* (No 2) 1975 s 31.

⁴⁵ Paras 17.11-71.12 above.

⁴⁶ Ibid.

It would be equally redundant under the Commission's preferred approach to arrest,⁴⁷ which would allow the police to arrest for any offence under set conditions. The Commission therefore **recommends** that the arrest power in section 42 be repealed.⁴⁸

(vi) *Section 44*

17.23 Section 44 gives power to arrest persons committing a number of listed offences, either on ships or on licensed premises or in licensed boarding, eating or lodging houses. These offences are all offences under other sections of the *Police Act* as well as under section 44.⁴⁹ Since all are punishable by imprisonment either under the section in question or under section 44 they are all arrestable offences, and there is a power to arrest without warrant under section 564(2) of the Code. Arrest without warrant would also be possible under the Commission's preferred approach.⁵⁰ The arrest power in section 44 is therefore redundant and the Commission **recommends** that it be repealed.

(vii) *Section 45*

17.24 Section 45 contains two separate arrest powers. One, which the Commission **recommends** be repealed, gives a police officer power to arrest a person who is reasonably believed to have committed any felony or misdemeanour.⁵¹ It is made redundant by section 564 of the Code. In virtually all cases felonies⁵² and misdemeanours would be punishable by imprisonment and would therefore be arrestable offences. Arrest without warrant would also be possible under the Commission's preferred approach.⁵³

(viii) *Section 70*

17.25 Section 70 gives the police power to -

⁴⁷ Ibid.

⁴⁸ As to the entry power in section 42 and the offence of refusing to leave, see paras 18.35-18.37 below.

⁴⁹ See paras 6.1-6.5 above.

⁵⁰ Paras 17.11-17.12 above.

⁵¹ For the Commission's recommendation as to the other power see para 17.33 below.

⁵² This must be taken as a reference to crimes: *Criminal Code Act 1913* s 3(1).

⁵³ Paras 17.11-17.12 above.

- * Search places, vehicles and packages under warrant where there is reasonable cause for suspecting that any thing stolen or unlawfully obtained is concealed or lodged there.
- * Arrest a person found in the place in question, or whom the police officer has reasonable cause to suspect to be privy to depositing the thing there knowing or having reasonable cause to suspect it to have been stolen or unlawfully obtained.

In the latter circumstance an arrestable offence would have been committed,⁵⁴ and arrest may be made without warrant under section 564(4) of the Code. Arrest without warrant would also be possible under the Commission's preferred approach.⁵⁵ The arrest power in section 70 is therefore redundant and, accordingly, the Commission **recommends** that it be repealed.⁵⁶

(ix) *Section 76G(3)*

17.26 Section 76G(3) is similar to the above provisions, except that it authorises arrest under a warrant. It gives power under warrant to enter premises and arrest a person living on the earnings of prostitution. As this is an arrestable offence,⁵⁷ it would be possible to enter the premises and arrest without warrant under section 564(4) and (5) of the Code. It would also be possible to obtain a warrant under section 59 of the *Justices Act 1902*. Arrest without warrant would be possible under the Commission's preferred approach.⁵⁸ The arrest power in section 76G(3) is therefore redundant and the Commission **recommends** that it be repealed.⁵⁹

(x) *Section 49*

17.27 Section 49, and also section 82(3) discussed in the following paragraph, are rendered redundant by section 569 of the *Criminal Code*. Under section 49, any person to whom any property or liquor is offered to be sold, pawned or delivered may, if the person has reasonable

⁵⁴ Under s 69, as to which see paras 13.2-13.6 above.

⁵⁵ Paras 17.11-17.12 above.

⁵⁶ For the Commission's recommendations on the entry and search powers in s 70, see paras 18.21 and 18.32-18.33 below.

⁵⁷ Because it is deemed to be an offence against s 66, which is punishable by imprisonment: s 76G(1).

⁵⁸ Paras 17.11-17.12 above.

⁵⁹ The Commission also recommends that the entry and search powers in s 76G(3) be repealed because they are redundant: see para 18.21 below. The Commission's recommendations as to the offence of living on the earnings of prostitution are set out in para 9.20 above.

cause to suspect that an offence has been committed with respect to the property or liquor, or that it has been stolen or unlawfully obtained, or is intended to be used for an unlawful purpose, arrest the person offering it. Section 569 of the Code authorises an arrest in these circumstances, except where it is suspected that the property was intended to be used for an unlawful purpose. In the most important cases in which a person could be arrested for selling property suspected to be intended to be used for an unlawful purpose, the actual sale or possession of the property is an offence. For example it is an offence to sell a prohibited drug,⁶⁰ possess weapons,⁶¹ an article of disguise,⁶² protective jacket,⁶³ deleterious drugs,⁶⁴ implements to facilitate the unlawful use of motor vehicles⁶⁵ and housebreaking implements.⁶⁶ All of these offences are arrestable offences under section 564 of the *Criminal Code* or could justify an arrest without warrant under the Commission's preferred approach to arrest without warrant.⁶⁷ The Commission therefore considers that there is no justification for retaining the arrest power in section 49 and **recommends** that it be repealed.⁶⁸

(xi) *Section 82(3)*

17.28 Section 82(3), which deals with disposal or retention by an employee of the employer's property, again gives any person to whom such property is offered to be sold, pawned or delivered a power of arrest. The Commission **recommends** that it be repealed because it duplicates section 569 of the *Criminal Code* and is redundant. In any case, the Commission **recommends** that section 82 be repealed.⁶⁹

(xii) *Sections 96, 104, 108 and 110*

17.29 Certain offences in Part VII - sections 96 (nuisances by persons in thoroughfares), 104 (bathing prohibited within certain limits), 108 (slops and night soil to be conveyed away only at certain hours) and 110 (no dead animals to be thrown into any harbour) - also contain powers of arrest. These offences, because they only carry a fine, are not arrestable offences

⁶⁰ *Misuse of Drugs Act 1981* s 6(1)(c).

⁶¹ *Criminal Code* s 407(a); *Police Act* ss 65(4) and (4a), as to which see paras 12.5-12.6 above.

⁶² *Police Act* s 65(4): see para 12.5 above.

⁶³ Id s 65(4aa): see para 12.13 above.

⁶⁴ Id s 65(5): see para 12.19 above.

⁶⁵ Id s 65(4b): see para 12.16 above.

⁶⁶ *Criminal Code* s 407(c); *Police Act* s 66(4), as to which see paras 12.24 above.

⁶⁷ Paras 17.11-17.12 above.

⁶⁸ The last words of s 49 deal with bail. It is not clear why they were not repealed by *the Acts Amendment (Bail) Act 1982* which repealed the similar words in ss 43(1) and 44.

⁶⁹ See paras 13.31-13.34 above.

under the *Criminal Code*. The Commission **recommends** that these offences, like the other offences in Part VII, should be repealed.⁷⁰ The powers of arrest contained in these sections would in any case be unwarranted at the present day.

(xiii) *Section 122*

17.30 Section 122 gives power under warrant to arrest a person convicted of an offence against sections 65, 66 or 67 who is suspected to be in certain kinds of premises. It is not clear why there should be power to arrest a person who is in a particular place just because that person has been convicted of an offence on some previous occasion, and the Commission **recommends** that this power should be repealed.⁷¹

(d) **Arrest provisions of the *Police Act* that should be retained**

17.31 There are a few arrest powers in the *Police Act* that should be retained because they have some special value. The Commission suggests that they be put in the *Criminal Code* alongside the other arrest provisions.

(i) *Section 43(2)*

17.32 Section 43(2) (added to the *Police Act* in 1977⁷²) confers on a police officer a power to arrest without warrant "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)". There is no comparable provision in the Code.⁷³ Section 58(3) of the *Justices Act 1902* authorises an arrest in such circumstances, but only under warrant. In the Commission's view, a power to arrest without warrant in the circumstances contemplated is appropriate, particularly since it is limited to indictable offences and is therefore broadly in harmony with the *Criminal Code*'s aim of limiting arrest without warrant to more serious offences. The Commission therefore **recommends** that this provision be retained. If the Commission's

⁷⁰ See Ch 16.

⁷¹ For the Commission's recommendations on the entry and search powers in s 122 see para 18.43 below.

⁷² *Police Act Amendment Act 1977* s 2.

⁷³ Which covers only acts wholly or partially committed in Western Australia: s 12.

preferred approach to arrest without warrant⁷⁴ were adopted, it would be necessary to make this arrest power consistent with that approach.

(ii) *Section 45*

17.33 Section 45 contains two separate arrest powers. One has already been referred to above.⁷⁵ The second authorises a police officer to arrest without warrant any person whom the officer may have reasonable or probable cause for believing or suspecting to be a person for whose apprehension a warrant shall have been issued. This power does not appear in the Code. The Commission therefore **recommends** that it be retained.

(iii) *Section 50*

17.34 Section 50 confers a further arrest power. The issues raised by the section are not confined to arrest, and so it is dealt with under the next heading.

3. POWER TO DEMAND NAME AND ADDRESS, AND ARREST: SECTION 50

17.35 Section 50 provides that a police officer may demand a person's name and address, and may apprehend without warrant a person who neglects or refuses to give his name and address when required to do so, or who furnishes information which the officer has reasonable cause to believe to be false.⁷⁶

17.36 In *Trobridge v Hardy*⁷⁷ Fullagar J set out the limits of this power:

"Section 50, if read literally, authorizes a constable to approach any person anywhere, though he has done no wrong and is suspected of no wrong, and demand his name and address: then, if the name and address are not given, that person may be arrested and held in custody. There are, however, two things to be said about s 50. On the one hand, it in terms authorizes arrest without warrant only where there is actual refusal or

⁷⁴ Paras 17.11-17.12 above.

⁷⁵ Para 17.24.

⁷⁶ Persons who neglect or refuse to give a name and address, or give a false name and address, commit an offence. As originally drafted, a police officer was able to demand a name and address only from an individual the officer did not know. This limitation was removed by the *Acts Amendment (Betting and Gaming) Act 1982* s 4.

There were 763 charges under s 50 in the Perth and East Perth Courts of Petty Sessions in 1989: see Appendix IV.

⁷⁷ (1955) 94 CLR 147, 153-154.

neglect to give name or address. . . It may be that the section could be held to extend to cases where there is an honest belief based on reasonable grounds that there has been such a refusal or neglect (e.g. where the constable reasonably but mistakenly believes that a false name or address has been given) . . . (I do not think the implication could be extended beyond cases where there was reasonable ground for the belief). On the other hand, the drastic power conferred by s 50 must, I would think, be taken to be conferred only for the purposes of the Act in which it occurs. If the power is used wantonly or otherwise than for the purpose of bringing an offender or suspected offender to book, there is an abuse of power which may give rise to a cause of action."

17.37 Summing up the effect of the authorities, Wallace J in *Yarran v Czerkasow*⁷⁸ said that a police officer is not permitted to seek a person's name and address unless the officer suspects that the person has committed an offence or may be a witness to the commission of an offence.⁷⁹

17.38 Of the other Australian jurisdictions, Queensland, South Australia, Tasmania and the Northern Territory give the police a similar power.⁸⁰ Except in Queensland, the power is much more carefully circumscribed. In South Australia, for example, section 74a of the *Summary Offences Act 1953* provides:

- "(1) Where a member of the police force has reasonable cause to suspect -
- (a) that a person has committed, is committing, or is about to commit, an offence; or
 - (b) that a person may be able to assist in the investigation of an offence or a suspected offence,

the member may require that person to state his or her full name and address.

(2) Where a member of the police force has reasonable cause to suspect that a name or address as stated in response to a requirement under subsection (1) is false, the member may require the person making the statement to produce evidence of the correctness of the name and address as stated.

- (3) A person who -
- (a) refuses or fails, without reasonable cause, to comply with a requirement under subsection (1) or (2); or
 - (b) in response to a requirement under subsection (1) or (2) -

⁷⁸ [1982] WAR 239, 240.

⁷⁹ S 50 is similar to other statutory provisions which empower police and other officials to demand the name and address of any person found offending against the statute: see eg *Health Act 1911* s 352.

⁸⁰ *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 42; *Summary Offences Act 1953* (SA) s 74a; *Police Offences Act 1935* (Tas) s 55A; *Police Administration Act* (NT) s 134.

- (i) states a name or address that is false; or
- (ii) produces false evidence of his or her name or address,

is guilty of an offence.

Penalty: Division 8 fine or division 8 imprisonment.

(4) Where a person has been required to state his or her full name and address under subsection (1), the person may require the member of the police force who has made the requirement to state his or her surname and rank."

17.39 As a result of the cases on the power, section 50 does not in its terms reflect the circumstances in which it may be exercised. While police officers, because of their training, may understand the circumstances in which it may be exercised, other people are likely to be misled by the section. To ensure that section 50 reflects in its terms the circumstances in which the power may be exercised, the Commission **recommends** that it be replaced by a provision along the lines of that in South Australia.

17.40 The Commission **recommends** that, as is the case in South Australia, a person required by a police officer to state his or her name and address should have a reciprocal right to demand and receive from the officer the officer's surname and rank.⁸¹ This is consistent with the present instructions issued to police officers.⁸² The disclosure would serve to reassure the person, particularly where the officer is a plain clothes officer. Breach of this duty by a police officer should be dealt with by disciplinary measures.⁸³

17.41 Although the proposed provision contains an offence, it is incidental to the principal purpose of the provision. Accordingly, the Commission **recommends** that the provision be

⁸¹ S 134(3) of the *Police Administration Act* (NT) also requires an officer to furnish his or her name and the address of his or her place of duty at the request of a person requested to disclose his or her name and address. A police officer who fails to comply with a request commits an offence carrying a penalty of \$200.

The Western Australian Domestic Violence Advisory Council in its *Discussion Paper on a Proposal to Enact Family Violence Legislation* (1992) at 4 recommended that police officers entering premises in relation to domestic violence should give their names and numbers to an occupier on request. See also Review of Commonwealth Criminal Law *Fifth Interim Report* (1991) Draft Bill cl 6.

⁸² At present uniformed police officers are required to give their number on request. Plain clothes police officers are required to identify themselves by disclosing their name and office.

⁸³ As is the case in South Australia.

Inquiries made of officers in Police Headquarters in South Australia and the Northern Territory by the Commission reveal that there have not been any problems (eg as to the security of individual police officers) arising out of the operation of this type of provision.

incorporated in the *Criminal Code* together with provisions dealing with police powers of entry, search and seizure.⁸⁴

4. POWER TO OBTAIN PARTICULARS OF IDENTITY: SECTION 50AA

17.42 Section 50AA provides that when a person is in lawful custody for any offence punishable on indictment or summary conviction, the police may obtain all particulars thought necessary or desirable for identification, including photographs, measurements, fingerprints and palmprints. Where the person is found not guilty these particulars must be destroyed if the person so requests. Otherwise they are retained.

17.43 At common law the police could not forcibly obtain the fingerprints of a suspected person. Section 50AA was enacted following a court ruling that it was not lawful to take fingerprints under the prison regulations.⁸⁵

17.44 In most other Australian jurisdictions fingerprints and other particulars may be taken when a person is in lawful custody,⁸⁶ as in Western Australia. In Victoria, however, fingerprints may be taken only if the suspect gives informed consent or under a court order.⁸⁷ A court may make an order when the suspect is in custody, or has been charged with an offence, or has been summoned to answer to a charge, but the Act enacts a safeguard by providing that in each case the court must be satisfied of specified matters.⁸⁸

17.45 In view of the importance of being able to identify individuals who are arrested, the Commission **recommends** that there should be no further restriction on the power to obtain particulars thought necessary or desirable for identification. However, the Commission does not consider that the retention of fingerprints and other particulars where the suspected person is not convicted is justified. The information would not have been obtained but for the suspicion which led to the person's arrest. Once it is established that the suspicion is unfounded, the police should not be permitted to retain the information. Many innocent

⁸⁴ Para 18.59 below.

⁸⁵ Western Australian *Parliamentary Debates* (1974) Vol 203, 364.

⁸⁶ *Crimes Act 1900* (NSW) s 353A(3); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 43; *Summary Offences Act 1953* (SA) s 81(4); *Crimes Act 1900* (ACT) s 353A(3); *Police Administration Act* (NT) s 146.

⁸⁷ *Crimes Act 1958* (Vic) s 464K, inserted by the *Crimes (Fingerprinting) Act 1988* s 4.

⁸⁸ S 464M.

people will be unaware of their right to request that these particulars be destroyed.⁸⁹ In other jurisdictions, fingerprints are automatically destroyed once a charge is withdrawn or dismissed.⁹⁰ Accordingly, the Commission **recommends** that section 50AA be amended to provide that fingerprints and other particulars should be destroyed automatically once a charge is withdrawn or dismissed.⁹¹

17.46 Consistent with the Commission's recommendation that police powers to obtain a person's name and address⁹² and police powers of entry, search and seizure⁹³ should be located in the *Criminal Code*, the Commission **recommends** that this provision should be located in the *Criminal Code*.

5. POWER TO APPREHEND FOR SOBERING-UP PURPOSES

17.47 At the time the Discussion Paper was published the *Police Act* contained provisions relating to drunkenness.⁹⁴ Since then drunkenness has been decriminalised and replaced with a system for apprehension and detention, without arrest, for sobering-up purposes set out in Part VA of the *Police Act*.⁹⁵ As a result of these changes, sections 53 and 65(6) of the *Police Act* have been repealed and section 44 of the Act has been amended in the manner suggested by the Commission in the Discussion Paper.⁹⁶

17.48 The Commission has recommended above⁹⁷ that a Summary Offences Act should be enacted in Western Australia. It would be inappropriate for the provisions of Part VA to be included in the proposed Summary Offences Act, or retained with the police administration provisions in the *Police Act* or the proposed Police Administration Act. The Commission

⁸⁹ *Police Act* s 50AA(2).

⁹⁰ *Crimes Act 1958* (Vic) s 464R; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 43; *Summary Offences Act 1953* (SA) s 81(4f); *Police Administration Act* (NT) s 147(2). See also Review of Commonwealth Criminal Law *Fifth Interim Report* (1991) 143-144.

⁹¹ This should not include a dismissal under s 669(1)(a) of the *Criminal Code* or s 24(2) of the *Children's Court of Western Australia Act 1988*. The Code provision applies only to first offenders and fingerprints and other particulars may be necessary to establish that a person has had the benefit of the provision. The same argument applies to a dismissal under s 24(2) of the *Children's Court of Western Australia Act 1988* which may not be applied in respect of more than 3 offences.

⁹² Para 17.39 above.

⁹³ Para 18.59 below.

⁹⁴ Ss 53 (being found drunk in a public place), 65(6) (habitual drunkards) and 44 (being found drunk on a ship or licensed premises): Discussion Paper paras 10.13-10.15.

⁹⁵ By the *Acts Amendments (Detention of Drunken Persons) Act 1989*. See R Milford "The Decriminalisation of Public Drunkenness in Western Australia" [1991] *Aboriginal Law Bulletin* 18.

⁹⁶ Para 10.17.

⁹⁷ Para 3.2.

therefore **recommends** that Part VA be enacted as a separate Act, as is the case with equivalent provisions in other jurisdictions.⁹⁸

⁹⁸ See *Intoxicated Persons Act 1979* (NSW); *Public Intoxication Act 1984* (SA). The Victorian Law Reform Commission in its Report on *Public Drunkenness* (Report No 25 1989) made a similar recommendation. See also its report *Public Drunkenness: Supplementary Report* (Report No 32 1990). In the Northern Territory, however, the drunkenness provisions have been incorporated in the *Police Administration Act 1978* ss 127A-133.

Chapter 18

POWERS OF ENTRY, SEARCH AND SEIZURE

1. INTRODUCTION

18.1 The *Police Act* contains provisions which give the police powers to search persons and vehicles; powers to enter premises and ships, in order to search, arrest suspected persons or for various other purposes; and powers to seize property. The Commission deals with these powers in this Report for the reasons stated in Chapter 3.¹ The *Police Act* provisions, together with other statutory provisions, such as those in the Code, considerably extend the powers of the police conferred by the common law.²

18.2 The law relating to entry, search and seizure has to balance two competing considerations, both of great importance. On the one hand there is the need to give the police enough power to perform their duty to uphold peace and order and to ensure that criminals are caught. On the other, there is the right of citizens to go about their business without unnecessary interference.³ Holding this balance raises especially difficult problems in the context of police powers to enter and search private premises, since the right to security in one's home is one of the most significant rights recognised in modern society.⁴

2. POWERS TO SEARCH PERSONS, VEHICLES AND PROPERTY

18.3 At common law there was no power to stop and search a person unless an arrest was made.⁵ On arrest there was a limited power to search the person arrested and also goods in that person's possession and control.⁶ The *Police Act* considerably enlarges these common law powers.

¹ See paras 3.32-3.34 above.

² As to which, see G A Flick *Civil Liberties in Australia* (1981) 41-60; J B Bishop *Criminal Procedure* (1983) 63-85; E Campbell & H Whitmore *Freedom in Australia* (2nd ed 1973) 58-77.

³ See generally E Campbell & H Whitmore *Freedom in Australia* (1st ed 1966) 30-33; K L Milte & T A Weber *Police in Australia* (1977) 59-62.

⁴ See generally D Feldman *The Law Relating to Entry, Search and Seizure* (1986) 1-28.

⁵ G A Flick *Civil Liberties in Australia* (1981) 42.

⁶ *Leigh v Cole* (1853) 6 Cox CC 329, 332; *Lindley v Rutter* [1981] QB 128.

(a) Section 49

18.4 Section 49 of the *Police Act* gives the police power to search persons and vehicles without making an arrest. The relevant part of the section provides that:

"[E]very 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 . . ."

18.5 Section 49 sandwiches this provision in between provisions dealing with arrests.⁷ Its 19th century origins are evident from its references to carts and carriages. The wording of section 49 may also give rise to some other problems: on a literal reading, it permits the detention of persons as well as vehicles and packages, but in the context of persons it appears simply to mean that they may be detained for as long as is necessary to search them. The reference to a person reasonably suspected of having or conveying anything stolen or unlawfully obtained appears to be a reference to the unlawful possession offence in section 69 of the Act.⁸

18.6 The Commission is of the view that a power to search persons and vehicles of the kind conferred by section 49 is necessary to allow the police to perform their functions of detecting and preventing crime.⁹ It **recommends** that -

1. The search power conferred by section 49 should be retained, but the provision should be redrafted in contemporary language and style.
2. The power to detain should be clarified.
3. This power should be separated from the other provisions in section 49, so that the new provision deals exclusively with search powers.

⁷ See paras 17.21 and 17.27 above. S 49 also contains a provision dealing with seizure of property: see para 18.57 below.

⁸ See paras 13.2-13.9 above. The words "reasonably suspected" are presumably to be interpreted in the same way as in s 69. On their meaning in that context, see para 13.5 above.

⁹ All those who commented on this issue agreed. Equivalent provisions in other Australian jurisdictions include *Crimes Act 1900* (NSW) s 357E; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 24; *Summary Offences Act 1953* (SA) s 68; *Police Act 1927* (ACT) s 16.

The new provision might provide as follows:

A police officer may -

- (a) stop and search -
 - (i) any person whom the officer, on reasonable grounds, believes to have, or to be conveying, anything stolen or otherwise unlawfully obtained;
 - (ii) any conveyance in or on which the officer has reason to believe anything stolen or unlawfully obtained may be found;
- (b) detain a person or conveyance for the purposes of such a search.¹⁰

(b) Section 68

18.7 Section 68 allows the police to search the person and property of a person convicted of particular offences under the *Police Act*:

"[T]he Justice or Justices by whom any person is convicted of an offence against section sixty-five, section sixty-six or section sixty-seven of this Act 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 . . ."

18.8 The most important provision dealing with the examination of accused persons in custody is section 236 of the *Criminal Code*. It empowers a police officer to search a person who is in lawful custody on a charge of committing any offence, and to take from that person anything found on him or her, using reasonable force if necessary.¹¹ The Murray Report¹² recommended several amendments to section 236, including the addition of a power, after a

¹⁰ An essentially similar recommendation was made in the Review of Commonwealth Criminal Law *Fifth Interim Report* (1991), 63-64. The Committee recommended that the proposed consolidation of Australian criminal law should give power to a police officer to stop and search any vehicle if he or she suspected on reasonable grounds that the search may disclose anything stolen or unlawfully obtained or anything used or intended to be used in the commission of an offence punishable by at least five years' imprisonment.

¹¹ There are similar provisions in most other Australian jurisdictions: see *Crimes Act 1900* (NSW) s 353A(1); *Criminal Code* (Qld) s 259; *Summary Offences Act 1953* (SA) s 81(1); *Crimes Act 1900* (ACT) s 353A.

¹² 144-148.

lawful arrest, to search property in the possession of the person arrested. These recommendations have not yet been implemented.

18.9 By comparison with section 236, the power of search in section 68 of the *Police Act* is very limited. It applies only to offences under sections 65, 66 and 67 of that Act.¹³ Unlike section 236, under which the purpose of the search is the preservation of evidence, the purpose of the search under section 68 appears to be to find money which can be used to defray gaol costs.

18.10 The Commission **recommends** that this search power conferred by section 68 be repealed,¹⁴ for the following reasons -

1. It is obsolete, because the purpose of the section 68 power is to obtain money which can be used to defray prison costs.
2. Section 236 of the *Criminal Code*, by providing a power to search accused persons in custody, already covers much of the ground covered by the section 68 power. If the amendments recommended in the Murray Report are implemented, it will cover all aspects of that power.
3. The section 68 power is limited to persons convicted of an offence against sections 65, 66 and 67. A power limited to a few particular offences is of little use. In any case, under the recommendations in this Report many of the offences in sections 65, 66 and 67 will be repealed.

(c) Other provisions

18.11 The *Police Act* contains two other provisions which give the police powers to search property -

¹³ The reason for this is that ss 65 to 68 were all derived from the *Vagrancy Act 1824 (UK)* and inserted in the *Police Act* without much amendment.

¹⁴ All those who commented on this issue agreed that this search power in s 68 should be repealed, except the Police Department and the Police Union (whose comments however appear to be directed at the other search power in s 68, that dealt with at paras 18.23-18.30 below).

- * a second provision in section 68, which gives the police power to inspect and search the property of any person taken into custody on a charge of felony;
- * section 70, which allows the police to search vehicles and packages under warrant.

In each case, the major purpose of the provision is to allow the police to enter premises for the purposes of making a search. They are therefore dealt with in that context later in this Chapter.¹⁵

3. POWERS TO ENTER PREMISES

(a) Introduction

18.12 A number of provisions in the *Police Act* give the police powers to enter private premises for various purposes. These provisions, together with provisions in the *Criminal Code*, considerably expand the powers to enter premises conferred by the common law.

18.13 At common law neither the police nor anyone else could enter private premises without the express or implied permission of the occupier, except under authority of law.¹⁶ The law authorised the issue of search warrants to search for stolen goods, but required the warrant to identify the particular thing or class of things for which the search was being made, or at least to specify the offence in respect of which the search was required. General warrants (warrants which allowed the holder to search any place at any time) were declared to be illegal.¹⁷ The law also gave police authority to enter private premises where there was an actual or threatened breach of the peace,¹⁸ or to make an arrest.¹⁹ The existence of a power to search premises following a lawful arrest on those premises is a matter of dispute. It was accepted that when a person was lawfully arrested for a serious crime, police could take and detain property found in that person's possession which would form material evidence in the prosecution for that crime.²⁰ This, however, did not authorise a general search of the premises

¹⁵ See paras 18.23-18.30 and 18.32-18.33 below.

¹⁶ *Mackay v Abrahams* [1916] VLR 681; *Great Central Railway Co v Bates* [1921] 3 KB 578; *Davis v Lisle* [1936] 2 KB 434.

¹⁷ *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807.

¹⁸ *Thomas v Sawkins* [1935] 2 KB 249.

¹⁹ *Smith v Shirley* (1846) 3 CB 142, 136 ER 58.

²⁰ *Dillon v O'Brien and Davis* (1887) 16 Cox CC 245.

on which the accused was found. More recent authority, which is controversial,²¹ suggests that police lawfully on premises to make an arrest or (perhaps) for other purposes have more general rights of search.²² The police do not have authority at common law to search a person's premises following the arrest of that person elsewhere.²³

(b) Entry for the purposes of arrest

(i) Without warrant: section 44

18.14 Under section 44 a police officer may enter certain premises without a warrant and make an arrest:

"[A]ny officer or constable of the force may enter at any hour of the day or night into any house licensed for the sale of fermented or spirituous liquors, or any licensed boarding, eating, or lodging house, and without any warrant other than this Act, apprehend any person whom he may find behaving himself in an indecent or disorderly manner, or using [profane, indecent, or obscene language, or using any threatening, abusive, or insulting words or behaviour], with intent or calculated to provoke a breach of the peace."²⁴

Section 44 provides a penalty for these offences which applies unless a different penalty is prescribed by the *Police Act*.²⁵ It also allows the officer or constable to search the premises for offenders and otherwise perform his duty.²⁶

18.15 The offences listed in section 44 are all arrestable offences under section 564 of the *Criminal Code*. Section 564(5) provides that where it is lawful for a police officer to arrest a person under section 564, it is lawful for the 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

²¹ See L H Leigh *Recent Developments in the Law of Search and Seizure* (1970) 33 MLR 268.

²² *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299; *Ghani v Jones* [1970] 1 QB 693. Lord Denning MR in these cases relied on the contentious case of *Elias v Pasmore* [1934] 2 KB 164, as to which see E C S Wade *Police Search* (1934) 50 LQR 354.

²³ *Jeffrey v Black* [1978] QB 490.

²⁴ For the other entry power conferred by s 44, see para 18.51 below.

²⁵ See paras 6.3-6.4 above.

²⁶ S 44 is the only provision in the *Police Act* which gives the police power to enter premises without warrant for the purposes of arrest. S 43(1) gives the police power to arrest without warrant all persons whom they have just cause to suspect of having committed or being about to commit an offence. However in *Letts v King* [1988] WAR 76 the Full Court held that s 43(1) does not carry with it the express or implied power to enter premises without the permission of the occupier for the purposes of making the arrest. For the Commission's recommendations as to the arrest power in s 43(1) see paras 17.14-17.15 above.

grounds, the person may be. Thus the entry power in section 44, in so far as it allows entry for the purpose of making an arrest,²⁷ is redundant. The Commission **recommends** that this power be repealed.²⁸

(ii) *With warrant: sections 70, 76G(3) and 122*

18.16 Three provisions in the *Police Act* give the police power to enter premises under a warrant for the purpose, inter alia, of making an arrest.

18.17 Section 70 gives the police power to arrest a person found on premises who the police have reasonable cause to suspect is privy to the deposit of property there knowing or having reasonable cause to suspect that it was stolen or otherwise unlawfully obtained. Under this section:

"If information shall be given on oath to any Justice that there is reasonable cause for suspecting that any thing stolen or unlawfully obtained is concealed or lodged in any place or in any vehicle or package, it shall be lawful for such Justice, by special warrant under his hand directed to any police constable, to cause every such place to be entered, and the same and every such vehicle or package to be searched at any time of the day or by night, and on any Sunday or other day; and the said Justice, if it shall appear to him necessary, may empower such police constable with such assistance as may be found necessary, such police constable having previously made known such his authority, to use force for the effecting of such entry, whether by breaking open doors or otherwise, and if upon search thereupon made any such thing shall be found, then to convey the same before a Justice or to guard the same on the spot until the offenders are taken before a Justice, or otherwise dispose thereof in some place of safety, and moreover to take into custody and carry before a Justice every person found in such house or place, or whom he shall have reasonable cause to suspect to have been privy to the deposit of any such thing knowing or having reasonable cause to suspect the same to have been stolen or otherwise unlawfully obtained."²⁹

18.18 Section 76G(3) gives police a power to enter premises, inter alia, to arrest a person suspected of living on the earnings of prostitution. It provides:

"If it be made to appear by information on oath to any stipendiary magistrate that there is reason to suspect that any house or part of a house is used by any female for purposes of prostitution, and that any person residing in or

²⁷ On one interpretation, this power in s 44 may allow entry for other purposes also: see paras 18.39-18.41 below.

²⁸ Most of the commentators who dealt with this issue agreed.

²⁹ The search aspects of this provision are dealt with at paras 18.32-18.33 below.

frequenting the house is living wholly or in part on the earnings of the said female, such magistrate may issue a warrant authorizing any police constable to enter and search the house, and to arrest such person."³⁰

18.19 Section 122 gives power to enter certain places, inter alia, to arrest a person convicted of an offence against sections 65, 66 or 67 who is, or is suspected to be, there. It provides:

"Any Justice, upon information on oath that any person who has been convicted of an offence against section sixty-five, section sixty-six or section sixty-seven of this Act, is, or is suspected to be, in any place, kept or purporting to be kept for the reception, lodging, or entertainment of travellers or others or that any place is a disorderly house, house of ill-fame, brothel, or bawdy-house, or place where, liquor is reasonably suspected of being illegally sold may enter the same at any time by day or night, or issue his warrant authorizing any constable or other person in like manner to enter the same, from time to time and to apprehend and bring before him, or any other Justice, every such convicted person, and to seize any liquor found therein, to be dealt with according to law."

18.20 The entry powers in sections 70 and 76G(3) are redundant because -

1. The common law gives a police officer power to enter private premises to make an arrest whenever the officer has the right to arrest, with or without a warrant.³¹
2. As regards arrest without warrant, section 564(5) of the *Criminal Code* provides that whenever it is lawful under section 564 to arrest a person without warrant it is lawful for the officer, for the purpose of effecting the arrest, to enter any place where the person is or is suspected to be. In the cases dealt with by sections 70 and 76G(3) the offence in question is an arrestable offence because it is punishable by imprisonment and so the officer could arrest without warrant, and enter premises in order to do so.

18.21 However, in the Commission's view it would be advantageous to provide in statute that police officers making an arrest under warrant have the right to enter private premises in order to do so. If such a provision is enacted, it should be a provision of general application, and not a provision such as sections 70 or 76G(3), which are limited to a few particular instances. Accordingly, the Commission **recommends** that -

³⁰ The search aspects of this provision are dealt with at paras 18.32-18.33 below.

³¹ See para 18.13 above.

1. Section 564 of the *Criminal Code* should be amended to provide that police may enter premises to effect an arrest not only when it is lawful to arrest without warrant under section 564 but also when arresting under warrant.
2. The provisions in section 70 and 76G(3) authorising entry on premises for the purpose of making an arrest should be repealed.³²

18.22 The power to enter premises for the purposes of arrest conferred by section 122 is obscure. It allows a justice to enter particular kinds of premises to arrest persons who have been *convicted* of an offence under sections 65, 66 or 67 of the *Police Act*, but it is not clear what offence they have committed - unless section 122 is making it an offence for persons with convictions for particular offences to be present in inns, disorderly houses and the like. Section 122 is clearly of very ancient origin and its present purpose is not clear. It should not remain on the statute book. The Commission **recommends** that section 122 be repealed.

(c) **Entry for the purposes of search**

(i) *Without warrant: sections 68 and 44*

18.23 Section 68 provides that:

"[W]hen 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."

18.24 This provision gives the police power to enter premises to search them without a warrant. The reference to felony must now be interpreted as a reference to an offence which is a crime under the provisions of the *Criminal Code*.³³

18.25 Section 711 of the *Criminal Code* gives the police a wide-ranging power to search premises under warrant. It provides that:

³² Of those who commented on this issue, all (including the Police Department and the Police Union) except one agreed.

³³ *Criminal Code Act 1913* s 3(1).

"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. . . ."³⁴

Another important search provision, section 14 of the *Misuse of Drugs Act 1981*, again requires a warrant. No statutory provision, apart from section 68 of the *Police Act*, and section 44, considered below,³⁵ gives the police power to search premises without a warrant, and the extent of the power conferred by the common law remains controversial.³⁶

18.26 Section 68 therefore represents an important potential incursion into the privacy of a person's home and private premises. The section attempts to keep this power within bounds by limiting it to cases where the person is charged with a serious offence. The Commission in the Discussion Paper sought comment as to whether the power should be further restricted.

18.27 There are a number of arguments for keeping the section 68 power in its present form -

1. The main purpose of the provision is to prevent the loss or destruction of evidence that will support the case against the defendant on the charge for which he or she has been arrested. This purpose may be frustrated by the need to obtain a warrant before entry onto the premises.

³⁴ Similar provisions exist in most other Australian jurisdictions: *Crimes Act 1958* (Vic) s 465; (Qld) *Criminal Code* s 679; *Crimes Act 1900* (ACT) s 358B; *Police Administration Act* (NT) s 117; in New South Wales, the similar provision in s 354 of the *Crimes Act 1900* has now been replaced by s 5 of the *Search Warrants Act 1985*. For discussion of the general principles governing the exercise of search warrants, see G A Flick *Civil Liberties in Australia* (1981) 54-59; J B Bishop *Criminal Procedure* (1983) 71-76.

³⁵ Para 18.31.

³⁶ See para 18.13 above.

2. Police have powers to stop and search, without warrant, any cart, carriage and vehicle where there is reason to suspect that anything stolen or unlawfully obtained may be found.³⁷
3. The provision is useful in that it enables the search of premises of persons arrested on shoplifting charges.³⁸

18.28 There are also arguments against the existence of a power to search premises without warrant such as that conferred by section 68 -

1. The power unduly encroaches on the rights of citizens to security in their private premises. This is a right which has been upheld by the courts over many years.³⁹ Searches of a person on arrest are justifiable,⁴⁰ but searches of that person's premises and property should be conducted under the authority of a warrant.
2. A warrant to enter premises can readily be obtained. Section 711 of the *Criminal Code* provides that a warrant to search premises may be issued by any justice of the peace. This section makes it possible to obtain a warrant in a wide-ranging variety of circumstances, including a case when a person has been arrested on a charge of serious crime.
3. No other Australian jurisdiction gives police a statutory power to enter the premises of arrested persons and search them without a warrant.⁴¹

³⁷ S 49. For the Commission's recommendations as to this power see para 18.6 above.

³⁸ Since stealing is a crime under S 378 of the *Criminal Code*. The Police, who made this point in their submission in response to the Discussion Paper, said that their power to search the premises of persons arrested on shoplifting charges had been curtailed by the *Criminal Code Amendment Act (No 2) 1987*, which had made stealing property worth \$400 or less a simple offence. However, this problem has been eliminated by the *Criminal Law Amendment Act 1990*, which repealed s 378A and replaced it with a provision giving prosecutors the right to elect summary trial for any offence under s 378 involving property worth \$400 or less.

³⁹ "[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose": *Semayne's Case* (1604) 5 Co Rep 91a per Coke CJ.

⁴⁰ S 236 of the *Criminal Code* gives the police power to search a person who is in lawful custody on a charge of committing any offence.

⁴¹ The only other statutory provisions allowing search without warrant appear to be *Police Administration Act* (NT) s 119 (allowing searches in an emergency, but not based on arrest); *Criminal Law Consolidation Act 1935* (SA) s 318 (giving authority to search for stolen property, but not based on arrest).

In other jurisdictions the issue in debate as regards search of premises is not so much whether search should be allowed without warrant as whether the power to attain a warrant for such a purpose should be

18.29 In view of the foregoing, the Commission has come to the conclusion that the power in section 68 to enter premises without a warrant for the purposes of search is too wide. It goes far beyond the rights of search permitted by the common law. Under section 68 police can carry out a general search of an arrested person's premises, whether the person is arrested there or not. The common law only allowed such a search when the person was arrested there. Even in that circumstance (except under recent English authority⁴² which has been the subject of criticism⁴³) the common law only allowed police to search for and seize property which would form material evidence in the prosecution for that crime.

18.30 The Commission therefore **recommends** that the power in section 68 to enter premises without a warrant for the purposes of search be repealed⁴⁴ and replaced by a power which more closely reflects the power traditionally recognised by the common law. This power will allow police, when they have lawfully entered premises for the purpose of arresting a person, to search the premises and detain property found there where this will form material evidence in the prosecution of that person for the offence for which he or she is arrested.

18.31 Section 44 of the *Police Act* is another provision which appears to allow police to enter particular premises to search them without a warrant. It provides that a police officer may enter "any house licensed for the sale of fermented or spirituous liquors, or any licensed boarding, eating, or lodging house" and arrest persons committing various disorderly conduct offences (a power dealt with above⁴⁵) "and to search therein for offenders and otherwise perform his duty, using as little annoyance to the inmates as possible". The grammar of this provision contributes to its obscurity, but it may mean that police can search these kinds of premises for persons who have committed the offences specified. These situations should not be regarded as different from any other situation in which the police might seek to search private premises. The Commission **recommends** that the search power in section 44 should be repealed.

restricted: see eg Office of the Minister for Police and Emergency Services and the Criminal Justice Commission *Police Powers in Queensland - An Issues Paper* (1991) 69-72; G Robertson *Freedom, the Individual and the Law* (6th ed 1989) 112-114; contrast Report of the Royal Commission on Criminal Procedure (1981 Cmnd 8092) para 3.121.

⁴² *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299; *Ghani v Jones* [1970] 1 QB 693.

⁴³ See para 18.13 above.

⁴⁴ Many of the commentators, including the Law Society and a leading academic commentator, were in favour of the repeal of this provision. Apart from the police comments, only one commentator was against any further restriction.

⁴⁵ Paras 18.14-18.15.

(ii) *With warrant: sections 70 and 76G(3)*

18.32 Two provisions of the *Police Act* already dealt with under the heading of powers to enter premises under warrant for the purposes of arrest⁴⁶ also confer powers of search.

* Section 70 authorises the search of premises under warrant where there is reasonable cause to suspect that property stolen or unlawfully obtained is concealed or lodged in any place.⁴⁷

* Section 76G(3) authorises the search under warrant of a house where there is reason to suspect that it is used by a female for purposes of prostitution.⁴⁸

18.33 Section 711 of the *Criminal Code* (quoted in paragraph 18.25 above) confers a general power to search premises under warrant. The more specific provisions in sections 70 and 76G(3) of the *Police Act* are therefore redundant. The Commission **recommends** that they be repealed.⁴⁹

(d) **Entry for other purposes**

18.34 Several provision in the *Police Act* give the police power to enter premises for purposes other than search or arrest.

(i) *Section 42*

18.35 Section 42 provides that:

"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

⁴⁶ See paras 18.16-18.22 above.

⁴⁷ S 70 is closely related to s 69, under which it is an offence to have or convey goods which are reasonably suspected of being stolen or unlawfully obtained, and fail to give a satisfactory account. On s 69, see paras 13.2-13.9 above. S 70 also provides for the seizure of the property suspected to be stolen: see para 18.56 below, and the arrest of persons found on the premises: see para 17.25 above.

⁴⁸ S 122, also dealt with in paras 18.16-18.22 above, according to the sidenote also deals with search, but such powers are not mentioned in the section itself.

⁴⁹ This recommendation, together with those in para 18.21 above, would result in the repeal of all provisions in ss 70 and 76G(3).

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".

18.36 Insofar as it confers power to enter premises where games are played, the games listed are not unlawful, and there is no reason why the police should have powers of entry to premises at which they take place. Powers to enter premises where it is suspected that unlawful games are taking place are given to the police by the *Gaming Commission Act 1987*.⁵⁰ Insofar as section 42 confers powers to enter theatres and the like and remove common prostitutes, reputed thieves and other loose, idle or disorderly persons, it is again unjustified. The section singles out people because they fall into familiar 19th century *Police Act* categories, not because they have been guilty of any wrongdoing. These references are outdated and should be removed. Other references to idle and disorderly persons were removed from the *Police Act* in 1975.⁵¹

18.37 The Discussion Paper⁵² provisionally suggested that there were no sufficient reasons justifying the retention of the power in section 42. However, on further reflection, and with the benefit of the views of the commentators, the Commission has modified its provisional suggestion because the police need the power conferred by section 42 to enable them to enter sports grounds and similar places of public entertainment where large groups of people are gathered, for the purpose of maintaining order. Though the common law recognises that the police have a public duty to maintain law and order on such occasions which would allow them to enter the premises independently of the existence of statutory provisions such as section 42,⁵³ it is preferable to set out that power in statutory form. Accordingly the Commission **recommends** that section 42 be redrafted in modern form so as to give the police such a power. The South Australian equivalent of section 42, section 73(1) of the

⁵⁰ S 25.

⁵¹ *Police Act Amendment Act* (No 2) 1975 ss 31-32.

⁵² Para 18.20.

⁵³ See *Harris v Sheffield United Football Club Ltd* [1988] QB 77, distinguishing between entry to maintain law and order and the provision of "special police services" under the *Police Act 1964* (UK), for which a charge could be made.

Summary Offences Act 1953, which was modernised along such lines in 1987, provides a suitable model. Following this model, section 42 could provide that:

A police officer may enter a place of public entertainment and -

- (a) order any person who is behaving in a disorderly or offensive manner to leave; or
- (b) use reasonable force to remove any person who is behaving in such a manner.

Such a provision would also cover premises where games are played, to the extent that it is necessary to do so. The present section 42 does not cover private premises, since it refers to premises where any public table, board or ground is kept.

18.38 The South Australian provision quoted above goes on to provide that remaining in a place of public entertainment after having been ordered to leave, or re-entering within 24 hours, is an offence.⁵⁴ However, in the Commission's view there is no need for such an offence in Western Australia, since such conduct would constitute the offence of remaining on premises after being requested to leave.⁵⁵

(ii) *Section 44*

18.39 Section 44 (quoted in paragraph 18.14 above), which allows the police to enter houses licensed for the sale of fermented or spirituous liquors, or any licensed boarding, eating or lodging house, may well not be limited to entry for the purposes of arrest. The drafting of the section is rather obscure. As regards licensed premises, in the Commission's view there is a need for the police to have a power to enter premises licensed under the *Liquor Licensing Act 1988* to deal with persons behaving in a disorderly or offensive manner,⁵⁶ similar to that recommended above⁵⁷ for places of public entertainment. The South Australian legislation of

⁵⁴ S 73(2).

⁵⁵ See the Commission's recommendation in para 8.15 above, based on s 82B of the present *Police Act*.

⁵⁶ Under the *Liquor Licensing Act 1988* s 155, police have power to enter any premises, whether licensed or not, where they suspect on reasonable grounds that liquor is being sold, supplied, consumed or stored unlawfully, or that there is evidence on the premises of an offence against the *Liquor Licensing Act*. Contrary to the suggestion in the Discussion Paper para 18.21, this power does not cover the situation which is the subject of the recommendation.

⁵⁷ Para 18.37.

1987 which introduced a power to enter such places also enacted a similar power to enter licensed premises.

18.40 The power to enter licensed boarding, eating or lodging houses, on the other hand, is redundant. It is largely covered by provisions in the *Health Act 1911*.⁵⁸ It does not need to be reproduced in any modern provision.

18.41 The Commission therefore **recommends** that -

1. The power in section 44 to enter houses licensed for the sale of fermented or spirituous liquors should be clarified by giving the police a power, similar to that in section 74 of the *South Australian Summary Offences Act 1953*, to enter premises licensed under the *Liquor Licensing Act 1988* to deal with persons behaving in a disorderly or offensive manner.
2. The power in section 44 to enter licensed boarding, eating or lodging houses should be repealed.⁵⁹

(iii) *Sections 101 and 102*

18.42 Sections 101 (butchers' shambles and slaughterhouses) and 102 (inspection of meat) also contain powers of entry and inspection. The Commission has recommended above⁶⁰ that these sections be repealed. The powers of entry and inspection contained in these sections have been superseded by provisions in the *Health Act 1911*.⁶¹

⁵⁸ The words were added when the draftsman of the *Police Act 1892* copied s 44 from the *South Australian Police Act 1869*. They were evidently intended to refer to the *Wines, Beer, and Spirit Sale Act 1880*, a precursor of the *Liquor Licensing Act 1988*, which in addition to various kinds of liquor licence also covered "an Eating Boarding and Lodging House License". These provisions were omitted from Liquor Licensing legislation with the enactment of the *Liquor Act 1970* (repealed by the 1988 Act). Today, Part V Division 2 of the *Health Act* deals with lodging-houses (defined to include buildings in which provision is made for lodging or boarding) and Part V Division 3 with eating houses. S 349 gives local authority inspectors and the like powers to enter "any house or premises", inter alia, to see whether the provisions of the Act are being contravened, but the police are not given any special powers of entry. The powers to enter such premises in s 44 are therefore not covered by any other legislation, but it is hard to see that they are necessary. S 122 covers, inter alia, similar premises, and no serious argument for its retention has been raised.

⁵⁹ For the Commission's recommendations on other aspects of s 44, see paras 18.14-18.15 (entry for purposes of arrest), 18.31 (entry for purposes of search), 6.1-6.15 (disorderly conduct offences).

⁶⁰ Paras 16.6-16.14.

⁶¹ See eg the entry powers conferred on environmental health officers by s 246ZB and the general entry powers in s 349; Part VIIA Division 2 (slaughtering of animals and meat).

(iv) *Section 122*

18.43 Section 122 (quoted in paragraph 18.19 above) is largely concerned with entry for the purposes of arrest and seizure of property, but also gives a power to enter disorderly houses and the like. It is not clear why this power is given. There is no reason why the police should have such a power except for the purposes of arrest, search or seizure. It has been repealed elsewhere.⁶² The Commission has recommended above⁶³ that section 122 be repealed.

4. POWERS TO ENTER SHIPS

18.44 A particular feature of the *Police Act* is that several sections are specifically devoted to powers to enter ships. This can probably be explained by the fact that most of these provisions date back to the early 19th century,⁶⁴ when ships were the most efficient method of transporting people and property.⁶⁵

(a) **Section 40**

18.45 Section 40 provides police with a general power to enter ships for a number of purposes:

"Any officer of the Police Force or senior constable in charge of a Police Station shall, by virtue of his office, be an Officer of Customs within the meaning of the law relating to the Customs for the time being and shall have power, by virtue of his office, to enter at all times, with such constables as he shall think necessary, as well by night as by day, into or upon every ship, boat, or other vessel (not being then actually employed in Her Majesty's service, and not being a vessel of war, the commanding officer whereof shall hold a commission from any foreign Government or Power) lying or being in any of the waters of the said State, or any dock thereto adjacent, and into every part of such vessel, for the purpose of

⁶² The equivalent provisions have been repealed in the United Kingdom, South Australia, the ACT, the Northern Territory and New Zealand.

⁶³ Para 18.22.

⁶⁴ All these provisions were taken from the *Police Act 1869* (SA) ss 42, 43 and 46. Ss 40 and 41(1) were derived from the *Metropolitan Police Act 1839* (UK) ss 33 and 34. The origins of s 44 are not clear.

⁶⁵ In preparation for the beginning of transportation of convicts to Western Australia, 14 Vic No 20 (1851) enacted a number of protective provisions, including some closely related to the *Police Act* provisions, such as s 2, allowing vessels to be boarded and searched. The Preamble to the Ordinance set out in detail the reason for its enactment: "Whereas the establishment of a station for convicts in the town of Fremantle, renders it necessary to adopt some precautionary regulations tending to insure the safety of the shipping at the port thereof, and to prevent the escape of convicts therefrom by the facilities [sic] afforded by such shipping . . .".

searching and inspecting the same, and of inspecting and observing the conduct of all persons who shall be employed on board any such ship or vessel in or about the lading or unloading thereof, as the case may be, and for the purpose of taking all such measures as may be necessary for providing against fire and other accidents, and for preserving peace and good order on board of any such ship or vessel and for the effectual prevention or detection of any felonies or misdemeanours."

18.46 There are a number of arguments in favour of the police having some powers to enter ships, for example to take measures to prevent injury to persons or damage to property by fire or otherwise, or to preserve peace and good order on board. Similar powers are conferred on police in some other Australian jurisdictions.⁶⁶ The recognition of the need for some police powers to enter ships is broadly consistent with previous recommendations which have recognised that in appropriate circumstances it is desirable for the police to have some powers to enter certain kinds of premises.⁶⁷ Section 40 in its present form, however, is greatly in need of redrafting and modernisation. The Commission **recommends** that it be replaced by a modern provision, as follows:

A police officer of or above the rank of sergeant or in charge of a police station, accompanied by other police officers if the first-mentioned police officer thinks it necessary, may at any time -

- (a) enter into any part of any vessel, or any part of any aircraft on the ground;
- (b) search and inspect the vessel or aircraft;
- (c) take all necessary measures for preventing injury to persons or damage to property by fire or otherwise on the vessel or aircraft; and
- (d) take all necessary measures for preserving peace and good order on the vessel or aircraft or for preventing, detecting or investigating any offences that may be, or may have been, committed on the vessel or aircraft.

This recommended provision is based on the New South Wales equivalent of section 40.⁶⁸

⁶⁶ *Crimes Act 1900* (NSW) s 357C; *Summary Offences Act 1953* (SA) s 69.

⁶⁷ See paras 18.34-18.41 above.

⁶⁸ *Crimes Act 1900* (NSW) s 357C.

18.47 The recommended provision -

1. Preserves the important aspects of section 40 in a modernised form, but eliminates unnecessary provisions such as that which allows the police to enter simply for the purpose of observing the conduct of those on board.
2. Requires that the decision to enter must be made by a police officer of or above the rank of sergeant, or in charge of a police station. This is consistent with the existing section 40.
3. Eliminates that part of the present provision which makes each police officer an Officer of Customs. In this respect, section 40 has been inoperative since 1901, when the Commonwealth *Customs Act* was enacted.⁶⁹ That Act confers broad powers of entry, stoppage, search and seizure on Commonwealth Officers of Customs.⁷⁰ Officers of Customs are persons employed in the service of the Customs or persons authorised in writing by the Comptroller to perform the functions of an officer of Customs.⁷¹ Police cannot act as Officers of Customs without such authorisation. No Australian jurisdictions with an equivalent of this provision makes police officers Officers of Customs.⁷²

18.48 In the Discussion Paper the Commission asked whether section 40 should be extended to aircraft. Any such extension would of necessity be limited to aircraft on the ground rather than in flight. Ships and aircraft should, in so far as is possible, be treated in the same way. The Commission therefore **recommends** that section 40 be extended to aircraft.⁷³

⁶⁹ S 90 of the *Commonwealth Constitution* states that the power of the Commonwealth to impose customs duties shall become exclusive to the Commonwealth on the imposition of uniform duties of customs. This was done by the *Customs Act 1901*.

⁷⁰ Part XII Division 1.

⁷¹ S 4.

⁷² In the United Kingdom, s 33 of the *Metropolitan Police Act 1839*, which is still in force, likewise contains no reference to making members of the police force officers of customs.

⁷³ This provision will cover aircraft at airports which are Commonwealth places: s 4(1) of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) provides that the provisions of the laws of a State apply in relation to Commonwealth places.

(b) Section 41(1)

18.49 Section 41(1) gives the police power to enter ships for arrest and allied purposes:

"Any officer of the Police Force, or senior constable in charge of a Police Station, having reasonable or probable cause to suspect that any offence has been, or is about to be committed on board of any ship, boat, or other vessel (not being then actually employed in Her Majesty's Service, and not being a vessel of war, the commanding officer whereof shall hold a commission from any foreign Government or Power), lying or being in any of the waters of the said State, or that any person who has committed an offence rendering him liable to apprehension, either with or without warrant, or that any person against whom any warrant shall have been issued by any Justice is harboured, secreted, or concealed on board of any such ship, boat, or vessel, may stop and detain such ship, boat, or vessel, and may enter at all times, with such constables as he shall think necessary, as well by night as by day, into and upon every such ship, boat, or other vessel, and into every part thereof, and may search and inspect the same, and therein take all necessary measures for the effectual prevention and detection of all such suspected offences, and for the apprehension of all such suspected persons as aforesaid, and may and shall take into custody all persons suspected of being concerned in such offences, or liable to apprehension as aforesaid, and shall also take charge of all property suspected to be stolen . . ."⁷⁴

A number of other Australian jurisdictions have similar provisions.⁷⁵

18.50 In some of the instances dealt with in section 41(1), the necessary power is already provided for in section 40 - namely, the power to enter for the purposes of search and inspection, and to take measures for the prevention and detection of suspected offences. However, section 40 makes no provision for entering ships for the purposes of arrest. Section 564(5) of the *Criminal Code* provides that whenever it is lawful under section 564 for a police officer to arrest a person, it is lawful for the officer to enter the place where the person is, or is on reasonable grounds suspected to be, for the purposes of making the arrest. It is uncertain whether section 564(5) authorises the police to enter a ship for arrest purposes. To put this matter beyond doubt, the Commission **recommends** that section 41(1) be replaced by a provision in similar terms to section 564(5) of the Code allowing the police to enter ships for the purpose of making an arrest. As was the case in relation to section 40, ships and aircraft

⁷⁴ The section goes on to create offences of resisting or obstructing the police, dealt with at paras 5.1-5.5 above, and harbouring suspected persons, dealt with at paras 5.11-5.12 above. As to the power of arrest, see paras 17.16-17.17 above. As to the power to take charge of all property suspected to be stolen, see para 18.56 below.

⁷⁵ *Crimes Act 1900* (NSW) s 357D; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) ss 23, 24(a); *Summary Offences Act 1953* (SA) ss 70-71.

should be treated similarly in so far as is possible. The Commission therefore **recommends** that the proposed new provision also apply to aircraft.

(c) Section 44

18.51 The first part of section 44⁷⁶ also gives the police power to enter ships for the purpose of arrest and search, in certain particular instances:

"Any constable, when so ordered by any officer of police, and any officer or constable of the force whenever called upon by the master or any officer of any ship or vessel (not being then actually employed in Her Majesty's Service and not being a vessel of war, the commanding officer whereof shall hold a commission from any foreign Government or Power), lying in any of the waters of the State or any dock thereto adjacent, may enter into and upon such ship or vessel, and without any warrant other than this Act, apprehend any person whom he may find behaving himself in an indecent or disorderly manner, or using profane, indecent, or obscene language, or using any threatening, abusive, or insulting words or behaviour, with intent or calculated to provoke a breach of the peace; ... and to search therein for offenders and otherwise perform his duty, using as little annoyance to the inmates as possible . . ."⁷⁷

18.52 Section 40, redrafted as recommended above,⁷⁸ will give police power to enter ships for the purposes of search. The issue of power to enter ships for the purpose of making an arrest has been dealt with by the recommendation in paragraph 18.50 above. If the Commission's recommendations are adopted, these provisions in section 44 are not needed. The Commission therefore **recommends** their repeal.

(d) Section 41(2)

18.53 Sections 40, 41(1) and 44 were all in the *Police Act* as originally enacted in 1892. Section 41(2), by contrast, is a modern provision. It was added in 1978⁷⁹ to deal with offshore offences, such as drug trafficking and fisheries matters.⁸⁰

"Any officer or constable of the Police Force who has reasonable cause to believe that any ship, boat or other vessel is being, or is likely to be, used for a voyage the purpose of which is to do or attempt to do any act which if done in the State

⁷⁶ For the other powers conferred by s 44, see paras 18.14-18.15, 18.31 and 18.39-18.41 above.

⁷⁷ For the offence created by s 44, see paras 6.1-6.15.

⁷⁸ Para 18.46.

⁷⁹ By the *Police Act Amendment Act 1978* s 11.

⁸⁰ Western Australian *Parliamentary Debates* (1978) Vol 218, 765.

would constitute an offence may, without warrant other than this Act, enter at all times into and upon and take charge of or secure any such ship, boat or vessel or may otherwise take such steps in relation thereto as may be expedient for the purpose of preventing that voyage, using for that purpose such assistance and reasonable force as he may think necessary, and, subject to subsection (3) of this section, may detain the vessel for so long as he has reasonable cause to suspect that any such voyage may be undertaken."

Subsections (3) to (6) of s 41 provide a procedure for applying to a magistrate for release of the vessel. Section 41(7) makes it an offence to resist or obstruct any member of the police force exercising powers under section 41(2).

18.54 Powers similar to those conferred by section 41(2) are given to Officers of Customs by the Commonwealth *Customs Act 1901*.⁸¹ However, it is clearly necessary for police to have such powers also. The Commission **recommends** that section 41(2) be retained, together with section 41(3) to (6). The Commission has already recommended that the offence in section 41(7) should be repealed because it duplicates other offences.⁸²

5. POWERS TO SEIZE PROPERTY

18.55 At common law a police officer lawfully on premises possessed a limited power to seize materials found on those premises which formed evidence of crime.⁸³ The scope of this power was a contentious issue.⁸⁴ More recent English authority appears to establish that police who are on premises pursuant to a search warrant may lawfully seize goods not specified in the warrant if there are reasonable grounds for suspecting them to be stolen.⁸⁵ Even where the *Police Act* without the authority of a warrant, the seizure of goods may be

⁸¹ Eg power to chase a ship or aircraft and compel her to bring to or land at the airport (s 184); power to board ships and aircraft hovering on coast (s 185); power to board and search ships and aircraft (s 187).

⁸² See paras 5.1-5.5 above. The Commission recommends at para 18.58 below that ss 41(2)-(6) should be transferred to the *Criminal Code*. This does not in any way affect its recommendation that s 41(7) be repealed. Resisting or obstructing a member of the police force exercising powers under s 41(2) would constitute the offence of interference with the police under s 20 of the *Police Act* as redrafted and inserted in the proposed *Summary Offences Act*, or obstructing or resisting a public officer under s 172 of the *Criminal Code*.

⁸³ *Elias v Pasmore* [1934] 2 KB 164.

⁸⁴ See L H Leigh *Recent Developments in the Law of Search and Seizure* (1970) 33 MLR 268; J W Bridge *Search and Seizure: An Antipodean View of Ghani v Jones* [1974] Crim LR 218.

⁸⁵ *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299.

lawful in certain circumstances.⁸⁶ These cases may be inconsistent with Victorian authority,⁸⁷ but they have been followed in New South Wales.⁸⁸

18.56 Some of the *Police Act* provisions dealt with above give the police power to seize property.

- * Under section 41(1)⁸⁹ police, having entered a ship and searched it, may take charge of all property suspected to be stolen.
- * Under section 68,⁹⁰ on arresting a person for an offence under sections 65, 66 or 67 police may seize any horse, cattle, money, goods or vehicle in that person's possession, and the money may be used or the property sold to pay the expenses of detaining the person in gaol or feeding horses and cattle seized.
- * Under section 70,⁹¹ property reasonably suspected to have been stolen or unlawfully obtained which is discovered on a search of premises under warrant can be taken into safe custody.
- * Under section 122,⁹² where there is power to enter a place where liquor is suspected of being illegally sold, the liquor may be seized.

18.57 Powers to seize property are also given by two other provisions not so far dealt with. Under section 49:

"[A]ny 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. . ."

⁸⁶ *Ghani v Jones* [1970] 1 QB 693.

⁸⁷ It is contrary to the view taken by the Victorian Full Court in *Levine v O'Keefe* [1930] VLR 70.

⁸⁸ *G H Photography Pty Ltd v McGarrigle* [1974] 2 NSWLR 635.

⁸⁹ Quoted in para 18.49 above.

⁹⁰ Quoted in para 18.7 above.

⁹¹ Quoted in para 18.17 above.

⁹² Quoted in para 18.19 above.

Under section 123:

"Whenever any person having charge of any horse, cart, carriage, or boat, or any other animal or thing, shall be taken into custody of any police constable under the provisions of this Act, it shall be lawful for any police constable to take charge of such horse, cart, carriage, or boat, or such other animal or thing, and to deposit the same in some place of safe custody as security for payment of any penalty to which the person having had charge thereof may become liable, and for payment of any expenses which may have been necessarily incurred for taking charge of and keeping the same; and it shall be lawful for any Justice before whom the case shall have been heard, to order such horse, cart, carriage, or boat, or such other animal or thing to be sold, for the purpose of satisfying such penalty and reasonable expenses in default of payment thereof, in like manner as if the same had been subject to be distrained and had been distrained for the payment of such penalty and reasonable expenses."⁹³

18.58 Section 236 of the *Criminal Code*⁹⁴ authorises the police to take the property of persons lawfully in custody, and section 711⁹⁵ authorises the seizure of the property being searched for under a search warrant.⁹⁶ The more specific provisions in sections 41(1) 49, 68, 70, 122 and 123 are therefore redundant. In addition, provisions such as sections 68 and 123, which allow the seizure and sale of property to pay expenses, are outdated. The Commission has already recommended the repeal of the other provisions in sections 41(1), 68, 70 and 122.⁹⁷ It now **recommends** the repeal of the seizure powers in those sections and in section 49, and of section 123.

6. LOCATION OF RETAINED PROVISIONS

18.59 The entry, search and seizure provisions which the Commission **recommends** for retention, in the same or a modified form, are the power to search persons given by section 49, the powers to enter premises conferred by sections 42 and 44, and sections 40, 41(1) and 41(2) (together with section 41(3) to (6)), dealing with powers to enter ships. All provisions dealing with police powers of entry, search and seizure should be located in the same statute. The

⁹³ Note also that s 83 gives power to seize adulterated or unwholesome articles of food. The Commission recommends in paras 15.31-15.33 above that s 83 should be repealed because it is obsolete.

⁹⁴ See para 18.8 above.

⁹⁵ See para 18.25 above.

⁹⁶ Amendments to ss 236 and 711 recommended in the Murray Report 144-148, 486-487 would widen somewhat the powers to take property on arrest or search. These amendments have not yet been implemented.

⁹⁷ See paras 18.50, 18.10, 18.21 and 18.33, 18.22 above.

Commission therefore **recommends** that all these provisions should be located in the
Criminal Code.

PART IV

Chapter 19

SUMMARY OF RECOMMENDATIONS

1. A SUMMARY OFFENCES ACT

The Commission **recommends** that -

1. The offence provisions recommended for retention should be separated from the administrative provisions in the earlier Parts of the *Police Act* and set out in a separate statute called the *Summary Offences Act*.

Paragraphs 3.2-3.3

2. The new legislation which replaces the *Police Act* should be drafted in contemporary form. In particular -

1. All offences which are retained should be redrafted in the current style used by Parliamentary Counsel. Suggested drafts of particular offences put forward in this Report are intended to reflect this approach.
2. The drafting of the offences should be consistent both within the proposed *Summary Offences Act* and with the *Criminal Code*. This applies particularly to the expression of mental elements in offences.
3. Definitions and terminology should be standardised to the extent that the context permits. This applies to terms such as "public place" and "premises", and also to references to members of the police force and the courts which deal with offences. Anachronisms such as references to "hard labour" in relation to imprisonment should be removed.

Paragraph 3.25

3. The penalties set out for each offence should be reviewed, so that they are appropriate to the offence in question and consistent as between different offences.

Paragraph 3.26

2. OFFENCES TO BE RETAINED

The Commission **recommends** that the following provisions be retained either in their present form or in a modified form -

(a) Offences against public order

(i) Move-on power

1. The offence of lying or loitering in any street, yard or other place and not giving a satisfactory account of oneself (section 43) should be replaced by a move-on power in the following terms:

(1) Where a person is loitering in a public place and a police officer has reasonable grounds for believing that the person has committed, or is likely to commit, an offence or a breach of the peace, the police officer may request the person to give an explanation of his or her presence there and if the person does not give a reasonable explanation the officer may direct the person to leave the vicinity.

(2) A person who contravenes a direction given under subsection (1) commits an offence.

Penalty: \$500 or imprisonment for 6 months.

(3) It is a sufficient defence to a prosecution for an offence under subsection (2) if the defendant satisfies the court that he or she -

(a) did not have the capacity to understand the request or direction or to give a reasonable explanation; or

- (b) gave the police officer a reasonable explanation for his or her presence in the place.

Paragraphs 4.18-4.21

(ii) *Disorderly conduct*

2. Sections 54, 59 and 44 should be combined and redrafted in a modern form providing that any person who in or within view or hearing from a public place, or in any police station or a police lock-up, is guilty of any disorderly conduct or uses any threatening, abusive or insulting words or behaviour commits an offence.

Paragraphs 6.1-6.15

(iii) *Wilful and obscene exposure of the person*

3. Section 66(11), relating to wilful and obscene exposure of the person, should be redrafted in the following gender neutral terms:

A person who wilfully and obscenely exposes his or her genitals to any other person in or within view of a public place commits an offence.

Penalty: \$1,000 or imprisonment for 12 months.

Paragraphs 6.21-6.26

(iv) *Regulation of houses of public resort*

4. Section 84, relating to drunkenness or disorderly conduct in houses of public resort, should be redrafted as follows:

A person who keeps premises where provisions or refreshments are sold or consumed and who knowingly permits drunkenness or disorderly conduct to take place on these premises commits an offence.

Penalty: \$250 or imprisonment for 3 months.

Paragraphs 6.27-6.30

(v) *Obstruction of streets*

5. Section 52, relating to the obstruction of streets, should be redrafted in the following manner:

(1) The Commissioner of Police may give instructions to police officers for -

- (a) regulating traffic of all kinds;
- (b) preventing obstructions;
- (c) maintaining order,

in any public place.

(2) No such instruction shall be given for the purpose of frustrating -

- (a) the holding of a meeting or the conduct of a procession authorized pursuant to a permit or order granted under the *Public Meetings and Processions Act 1984*; or
- (b) the holding or conduct of an event on a road closed pursuant to an order granted under Part VA of the *Road Traffic Act 1974*.

(3) A police officer acting in accordance with instructions given under subsection (1) may give such directions as may seem expedient to him or her to give effect to those instructions.

(4) A person who knowingly contravenes a direction given under subsection (3) commits an offence.

Penalty: \$100.

(5) The power vested in the Commissioner of Police by subsection (1) may be exercised by any police officer of or above the rank of sergeant duly authorized in writing by the Commissioner of Police for the purpose.

(6) In this section "public place" means -

- (a) a place (whether or not covered by water); or
- (b) a part of premises,

that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons.

Paragraphs 7.2-7.6

(vi) *Public Meetings and Processions Act 1984*

6. The provisions of the *Public Meetings and Processions Act 1984* should not be integrated with the provisions of section 52 of the *Police Act*.

Paragraphs 7.10-7.12

(b) Obstruction and hindering police and escape

(i) *Interference with the police in the execution of their duty*

7. The offences in sections 41(1), 41(7), 66(7), 67(3) and 90 should be repealed, leaving section 20 as the only offence dealing with interference with the police in the execution of their duty. Section 20 should be modernised and redrafted in the following manner:

A person who disturbs, hinders or resists, or aids or incites any person to disturb, hinder or resist, a police officer in the execution of his or her duty or other person lawfully assisting a police officer in the execution of his or her duty commits an offence.

Penalty: \$500 or imprisonment for 6 months.

Paragraphs 5.1-5.5

(ii) *Escaping legal custody and assisting escape*

8. Section 67(1), dealing with escaping from legal custody, and section 67A, dealing with assisting escape, should be retained.

Paragraphs 5.6-5.10

(iii) *False reports*

9. Section 90A, dealing with false reports, should be retained.

Paragraphs 5.13-5.14

(c) **Offences against property**

(i) *Wilful damage to property*

10. Section 80, relating to wilful damage to property, should be redrafted to provide:

A person who wilfully and unlawfully destroys or damages any property commits an offence.

Penalty: \$500 or imprisonment for 6 months.

Paragraphs 11.1-11.5

(ii) *Possession of property reasonably suspected of being stolen*

11. Sections 69 and 71, relating to being suspected of having or conveying stolen property, should be repealed. Section 69 should be replaced by the following provision:

(1) A person who -

- (a) has any thing in his or her custody;
- (b) has any thing in the custody of another person;
- (c) has any thing in or on premises, whether belonging to or occupied by the person or not, or whether that thing is there for the person's own use or the use of another; or
- (d) gives custody of any thing to a person who is not lawfully entitled to possession of the thing,

which, on reasonable grounds, is believed to be stolen or otherwise unlawfully obtained commits an offence.

Penalty: \$10,000 or imprisonment for 2 years.

(2) It is a sufficient defence to a prosecution for an offence under subsection (1) if the defendant satisfies the court that he or she had no reasonable grounds for believing that the thing referred to in the charge was stolen or otherwise unlawfully obtained.

Paragraphs 13.2-13.11

(iii) *Unlawfully taking or using animals*

12. Section 79A, relating to unlawfully taking or using animals, should be repealed and replaced by the following provision modelled on section 428 of the *Criminal Code*:

- (1) A person who -
- (a) unlawfully uses, or takes for the purpose of using, any domestic animal or captive animal without the consent of the owner or person in lawful possession;
or
 - (b) takes any domestic animal or captive animal for the purpose of secreting it, or obtaining a reward for its restoration or pretended finding or for any unlawful purpose,

commits an offence.

Penalty: \$1,000 or imprisonment for 12 months.

- (2) In subsection (1) -

"domestic animal" means any animal which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man; and

"captive animal" means any animal (not being a domestic animal) which is in captivity, or confinement, or which is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement.

Paragraphs 13.22-13.26

(iv) *Unlawful use of a boat or taking a boat or any boat fitting*

13. Section 81, relating to unlawful use of a boat or taking a boat or any boat fitting, should be redrafted to provide:

A person who takes, uses, or assumes control of any vessel or any fitting or equipment, including any motor, of a vessel without previously obtaining the consent of the owner or person in charge of it commits an offence.

Penalty: \$2,000 or imprisonment for 2 years.

Paragraphs 13.27-13.30

(d) Trespass

14. Sections 66(8), 66(13), 82A and 82B(1) should be repealed and replaced by the following provision:

- (1) A person who -
- (a) enters the premises of another for an unlawful purpose;
 - (b) enters the premises of another without lawful excuse; or
 - (c) remains on premises, without lawful authority, after being requested to leave by the owner, occupier or person in charge of the premises or, at the request of the owner, occupier or person in charge of the premises, by a police officer,

commits an offence.

Penalty: for an offence under paragraph (a): \$1,000 or imprisonment for 6 months;

for an offence under paragraph (b) or (c): \$500 or imprisonment for 3 months.

(2) A person who for the purposes of and in accordance with subsection (1)(c) requests some other person to leave premises may, at the same time as he or she makes the request, indicate to such person that part of the premises which the person concerned is required to leave and in any such circumstances the part of the premises so indicated shall constitute the premises for the purposes of that subsection.

(3) In this section, "premises" includes any land, building, structure, or any part thereof.

Paragraphs 8.2-8.17

(e) Possession of crime-related property

(i) Articles of disguise and weapons

15. Section 65(4) should be replaced by an offence limited to the possession of any article of disguise. The provision might be as follows:

A person who, without lawful excuse, is found in possession of an article of disguise commits an offence.

Penalty: \$500 or imprisonment for 6 months.

Paragraphs 12.5-12.9

16. Section 65(4a), relating to weapons, should be redrafted to provide:

A person who, without a valid and satisfactory reason, carries or has on or about his or her person or in his or her possession any article made or adapted for use for causing injury to the person, or intended by him or her for such use by him or her commits an offence.

Penalty: \$500 or imprisonment for 6 months.

Paragraphs 12.10-12.12

(ii) *Protective jackets and vests*

17. Section 65(4aa), relating to protective jackets and vests, should be retained, but a person refused permission to possess a protective jacket or vest should be able to appeal to a stipendiary magistrate against the decision.

Paragraphs 12.13-12.15

(iii) *Implements to facilitate unlawful use of motor vehicles*

18. Section 65(4b), relating to possession of implements to facilitate the unlawful use of motor vehicles, should be retained but simplified by deleting the reference to particular objects. It should provide:

A person who, without lawful excuse, carries or has in his or her possession any implement or device capable of being used to facilitate the unlawful driving or use of a motor vehicle commits an offence.

Penalty: \$500 or imprisonment for 6 months.

Paragraphs 12.16-12.18

(iv) *Deleterious drugs*

19. Section 65(5), relating to deleterious drugs, should be repealed and replaced by the following provision:

(1) A person who, without a valid and satisfactory reason, has in his or her possession any disabling substance commits an offence.

Penalty: \$500 or imprisonment for 6 months.

(2) In subsection (1) 'disabling substance' means any anaesthetising or other substance produced for use for disabling persons, or intended by any person having it with him or her for such use.

Paragraphs 12.19-12.23

(v) *Housebreaking implements and explosive substances*

20. Section 66(4), relating to housebreaking implements and explosive substances, should be retained but reformulated to provide:

A person who, without lawful excuse, has in his or her custody or possession any implement of housebreaking or explosive substance commits an offence.

Penalty: \$1,000 or imprisonment for 12 months.

Paragraphs 12.24-12.27

(f) Prostitution-related offences

(i) *Keeping premises for the purpose of prostitution*

21. If the recommendations of the *Final Report of the Community Panel on Prostitution* are not accepted, section 76F, dealing with keeping premises for the purpose of prostitution, should be retained.

Paragraphs 9.10-9.12, 9.17-9.18

(ii) *Living on the earnings of prostitution*

22. If the Community Panel's recommendations are not accepted, section 76G, dealing with living on the earnings of prostitution, should be retained, with the following amendments

-

1. The offence should be separated from the offence of persistently soliciting for immoral purposes dealt with in section 76G(1)(b).
2. Rather than deeming an offence to be committed under section 66, the section should itself state a penalty.
3. Section 76G(2), which reverses the normal onus of proof, and provides that a person who lives with or is habitually in the company of a prostitute, and has no visible means of subsistence, is deemed to be living on the earnings of prostitution unless he can satisfy the court to the contrary, should be repealed.

Paragraphs 9.13-9.14, 9.19-9.20

(iii) Soliciting and loitering

23. If the Community Panel's recommendations are not accepted, section 59, dealing with soliciting and loitering, should be retained, with the following amendments -

1. The soliciting offence in section 59 should be separated from the other offences in that section and dealt with in a section dealing specifically with soliciting.
2. The penalty under section 59, presently \$40, should be increased to a more realistic figure.

Paragraphs 9.21-9.27

(iv) Persistently soliciting or importuning for immoral purposes

24. Section 76G(1)(b), relating to persistently soliciting or importuning for immoral purposes, should be retained. The penalty applying on conviction for this offence should be set out in section 76G(1)(b) itself, rather than a conviction for the offence being deemed to be a conviction under section 66.

Paragraphs 9.30-9.33

3. OFFENCES TO BE REPEALED

The Commission **recommends** that the following provisions be repealed -

(a) **Preventive offences (Chapter 4)**

(i) *No lawful means of support*

1. Section 65(1), relating to no visible lawful means of support.

Paragraphs 4.2-4.5

(ii) *Sleeping rough*

2. Section 66(9), relating to sleeping rough.

Paragraphs 4.6-4.8

(iii) *Consorting*

3. Sections 65(7) and 65(9), relating to consorting.

Paragraphs 4.9-4.12

(iv) *Section 43(1) offences*

4. The offence of being suspected of having committed an offence and not giving a satisfactory account of oneself.

Paragraph 4.16

5. The offence of being suspected of being about to commit any offence and not give a satisfactory account of oneself.

Paragraph 4.17

6. The offence of being suspected of having any "evil designs" and not giving a satisfactory account of oneself.

Paragraphs 4.22-4.23

(b) Interference with the police and allied offences (Chapter 5)

Harbouring or assisting suspected persons

7. The offence of harbouring, concealing, rescuing or attempting to rescue or assist suspected persons contained in section 41(1).

Paragraphs 5.11-5.12

(c) Disorderly conduct and related offences (Chapter 6)

(i) Challenge to fight

8. Section 64, relating to challenges to fight.

Paragraphs 6.16-6.18

(ii) Exposing obscene pictures to the public

9. Section 66(5), relating to exposing obscene pictures and other material to the public.

Paragraphs 6.19-6.20

(d) Public assemblies (Chapter 7)

Disorderly assembly

10. Section 54A, relating to disorderly assembly. It should be possible for charges under section 63 or section 64 of the *Criminal Code* to be dealt with summarily at the election of the person charged.

Paragraphs 7.7-7.9

(e) Being unlawfully on land or premises and related offences (Chapter 8)

Obstructing licence holders or hindering lawful activities

11. Section 67(4), relating to obstructing licence holders, and section 82B(3), relating to hindering lawful activities.

Paragraphs 8.18-8.23

(f) Prostitution (Chapter 9)

Riotous or indecent behaviour by common prostitutes

12. Section 65(8), relating to riotous or indecent behaviour by common prostitutes.

Paragraphs 9.28-9.29

(g) Damage to property (Chapter 11)

(i) Damage to animals or plants in gardens

13. Section 58A, relating to damage to animals or plants in gardens.

Paragraphs 11.6-11.9

(ii) Extinguishing wantonly any light set up for public convenience

14. The offence of extinguishing wantonly any light set up for public convenience in section 59.

Paragraph 11.10

(h) Offences akin to stealing (Chapter 13)

(i) Possession of gold, pearl or uncut diamond suspected of being stolen

15. Sections 76A to 76E and 76I, relating to possession of gold, pearl or uncut diamond suspected of being stolen.

Paragraphs 13.12-13.21

(ii) Destroying property with intent to steal, or retaining or disposing of property

16. Section 82, relating to destroying property with intent to steal, or retaining or disposing of property.

Paragraphs 13.31-13.34

(i) Fraud and deception (Chapter 14)

(i) Valueless cheques

17. Section 64A, relating to valueless cheques.

Paragraphs 14.3-14.8

(ii) Imposition upon charitable institutions or private individuals

18. Section 66(2), relating to imposition upon charitable institutions or private individuals.

Paragraphs 14.9-14.11

(iii) Obtaining unemployment benefits without entitlement

19. Section 66(2a) and (2b), relating to obtaining unemployment benefits without entitlement.

Paragraphs 14.12-14.15

(iv) Fortune telling

20. Section 66(3), relating to fortune telling.

Paragraphs 14.16-14.21

(v) Fraudulently manufacturing or selling adulterated metals or substances

21. Section 66(12), relating to fraudulently manufacturing or selling adulterated metals or substances.

Paragraphs 14.22-14.24

(j) Other offences in Parts V and VI (Chapter 15)

(i) Wilful neglect of duty by police

22. Section 47, relating to wilful neglect of duty by police.

Paragraphs 15.2-15.3

(ii) Mad dogs

23. Section 51, relating to mad dogs.

Paragraphs 15.4-15.7

(iii) Negligent or furious driving

24. Section 57, relating to negligent or furious driving.

Paragraphs 15.8-15.12

(iv) Restriction on games on certain days

25. Section 61, which restricts the hours of operation of certain amusement centres.

Paragraphs 15.13-15.18

(v) Taking a dog into public gardens

26. Section 63, relating to taking a dog into a public garden.

Paragraphs 15.19-15.21

(vi) Begging

27. Section 65(3), relating to begging.

Paragraphs 15.22-15.24

(vii) *Wilful neglect*

28. Section 66(10), relating to wilful neglect.

Paragraphs 15.25-15.27

(viii) *Repeated offences*

29. Sections 66(1) and 67(2), relating to repeated offences.

Paragraphs 15.28-15.30

(ix) *Persons selling adulterated or unwholesome articles of food*

30. Section 83, relating to persons selling adulterated or unwholesome articles of food.

Paragraphs 15.31-15.33

(k) Offences in Part VII (Chapter 16)

31. The whole of Part VII (sections 95-121).

Paragraphs 16.1-16.14

4. OFFENCES TO BE TRANSFERRED TO OTHER LEGISLATION

Gaming offences

The Commission **recommends** that -

1. Section 84C, relating to keeping a house for the purpose of betting, and section 84B, an ancillary provision, should be repealed and section 41 of the *Gaming Commission Act 1987* amended so that it expressly includes betting houses.

Paragraphs 10.6-10.8

2. Section 84D, relating to receiving money on condition of paying money on the event of any bet, should be repealed, but an offence along similar lines should be included in the *Betting Control Act 1954* together with the ancillary provisions, sections 84E and 84F.

Paragraphs 10.9-10.12

3. Sections 84G and 84H, relating to advertising betting, should be redrafted in contemporary form in the *Betting Control Act 1954*.

Paragraphs 10.13-10.16

5. POLICE POWERS

(a) Arrest and related powers (Chapter 17)

In relation to arrest and related powers -

Preferred approach

1. The Commission suggests that section 564(1)-(4) of the *Criminal Code* be replaced with a provision along the lines of section 352 of the Australian Capital Territory *Crimes Act 1900* directing that proceedings should be commenced by summons rather than arrest unless proceedings by way of summons would not achieve specified purposes.

Paragraphs 17.7-17.12

The Commission **recommends** that -

(i) Powers of arrest for any offence

1. The power to arrest for non-arrestable offences conferred by section 43(1) should be repealed.

Paragraphs 17.14-17.18

2. The power of arrest conferred by section 41(1) should be repealed.

Paragraphs 17.14-17.18

3. The powers of arrest conferred by sections 46, 47 and 49 should be repealed.

Paragraphs 17.19-17.21

4. The power of arrest conferred by section 45 to arrest a person who is reasonably believed to have committed any felony or misdemeanour should be repealed.

Paragraph 17.24

(ii) Powers authorising arrest for specific offences

5. The powers to arrest for specific offences conferred by sections 42, 44, 70, 76G(3), 49, 82(3), 96, 104, 108, 110 and 122 should be repealed.

Paragraphs 17.22-17.23 and 17.25-17.30

(iii) Special cases

6. The powers of arrest conferred by section 43(2) and section 45 should be retained. Consideration should be given to incorporating these powers in the *Criminal Code* alongside the other arrest powers.

Paragraphs 17.31-17.33

(iv) Power to demand name and address

7. The power to demand name and address conferred by section 50 should be repealed and replaced by a provision incorporated in the *Criminal Code* along the following lines:

- (1) Where a police officer has reasonable cause to suspect -

- (a) that a person has committed, is committing, or is about to commit, an offence; or
- (b) that a person may be able to assist in the investigation of an offence or a suspected offence,

the officer may require that person to state his or her full name and address.

- (2) Where a police officer has reasonable cause to suspect that a name or address as stated in response to a requirement under subsection (1) is false, the officer may require the person making the statement to produce evidence of the correctness of the name and address as stated by him or her.

- (3) A person who -
- (a) refuses or fails, without reasonable cause, to comply with a requirement under subsection (1) or (2); or
 - (b) in response to a requirement under subsection (1) or (2) -
 - (i) states a name or address that is false; or
 - (ii) produces false evidence of his or her name or address,
- commits an offence.

Penalty: \$1000 or imprisonment for 12 months.

- (4) Where a person has been required to state his or her full name and address under subsection (1), the person may require the police officer who has made the requirement to state his or her surname and rank.

Paragraphs 17.35-17.41

(v) *Power to obtain particulars of identity*

8. The power to obtain fingerprints and other particulars of identity contained in section 50AA should be retained, but it should be located in the *Criminal Code*.

Paragraphs 17.42-17.46

9. Fingerprints and other particulars of identity should be destroyed automatically once a charge is withdrawn or dismissed.

Paragraph 17.45

(vi) *Power to apprehend for sobering-up purposes*

10. Part VA of the *Police Act*, which provides a system for apprehension and detention, without arrest, for sobering-up purposes should be enacted as a separate Act.

Paragraphs 17.47-17.48

(b) Powers of entry, search and seizure (Chapter 18)

In relation to powers of entry, search and seizure the Commission **recommends** that -

(i) *Powers to search persons, vehicles and property*

11. The search power conferred by section 49 should be retained but should be redrafted in contemporary language and style, and the power to detain should be clarified. The new provision should provide:

A police officer may -

(a) stop and search -

- (i) any person whom the officer, on reasonable grounds, believes to have, or to be conveying, anything stolen or otherwise unlawfully obtained;
- (ii) any conveyance in or on which the officer has reason to believe that anything stolen or unlawfully obtained may be found;

(b) detain a person or conveyance for the purposes of such a search.

Paragraphs 18.4-18.6

12. The search power conferred by section 68 should be repealed.

Paragraphs 18.7-18.10

(ii) *Powers to enter premises for the purposes of arrest*

13. The power to enter premises without warrant for the purposes of arrest conferred by section 44 should be repealed.

Paragraphs 18.14-18.15

14. Section 564 of the *Criminal Code* should be amended to provide that police may also enter premises to effect an arrest under warrant.

Paragraph 18.21

15. The powers to enter premises with a warrant for the purpose of arrest conferred by sections 70 and 76G(3) should be repealed.

Paragraphs 18.17-18.18, 18.20-18.21

16. Section 122 should be repealed.

Paragraphs 18.19, 18.22

(iii) *Powers to enter premises for the purposes of search*

17. The power to enter premises without warrant for the purpose of search conferred by section 68 should be repealed. It should be replaced by a statutory power allowing police, when they have lawfully entered premises for the purposes of arresting a person, to search the premises and detain property found there where this will form material evidence in the prosecution of that person for the offence for which he or she is arrested.

Paragraphs 18.23-18.30

18. The search power in section 44 should be repealed.

Paragraph 18.31

19. The power to enter premises with a warrant for the purpose of search conferred by sections 70 and 76G(3) should be repealed.

Paragraphs 18.32-18.33

(iv) *Powers to enter premises for other purposes*

20. Section 42 should be redrafted in modern form to provide that:

A police officer may enter a place of public entertainment and -

- (a) order any person who is behaving in a disorderly or offensive manner to leave; or
- (b) use reasonable force to remove any person who is behaving in such a manner.

Paragraphs 18.35-18.38

21. The power in section 44 to enter houses licensed for the sale of fermented or spirituous liquors should be clarified by giving the police a power to enter premises licensed under the *Liquor Licensing Act 1988* to deal with persons behaving in a disorderly or offensive manner.

Paragraphs 18.39-18.41

22. The power in section 44 to enter licensed boarding, eating or lodging houses should be repealed.

Paragraphs 18.39-18.41

(v) *Powers to enter ships*

23. Section 40 should be replaced by a modern provision, and should also extend to aircraft on the ground. It could provide:

A police officer of or above the rank of sergeant or in charge of a police station, accompanied by other police officers if the first-mentioned police officer thinks it necessary, may at any time -

- (a) enter into any part of any vessel, or any part of any aircraft on the ground;
- (b) search and inspect the vessel or aircraft;
- (c) take all necessary measures for preventing injury to persons or damage to property by fire or otherwise on the vessel or aircraft; and
- (d) take all necessary measures for preserving peace and good order on the vessel or aircraft or for preventing, detecting or investigating any offences that may be, or may have been, committed on the vessel or aircraft.

Paragraphs 18.45-18.48

24. Section 41(1) should be replaced by a provision in similar terms to section 564(5) of the Code allowing the police to enter ships for the purpose of making an arrest, but should also apply to aircraft.

Paragraphs 18.49-18.50

25. The provisions in section 44 giving police power to enter ships for the purpose of arrest and search should be repealed.

Paragraphs 18.51-18.52

26. Section 41(2) should be retained, together with section 41(3) to (6).

Paragraphs 18.53-18.54

(vi) *Powers to seize property*

27. The seizure powers in sections 41(1), 49, 68, 70 and 122, and section 123 should be repealed.

Paragraphs 18.55-18.58

(vii) *Location of retained provisions*

28. The provisions as to police powers of entry, search and seizure which the Commission **recommends** for retention should be located in the *Criminal Code* together with other provisions dealing with police powers of entry, search and seizure.

Paragraph 18.59

M D PENDLETON, *Chairman*

R L LE MIERE

J A THOMSON

14 AUGUST 1992

Appendix I

LIST OF THOSE WHO COMMENTED ON THE DISCUSSION PAPER

Aboriginal Affairs Planning Authority
Australian Rights Movement
Australian Skeptics (WA Branch)
Baws, J
Belpitt, N, JP
Best, J
Bevan, E and D B
Council for Civil Liberties
Day, A
Department for Community Services
Edwards, Emeritus Professor E J
Equal Opportunity Committee of the Law Society
Grant, Sgt P (Member, Police Force)
Gray, J B
King, Snr Sgt J (Member, Police Force)
Kitney, L
Law Society of Western Australia
Legal Aid Commission of Western Australia
Leisure & Allied Industries
Maylands Spiritualist Church Inc.
McIntyre, G (Principal Legal Officer, Aboriginal Legal Service (WA) (Inc))
Melville Spiritualist Centre Inc.
Mulrennan, P G, JP
Nichols, P W (Barrister)
O'Malley, T (Aboriginal Legal Service (WA) (Inc))
Police Department of Western Australia
Progressive Spiritualist Church Inc.
Psychic Development Association of Australia (Inc)
Psychic Guild of Western Australia (Inc)
Regts, M
Roberts, B
Society of Labor Lawyers (WA)
Tennant, B G, JP
Teusner, M
Utting, R (Barrister)
Youth Legal Service
Western Australian Police Union of Workers
Women's Advisory Council to the Premier (now part of the Office of Women's Interests)

Appendix II

PROCEDURAL AND OTHER PROVISIONS IN THE POLICE ACT

1. INTRODUCTION

1. In addition to the offence provisions and the various powers given to the police, there are a few other provisions scattered through Parts V, VI and VII of the *Police Act* - provisions which deal with matters such as compensation, restitution or forfeiture or set out procedural provisions. Part VIII also contains procedural provisions ancillary to the offence provisions in Parts V, VI and VII.

2. The Commission's terms of reference are limited to the offences in Parts V, VI and VII, and so it has not conducted a detailed examination of the provisions referred to in the previous paragraph. However, the Commission briefly examines them in this Appendix for the reasons stated in paragraph 3.38 above.

2. COMPENSATION PROVISIONS

3. Several sections provide that on commission of an offence, the offender, in addition to paying the criminal penalty, shall compensate those who have suffered damage as a consequence. Section 20, for example, which creates an offence of disturbing, hindering or resisting a member of the police force in the execution of his duty, after providing that a person committing this offence shall pay a fine, provides that the offender shall also pay "such further sum of money as shall appear to the convicting Justices to be a reasonable compensation for any damage or injury caused by such offender to the uniform, clothing, accoutrements, horse or vehicle of such member of the force, or of any medicine or other expenses incurred in consequence of personal injuries sustained by him thereby". Similar compensation provisions can be found in sections 80(3), 81, 82(1), (2) and (3), 82A(1) and 90A(3) and (4).

4. As a result of an amendment in 1985,¹ adopting recommendations made in the Murray Report,² section 719 of the *Criminal Code* now contains comprehensive provisions for compensating persons who suffer injury, loss or damage or incur expense as the result of the commission of an offence. The court can at any time, in addition to any punishment to which the offender is liable, order that the offender shall pay a sum of money to that person by way of compensation. The specific compensation provisions referred to above are therefore redundant.

5. Some of the sections in Part VII also contain provisions requiring offenders to pay compensation for causing damage. In some cases, the damage results from the commission of an offence;³ in others, the primary effect of the provision is to create a liability to pay compensation and the conduct is criminal only if the damage is wilfully done.⁴ At least in the first group of cases, the question of compensation would now be covered by section 719 of the Code.⁵ If the Commission's recommendation that Part VII of the Act be repealed⁶ is accepted, this disposes of the problem.

3. RESTITUTION PROVISIONS

6. Two sections provide that on conviction of an offence property acquired as a result of the offence is to be restored to the rightful owner. Under section 76E, on conviction of stealing gold, pearl or uncut diamonds under sections 76A, 76C or 76D, a magistrate may order that the property be delivered to the person entitled to it. Under section 82(3), where an employee is convicted of unlawfully acquiring or retaining property belonging to an employer, the court may order that it be delivered over to the rightful owner, if known.⁷

7. Again, the *Criminal Code* now contains comprehensive provisions about restitution, enacted in 1985⁸ to implement the recommendations of the Murray Report.⁹ Under section

¹ *Criminal Law Amendment Act 1985* s 29.

² 503-505.

³ Ss 106, 110, 112, 114, 120.

⁴ Ss 105 and 107.

⁵ The damage is suffered not by any individual but by the local authority. However the word "person" in the Code includes corporations of all kinds and any other associations of persons capable of owning property: s 1(1).

⁶ Para 16.6 above.

⁷ If the rightful owner is not known, the property is to be retained and sold and the proceeds applied in the same way as penalties awarded under the Act, as to which see para 13 below.

⁸ By the *Criminal Law Amendment Act 1985* s 29.

⁹ 496-501.

717, on conviction, a court can order the offender or any other person to deliver to the owner any property to which the offence relates, or any other property derived from the sale or disposition of that property. Under section 718 innocent purchasers or lenders who are required to restore property under such an order have a right to compensation from the offender. In the light of these provisions, the restitution provisions in sections 76E and 82(3) are redundant. In any case the Commission **recommends** that these sections be repealed.¹⁰

4. FORFEITURE PROVISIONS

8. Sections 65 and 66 provide that on conviction of particular offences under those sections various items are to be forfeited to Her Majesty. In each case, the words in fact relate only to one of the offences in the section in question.¹¹ To the extent that these offences are to be retained,¹² the forfeiture provision should be incorporated in the particular provision in question. Forfeiture provisions might also be included in offences relating to possession of crime-related property.¹³

9. Other forfeiture provisions of various kinds are to be found in section 76E (in default of someone lawfully entitled to the gold, pearl or uncut diamond in question) and section 83 (adulterated or unwholesome articles of food). The Commission **recommends** above that both these sections should be repealed.¹⁴

10. There were a number of forfeiture or seizure provisions in the gaming Division of Part VI.¹⁵ When these provisions were redrafted by the *Acts Amendment (Betting and Gaming) Act 1982* sections 90B and 90C were added¹⁶ to provide a comprehensive procedure for forfeiture or seizure and its consequences.¹⁷ The provisions apply to any forfeiture or seizure under Part VI, and so apply for example to sections 65(4) and 66(4).

¹⁰ Paras 13.21 and 13.34 above.

¹¹ The offences in s 65(4) (possession of any "weapon or instrument or thing capable of being used for the purpose of disguise") and s 66(4) (possession of any "picklock, key, crow, jack, bit, or other implement of housebreaking or any explosive substance").

¹² See paras 12.7 and 12.27 above.

¹³ See generally Ch 12.

¹⁴ See paras 13.21 and 15.33 respectively.

¹⁵ Ss 86(5), 87(5), 89(1), 89A(4), (4a) and (6).

¹⁶ By s 23.

¹⁷ Including an offence for failure to comply with an embargo notice: s 90B(3).

11. When the gaming provisions were repealed by the *Acts Amendment and Repeal (Gaming) Act 1987*, sections 90B and 90C were left intact. The *Gaming Commission Act 1987*, which contains new provisions on gaming equivalent to the now repealed provisions in the *Police Act*, provides that:

"Where any thing is, or is liable to be, seized or forfeited to the Crown under this Act the provisions of sections 90B and 90C of the *Police Act 1892* shall apply to and in relation to that thing as if it had been, or had been liable to be, seized or forfeited under Part VI of that Act and as if the proceedings to which the things relate were proceedings for the purposes of that Act."¹⁸

The *Liquor Licensing Act 1988* contains an almost identical provision.¹⁹

12. Given that there are forfeiture provisions in a number of Acts, the Commission suggests that general provisions along the lines of sections 90B and 90C be incorporated into the *Criminal Code*. Sections 90B and 90C could then be repealed.

5. PROCEDURAL PROVISIONS IN PART VI

(a) Stolen goods: sections 71 to 75

13. Sections 71 to 75, along with section 69 (which creates the offence of being suspected of having or conveying stolen goods)²⁰ and section 70 (which gives powers of entry, search, seizure and arrest in such cases),²¹ have been taken more or less verbatim from the United Kingdom *Metropolitan Police Courts Act 1839*. They were incorporated in the *Police Ordinance 1861* and have remained in the Western Australian legislation ever since. Sections 71 to 75 set out various procedural provisions for dealing with cases involving stolen goods. A party from whom the goods are received may be examined by a justice.²² The justice may order that goods stolen or fraudulently obtained be delivered to their owner (though this does not bar a civil action by the person compelled to deliver them).²³ There are provisions as to

¹⁸ S 32(1).

¹⁹ S 155(5).

²⁰ See para 13.2 above.

²¹ See para 18.17 above.

²² S 71.

²³ S 72. The *Pawnbrokers Act 1860* contains a similar provision (s 23). The Commission has recommended that this provision be retained in legislation revising the Act: Report on the *Pawnbrokers Act 1860-1984* (Project No 81 1985) para 5.13.

property unlawfully pawned, pledged or exchanged,²⁴ property which has come into the hands of the police,²⁵ and the sale of unclaimed stolen goods.²⁶

14. The Commission has not conducted a detailed examination of sections 71 to 75. However it suspects that they are now obsolete. The other Australian jurisdictions either never adopted these provisions or have now repealed them.²⁷ In the United Kingdom the original provisions of the *Metropolitan Police Courts Act* have nearly all been repealed.²⁸ In Western Australia, the new restitution provisions in the *Criminal Code* make sections 72 and 73 largely unnecessary.²⁹

15. The Commission **recommends** that when the *Police Act* is redrafted consideration should be given to repealing sections 71 to 75. Any provisions thought worth retaining should be redrafted in modern form and included either in the *Criminal Code* or in the proposed Police Administration Act.

(b) Other provisions: sections 50A, 52A, 67, 76 and 78

16. There are five other sections in Parts V and VI which need to be dealt with.

17. Section 50A provides that every member of the Police Force may prosecute for any offence against any by-law or regulation made by a local authority. Since the enactment of section 646(5) of the *Local Government Act 1960* it is redundant and should be repealed.

18. Section 52A provides that nothing in the *Police Act* shall be read as limiting or affecting the right of a person conferred by the *Bail Act 1982*³⁰ to have his or her case for bail considered under that Act or the duties imposed on police officers under that Act.³¹ If the

²⁴ S 73. The *Second-hand Dealers Act 1906* contains a similar provision (s 14).

²⁵ S 74.

²⁶ S 75.

²⁷ The *Police Act 1869* (SA) incorporated only the equivalents of ss 72 and 74. They have since been repealed. These sections were also incorporated in the *Police and Police Offences Ordinance 1923* (NT) and the *Police Offences Ordinance 1930* (ACT), but have now been repealed.

²⁸ The equivalent of s 71 was repealed by the *Theft Act 1968* and the equivalents of ss 74 and 75 by the *Police (Property) Act 1897*. The equivalents of ss 72 and 73 are still in force, though modified by the *Consumer Credit Act 1974*.

²⁹ Ss 717 and 718 of the *Criminal Code* do not cover the provisions in ss 72 and 73 for payment or compensation at the time the property is delivered up, or the possibility of a civil action in s 72.

³⁰ S 5.

³¹ S 6.

powers of police officers to arrest offenders are incorporated in the *Criminal Code* as recommended by the Commission³² this provision should accompany them.

19. Section 67 contains a proviso to the effect that offenders under that section can be committed to the nearest gaol to await the next Sessions of the District Court of Western Australia to be held in that district. This can be traced back to the United Kingdom *Vagrancy Act 1824*, under which offenders who had been convicted could be committed by a justice to a house of correction to remain there until the next General or Quarter Sessions of the Peace.³³ The *Police Act* makes the section more obscure by leaving out the reference to the offender having been convicted. If the section is prescribing a punishment on conviction, it is superfluous because it already provides for imprisonment with hard labour and a Court of Petty Sessions can impose such a sentence without sending the case to the District Court;³⁴ if it suggests that offenders instead of being tried summarily can be committed for trial before the District Court, it is in practical terms useless - a point made in the Murray Report³⁵ - and also contrary to principle, since it appears to do away with a preliminary hearing. The Commission endorses the recommendation in the Murray Report that the proviso be repealed.

20. Section 76 deals with the disposition of unclaimed goods in the possession of the police. This is a useful and necessary provision, but it belongs with the police administration provisions in the earlier part of the Act or in the proposed Police Administration Act, not in a Summary Offences Act.

21. Section 78 provides a summary remedy analogous to a civil action for detinue³⁶ to enable a person to recover the possession of goods unlawfully detained or to recover a sum of money not greater than \$100. It is anomalous to provide for the recovery of goods unlawfully detained by criminal proceedings and section 78 should be repealed.

6. PROCEDURAL PROVISIONS IN PART VIII

22. The *Police Act* when enacted was seen as a code of simple offences and the procedure for dealing with them. The procedural provisions, mostly drawn from English sources, were

³² Paras 17.12 and 17.31 above.

³³ S 5.

³⁴ Nichols 109.

³⁵ 101.

³⁶ Nichols 134.

set out in Part VIII, which as originally drafted contained provisions as to bail,³⁷ informality of warrants,³⁸ service of summons³⁹ and appeals.⁴⁰ On the enactment of the *Justices Act*, these provisions were transferred to that Act.⁴¹ The other procedural provisions in Part VIII were allowed to remain. In the present day context, the Commission sees this as undesirable. Procedural provisions dealing generally with simple offences should all be in the same Act, that is the *Justices Act* or the legislation which replaces it.⁴²

(a) Penalty for offences where no special penalty is appointed: section 124

23. Section 124 provides a penalty for every offence against the *Police Act* for which no special penalty is appointed. Under the Act as currently in force, section 124 provides the penalty for offences under sections 43,⁴³ 47⁴⁴ and 84C.⁴⁵ If the Commission's recommendations as respects these offences are accepted, they will be repealed.⁴⁶ Section 124 would therefore become redundant, though there may still be reason for leaving it in the Act as a safety-first provision. Similar provisions can be found in other legislation.⁴⁷

(b) Penalty for compounding information: section 125

24. Under this section a person who lodges information concerning an alleged offence by which he was not personally aggrieved, and afterwards receives money or some other reward for compounding, delaying or withdrawing the information, is guilty of an offence. The section is not limited to offences against the *Police Act* but applies to all offences - a clear indication of its original purpose as a general procedural provision.

³⁷ S 130.

³⁸ S 131.

³⁹ S 132.

⁴⁰ Ss 136, 139-141.

⁴¹ Bail is now governed by the *Bail Act 1982*.

⁴² The Commission has recommended that Courts of Petty Sessions and Local Courts should be merged so as to create a court of general inferior jurisdiction: Court of Petty Sessions Report Ch 3. If this recommendation is adopted it is likely that the legislative provisions at present found in the *Justices Act* will be split up into several different Acts, among which would be one dealing with procedure for simple offences.

⁴³ See paras 4.13-4.23 above.

⁴⁴ See para 15.2 above.

⁴⁵ See para 10.6 above.

⁴⁶ A move-on power would however replace the loitering offence in s 43(1).

⁴⁷ Eg *Local Government Act 1960* s 671; *Health Act 1911* s 360.

25. The compounding provisions now contained in the *Criminal Code* are more restricted than section 125 - section 136 deals only with the compounding of crimes and section 137 with the compounding of penal actions.⁴⁸ The Murray Report recommends that sections 136 and 137 should be replaced by one section covering the compounding or concealment of any offence - a section which would also replace section 125 of the *Police Act*.⁴⁹ The Commission endorses that recommendation, which would mean that section 125 would be repealed.⁵⁰

(c) Act not to prevent indictment of offenders or liability for higher penalties: section 126

26. Section 126 provides that nothing in the *Police Act* is to be construed to save any person from being indicted or prosecuted for any indictable offence made punishable on summary conviction by the Act, or to prevent any person being liable for a higher penalty than provided by the Act, provided that no person be punished twice for the same offence.⁵¹

27. Section 6 of the *Criminal Code Act 1913* provides that where an offender is punishable under the provisions of the Code (in which nearly all indictable offences are to be found⁵²) and also under the provisions of some other statute, he may be prosecuted and convicted under either provision, provided that he is not twice punished for the same offence. Section 126 can therefore be repealed.⁵³

(d) Committal to court of superior jurisdiction: section 127

28. Under section 127, where any person is charged before a justice with an offence cognisable by a court of superior jurisdiction, and in the justice's opinion the case is proper to be disposed of by the superior court, the justice may commit the person for trial to any court of competent jurisdiction, and forward the depositions taken. Again this provision covers not

⁴⁸ "[A] rather archaic type of situation, not now generally encountered": Murray Report 96.

⁴⁹ Ibid.

⁵⁰ The United Kingdom provision on which s 125 was based, s 33 of the *Metropolitan Police Courts Act 1839*, and equivalent provisions in the ACT and the Northern Territory, *Police Offences Ordinance 1930* (ACT) s 80 and *Summary Offences Act* (NT) s 70, have been repealed, though that in South Australia, *Summary Offences Act 1953* (SA) s 66, is still in force.

⁵¹ In *O'Brien v Reitze* [1972] WAR 152, 155, Wickham J approved a statement of the South Australian Full Court in *Lenthall v Newmann* [1932] SASR 126 that the prosecution should not present the defendant for summary trial when the case is a proper one for prosecution on indictment: see Ch 13 fn 16 above.

⁵² The major exceptions are the indictable offences in the *Misuse of Drugs Act 1981*.

⁵³ The equivalent provisions in South Australia, the ACT and the Northern Territory have all been repealed.

just offences under the *Police Act* but any case where a person is charged before a justice with an offence cognisable by a court of superior jurisdiction.

29. Section 127 is undesirable for a number of reasons. First, read literally it appears to permit committal for trial without a preliminary hearing, which is inconsistent with the *Justices Act 1902*.⁵⁴ Second, it is inconsistent with provisions in the Code which set out the circumstances in which particular indictable offences are punishable on summary conviction, and lay down a procedure for dealing with the matter.⁵⁵ Third, the provision that the depositions must be forwarded to the proper officer of the court to which the person is committed for trial is again inconsistent with the *Justices Act*, under which the depositions are to be transmitted to the Attorney General or the person appointed to present indictments in the district.⁵⁶ Section 127 is clearly obsolete and should be repealed.⁵⁷

(e) Amends for frivolous information: section 128

30. Section 128 provides that where an information or complaint of an offence is laid before a justice but not further prosecuted, or if in the opinion of the justice there was no sufficient ground for making it, the justice can award amends to be paid by the informer, or imprison the informer. The section does not apply to any information or charge preferred by a police officer or constable. Again, the section applies to any offence, not just those in the *Police Act*.

31. If this procedure is necessary, then it should be incorporated in the *Justices Act 1902*. In its report on Courts of Petty Sessions the Commission recommended that parties should be able to apply for pre-trial hearings in summary prosecutions, and that a court which ordered a pre-trial hearing should have power to make such orders and give such directions as are necessary for the just and efficient disposal of the proceedings.⁵⁸ If it were thought necessary, the court could be empowered to order the payment of amends at a pre-trial hearing. However it seems likely that the real purpose of section 128 is to deter persons from laying information or making complaints on frivolous grounds. The pre-trial hearing procedure would allow such

⁵⁴ Ss 101A-101B.

⁵⁵ S 5; eg ss 426-440 (stealing and analogous offences) and 465-467 (damage to property).

⁵⁶ S 127.

⁵⁷ The equivalent provisions in South Australia, the ACT and the Northern Territory have all been repealed.

⁵⁸ Courts of Petty Sessions Report paras 5.1-5.5.

cases to be identified and disposed of as early as possible, in advance of the full hearing, so minimising any losses and expenses suffered.

32. In its present form, section 128 is undesirable and should be abolished. Its drafting was criticised by the Murray Report,⁵⁹ and equivalent provisions in other jurisdictions have been repealed.⁶⁰

(f) Fines to be paid to Treasurer: section 129

33. Section 129 provides that where persons employed in the police force are entitled to the whole or any portion of any forfeiture, penalty or seizure under the *Police Act* or any other Act, the proceeds go to the Treasurer for the public use of the State.

34. This provision has been superseded by the more general provisions of the *Fines and Penalties Appropriation Act 1909*,⁶¹ under which every fine and penalty imposed by any court of summary jurisdiction under any Act is to be paid to the Treasury for the public uses of the State.⁶² In any case there are no provisions in the *Police Act* under which persons employed in the police force are entitled to the whole or any portion of any forfeiture, penalty or seizure.⁶³ Such provisions in other Acts are rare, and would only be found in older legislation.⁶⁴ Section 129 is unnecessary and can be repealed.

⁵⁹ 94, though the Report seems to be wrong in characterising s 128 as an offence. The recommendations in the Report for the amendment of s 134 of the Code would make any such offence unnecessary.

⁶⁰ The original section on which s 128 was based, *Metropolitan Police Courts Act 1839 (UK)* s 32, and the equivalent sections in South Australia, the ACT and the Northern Territory have all been repealed.

⁶¹ S 2.

⁶² S 168 of the *Justices Act 1902* also contains a provision specifying the destination of fines imposed in summary proceedings. The Commission has recommended that these provisions should be consolidated into a single provision in the *Justices Act: Courts of Petty Sessions Report* para 7.7.

⁶³ S 90A (false reports) provides that a court convicting a person of an offence under this section may, in addition to or without imposing any penalty, order that person to pay the amount of any wages attributable to, or expenses reasonably incurred with respect to, any investigation, inquiry or search. The order is to specify to whom and in what manner the amount is to be paid, and may be enforced as though the amount were a penalty imposed under the section. The amount so paid is distinct from a penalty, and cannot constitute either a forfeiture or a seizure.

⁶⁴ Eg *Justices Act 1902* s 145, under which the court may order a fine or part thereof to be paid to the victim of an assault. In its *Courts of Petty Sessions Report* para 7.6, the Commission said that this provision had been superseded by the *Criminal Injuries Compensation Act 1985* and a revision of s 719 of the *Criminal Code*, and recommended that s 145 should be repealed.

(g) Proceedings may be taken against master for offences committed by servant: section 133

35. Under section 133, where a person commits an offence under the *Police Act* and it appears to the justice that that person acted only under orders or by the sanction of a master or employer, and that the master or employer is in fact the offending party, either solely or as well as the other person, the justice may summon and proceed against the master or employer, either instead of or as well as the other person.

36. The derivation of this section is unclear. It does not appear to have been drawn either from United Kingdom sources or from the South Australian *Police Act 1869*.⁶⁵ It appears to have been rendered obsolete by the enactment of sections 7 and 8 of the *Criminal Code*. Section 7 sets out the persons who, by aiding, counselling or procuring, are deemed to have taken part in committing an offence and may be charged with committing it, and section 8 with offences committed by two or more persons in prosecution of a common purpose. The situation contemplated by section 133 is clearly covered by the Code provisions, which have been held applicable to simple offences as well as indictable offences.⁶⁶ Section 133 can therefore be repealed.

(h) Offence punishable summarily: section 134

37. Section 134 says that all offences against the *Police Act* shall, except where otherwise provided, be summarily punishable on conviction before any justice in Petty Sessions, and so much of any pecuniary penalty as is not awarded to the informer or party prosecuting shall be appropriated for the public uses of the State.

38. Strictly speaking, there is no need for section 134. The *Criminal Code* provides that offences not otherwise designated are simple offences,⁶⁷ and the *Justices Act* provides that such offences are to be heard and determined in a summary manner.⁶⁸ However, it seems desirable for a statute setting out simple offences of a general nature to provide expressly - and probably at the beginning rather than at the end - that the offences are to be determined

⁶⁵ Queensland and Victoria are the only Australian jurisdictions with provisions which are in any way equivalent: *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 48; *Summary Offences Act 1966* (Vic) s 55.

⁶⁶ *West v Suzuka* [1964] WAR 112.

⁶⁷ S 3.

⁶⁸ S 20.

summarily.⁶⁹ The provision about the destination of pecuniary penalties is redundant. There are no provisions in the *Police Act* which award any part of any pecuniary penalty to the informer or prosecutor⁷⁰ and the destination of fines imposed in summary proceedings is dealt with in other legislation.⁷¹

(i) Amends to be assessed by justice: section 135

39. Section 135 deals with provisions in the *Police Act* under which a person may be ordered to pay money by way of amends, compensation, damages, or the value, costs or expenses of repairing, reinstating and making good any injury or damage done. It gives the court power to determine the sum payable, and order instalments if necessary, and provides for the method of enforcement.

40. This provision is now redundant in the light of the restitution and compensation provisions of the *Criminal Code* already discussed.⁷²

(j) Justices not bound to convict in certain cases: section 137

41. Under section 137, justices are not bound to convict if the offence proved is in their opinion of so trivial a nature as not to merit punishment. The section is not expressly confined to offences against the *Police Act*, though it may be impliedly so confined.⁷³ Section 137 is much used by Courts of Petty Sessions and should be retained. If it is accepted as applicable to all offences which are trivial in nature, it should be incorporated in the *Criminal Code* with section 669 of the Code⁷⁴ Section 669 contains provisions whereby "first offenders" as defined by the section can either have charges dismissed without conviction or be convicted and discharged if, having regard to the youth, character or antecedents of the offender, or the trivial nature of the offence, it is inexpedient to inflict punishment. Section 137 is much wider than section 669 in that it applies in any case where the offence is thought to be trivial whether

⁶⁹ Cf *Summary Offences Act 1953* (SA) s 84; cf also other Western Australian statutes prescribing minor offences: eg *Dog Act 1976* s 44(1). The *Justices Act 1902* prescribes the form which summary proceedings should take: ss 20, 29, 32. For the Commission's recommendations, see Courts of Petty Sessions Report paras 2.18-2.23, 3.14-3.24.

⁷⁰ Cf para 34 above.

⁷¹ See para 34 above.

⁷² See paras 3-7 above.

⁷³ Compare the wording of, for example, s 125: "any offence . . ."

⁷⁴ S 467 of the Code, which contains a provision similar to s 137 of the *Police Act* dealing with trivial charges of damage to property, could be repealed.

the accused is a "first offender" or not. If on the other hand it is thought appropriate to confine section 137 to trivial offences under the proposed Summary Offences Act, it should be incorporated in that Act.

(k) Shortening Ordinance incorporation: section 138

42. Section 138 incorporates in the *Police Act* sections A, D, G and H of the *Shortening Ordinance 1853*. Section 47(2) of the *Interpretation Act 1918*, which preserves the provisions of the *Shortening Ordinance 1853* as amended, was itself preserved by section 77(4) of the *Interpretation Act 1984*. The four provisions incorporated in the *Police Act* by this means deal respectively with the procedure for dealing with offences under the Act, the time limit for commencing proceedings, actions against persons acting in execution of the Act and actions against justices and members of the police force.

43. In the Commission's view, if these provisions are necessary they should be expressly incorporated in more appropriate legislation. At present anyone wishing to find out what they are has to consult a schedule to an Ordinance passed in 1853 and otherwise repealed in 1918. It is clear that sections A and D are no longer necessary. Section A says that proceedings for offences under the *Police Act* made summarily punishable on conviction before justices in Petty Sessions are to be heard and determined according to the provisions of the *Justices Act 1902*. The *Justices Act* itself prescribes the form which summary proceedings should take.⁷⁵ The limitation period incorporated in the *Police Act* by section D is identical with that made applicable in all summary proceedings by the *Justices Act*.⁷⁶

44. It is likely that section G is also unnecessary.⁷⁷ It provides that in actions against persons acting in execution of the *Police Act* -

1. one month's notice of the action must be given to the defendant;

⁷⁵ See also para 38 above.

⁷⁶ S 51. The Commission has recommended that no change should be made to this provision: Courts of Petty Sessions Report para 7.18. However cl 15 of the Acts Amendment (Jurisdiction and Criminal Procedure) Bill, introduced into Parliament in June 1992, increases the limitation period in the *Justices Act* to 12 months.

⁷⁷ Equivalent sections in most other jurisdictions have been repealed, eg *Police Offences Ordinance 1930* (ACT) s 86, *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 56, *Police Offences Act 1901* (NSW) s 114. The exceptions are *Summary Offences Act 1953* (SA) s 85 and *Police Administration Act* (NT) s 162, both of which are still in force.

2. the defendant may plead the general issue and put the *Police Act* and the special matter in evidence;
3. no plaintiff may recover if tender of sufficient amends has been made, or a sufficient sum of money has been paid into court;
4. a successful defendant is to recover full costs, but a successful plaintiff is not to recover costs unless the judge certifies approbation of the action and the verdict.

Most jurisdictions have abolished special limitation and notice provisions.⁷⁸ Pleading the general issue is part of the old common law rules of procedure abolished in the 19th century.⁷⁹ Amends and payment into court are available in all civil actions,⁸⁰ and there is no need for a special procedure. Again there are general rules about costs,⁸¹ and there is no need for a special rule unless the limitation on costs for a successful plaintiff is to be retained.

45. Section H provides that no action lies against a justice of the peace, officer of police, policeman, constable, peace officer or any other person in the employ of the government or authorised to carry the provisions of the Act into effect unless there is direct proof of corruption or malice, and then only if the action is commenced within three months after the cause of complaint has arisen. The defendant can plead the general issue and give the special matter in evidence, and if judgment is given for the defendant or the plaintiff discontinues or becomes nonsuit the defendant is entitled to treble costs.

46. No other Australian jurisdiction has a similar provision.⁸² Some of the procedural provisions are obsolete.⁸³ If the police need the protection given by section H,⁸⁴ it should be

⁷⁸ The Commission deals with these rules in its *Discussion Paper on Limitation and Notice of Actions* (Project No 36 Part II).

⁷⁹ For these reforms in Western Australia, see Russell 198-199.

⁸⁰ For the Supreme Court and the District Court, see the Rules of the Supreme Court 1971 O 24. For the Local Court, see *Local Courts Act 1904* s 49 and *Local Court Rules 1961* O 9 r 8.

⁸¹ For the Supreme Court and the District Court see the *Rules of the Supreme Court* O 66. For Local Courts, see *Local Courts Act 1904* ss 81-88, the *Local Court Rules 1961* O 37 and the Commission's *Report on Local Courts* (Project No 16 Part I).

⁸² "The statute . . . is a very curious one. It seems not unlikely that it represents a confusion between the respective positions and common law of justices and of constables. I have not been able to find any model or precedent for it, or any authority giving any guidance as to what is meant by 'direct proof of malice': *Trobridge v Hardy* (1955) 94 CLR 147, 156 per Fullagar J.

⁸³ See para 44 above.

redrafted in modern form and set out with the police administration provisions in the proposed Police Administration Act.

⁸⁴ For a case in which the section was applied see *Webster v Lampard* (unreported) Supreme Court of Western Australia, 3 June 1992, Appeal No 116 of 1991.

Appendix III

PART VII OFFENCES

The offences in Part VII (dealt with in Chapter 16 above) are drafted in typical 19th-century style and usually consist of one long sentence running together a number of different offences. They are therefore not easy to read and understand. Instead of quoting the sections, this Appendix summarises their effect.

1. PROHIBITION OF NUISANCES BY PERSONS IN THOROUGHFARES: SECTION 96

Section 96(1) prohibits various activities involving horses or other animals being carried on in the street -

- (1) exposing them for show or sale;
- (2) feeding or foddering;
- (3) shoeing, bleeding or farrying;
- (4) cleansing, dressing, exercising, training or breaking.

In addition, it prohibits cleaning, making or repairing any part of any carriage or cart. In each case there are certain exceptions.

Section 96(2) prohibits -

- (1) turning loose any horses or cattle;
- (2) suffering unmuzzled ferocious dogs to be at large;
- (3) setting on or urging or permitting dogs or other animals to attack, worry or put in fear persons, horses or other animals.

Section 96(3) prohibits the driving of horses or cattle in streets, except at night. Local authorities may define, by publication in the Government Gazette, the route by which horses, cattle and sheep may be driven.¹

Section 96(4) prohibits -

- (1) negligence or ill-usage in driving stock causing the stock to do mischief, or misbehaviour in the driving, care or management of stock;
- (2) the wanton pelting, hunting or driving of stock by a person not hired or employed to drive them.

Section 96(5) is in essence a Road Traffic provision - a sort of 19th century highway code. It deals with wagons, wains, carts, drays and other carriages, machines and vehicles. It prohibits -

- (1) drivers riding on carriages without having a person on foot to guide them (except in cases where carriages are drawn by horses and properly driven with reins only);
- (2) drivers wilfully being at such a distance from the carriage that, or in a situation in which, they cannot have the direction and government of the horses and cattle drawing it;
- (3) riding on the shafts of the carriage;
- (4) not keeping to the left or near side when meeting oncoming traffic - this provision also covers riders on horseback;
- (5) wilfully preventing another person from passing, or hindering such passage by negligence or misbehaviour.

Section 96(6) contains further road traffic provisions. It prohibits -

- (1) causing a cart, hackney carriage, truck or barrow to stand longer than necessary for loading or unloading, or taking up or setting down passengers;
- (2) wilfully interrupting a public crossing or causing an obstruction by means of any cart, carriage, truck, vehicle or barrow, or horse or other animal.

¹ No such routes ever appear to have been published.

Section 96(7) prohibits -

- (1) the posting of bills against or on, or
- (2) writing on, marking, soiling or defacing -

buildings, walls, fences, trees or pales without the owner's consent.

Section 96(8) creates offences of -

- (1) wantonly discharging any firearm;
- (2) burning or setting light to anything;
- (3) throwing or discharging stones or other missiles to the damage, annoyance or danger of any person or property;
- (4) throwing or setting light to a firework without written consent from the proper authorities.

Section 96(9) creates offences of -

- (1) wilfully disturbing inhabitants by ringing doorbells or knocking at any house without lawful excuse;
- (2) wilfully and unlawfully extinguishing the light or breaking the glass of any lamp.

Section 96(10) creates offences of -

- (1) flying kites;
- (2) playing games;
- (3) using any shanghai or other sling or instrument,

to the annoyance of inhabitants or to the annoyance and danger of persons in the street.

Section 96(11) makes it an offence to turn animals loose or suffer them to stray or be tethered or depastured in any street.

Section 96(12) makes it an offence to -

- (1) stand or loiter about to the annoyance of passers by;
- (2) interfere with or impede the free passage of pedestrians.

Section 96(13) makes it an offence to -

- (1) lead or ride any horse or other animal, or draw, drive or propel any carriage, cart, sledge, truck, barrow or other vehicle or machine (except a bath chair or perambulator) on any footway or kerbstone;
- (2) fasten any horse or animal so it can stand across or upon any footway.

Section 96(14) prohibits rolling or carrying particular items (casks, tubs, hoops, wheels, ladders, planks, poles, showboards or placards) on any footway, except for the purpose of loading or unloading any cart or carriage or crossing the footway.

Section 96(15) prohibits the carrying on of various activities in the street -

- (1) burning, dressing or cleansing cork;
- (2) hooping, cleansing, firing, washing or scalding casks or tubs;
- (3) hewing, sawing, boring or cutting timber or stone;
- (4) slacking, sifting or screening lime.

Section 96(16) prohibits the throwing or laying in any street of coals, stones, slates, shells, lime, bricks, timber, iron or other materials (except building materials or rubbish occasioned by building).

Section 96(17) prohibits -

- (1) beating or shaking carpets, rugs or mats in the street (except doormats before 8 am);
- (2) throwing or laying various listed kinds of rubbish, or causing it to fall, into a sewer, pipe, drain, well, stream, watercourse, pond or reservoir;
- (3) causing offensive matter to run from any manufactory, brewery, slaughterhouse, butcher's shop or dunghill into any street or uncovered place.

Section 96(18) makes it an offence to -

- (1) pick, take or injure flowers, fruit, shrubs or trees in any public or private garden;
- (2) throw any missile at any tree growing in any street or public place.

Section 96(19) makes it an offence to -

- (1) expose anything for sale on, or so as to hang over, any carriageway or footway or on the outside of any house or shop,
- (2) have a pole, blind, awning, line or other projection from a house, shop or other building,

so as to cause any annoyance or obstruction in any street.

Section 96(20) regulates the conduct of drivers or guards of public vehicles for the conveyance of passengers on the road. It creates offences of -

- (1) wilfully delaying on the road;
- (2) using abusive or insulting language to any passenger;
- (3) by reason of intoxication, negligence or other misconduct, endangering the safety or property of any passenger or other person;
- (4) demanding or exacting more than the proper fare.

2. DESTRUCTION OF ACCLIMATISED ANIMALS OR BIRDS: SECTION 97

Section 97 creates an offence of wilfully injuring or destroying any native or acclimatised animals or birds on any park or public road or reserve.

3. STREET MUSICIANS TO DEPART WHEN DESIRED TO DO SO: SECTION 98

Under section 98 a person who plays or sounds on any musical instrument in the street commits an offence, if an annoyed inhabitant lays an information or makes a written

complaint. Householders are given power to require street musicians to depart from the neighbourhood for any reasonable cause, and failure to comply is also an offence.

4. CANNONS NOT TO BE FIRED NEAR DWELLING HOUSES: SECTION 99

Under section 99 it is an offence to discharge "any cannon or other firearm of greater calibre than a common fowling piece" within three hundred metres of a dwelling house to the annoyance of the inhabitants, after being warned of the annoyance.

5. HOG-STIES AND NUISANCES NOT REMOVED ON COMPLAINT: SECTION 100

Section 100 is a provision dealing with privies, pig-sties or other places, matters or things which constitute a nuisance to any inhabitants. On complaint, justices can order that the subject of the nuisance be remedied or removed. Failure to do so is an offence, and justices can also order the removal of the nuisance at the expense of the person in default.

6. BUTCHERS' SHAMBLES AND SLAUGHTERHOUSES: SECTION 101

Section 101 gives power to justices or constables authorised by justices to visit and inspect butchers' shambles² and slaughterhouses and give directions about cleansing. Any butcher, owner or occupier who -

- (1) obstructs or molests any justice or constable in the course of the inspection; or
- (2) refuses or neglects to comply with directions within a stated time,

commits an offence.

7. INSPECTION OF MEAT: SECTION 102

Section 102 gives constables power to enter premises where meat is prepared or exposed for sale and inspect and examine the meat. If it is unfit for human consumption, a justice may order it to be destroyed, and the person concerned commits an offence.

² A place where meat is sold; a flesh or meat market: Shorter Oxford Dictionary.

8. PRIVATE AVENUES: SECTION 103

Under section 103 it is an offence to neglect to keep private avenues, passages, yards and ways clean, so causing a nuisance by offensive smell or otherwise.

9. BATHING PROHIBITED WITHIN CERTAIN LIMITS: SECTION 104

Section 104 prohibits bathing, except in proper bathing costume, near to or within view of any public wharf, quay, jetty, bridge, street, road or other place of public resort between 6.00 in the morning and 8.00 in the evening.

10. DAMAGING PUBLIC BUILDINGS: SECTION 105

Under section 105 wilful damage to public property (of which a number of examples, including public buildings, are listed) is an offence, and any person damaging such property, wilfully or not, must pay the costs of repair.

11. WATERCOURSES: SECTION 106

Under section 106, it is an offence to cast various kinds of rubbish or any noxious substance into various kinds of watercourses, or to obstruct or divert watercourses from their channel. In addition to the conviction, there is again a provision for paying the costs of restoration.

12. INJURING PUBLIC FOUNTAINS: SECTION 107

Section 107 is concerned with public fountains, pumps, cocks and water pipes. It creates offences of -

- (1) wilfully injuring any of the above;
- (2) clandestinely and unlawfully appropriating water;
- (3) allowing water to run to waste;
- (4) washing clothes or animals at public fountains or pumps.

13. SLOPS, NIGHT-SOIL, TO BE CONVEYED AWAY ONLY AT CERTAIN HOURS: SECTION 108

Sections 108 and 109 both deal with the problems created by night soil, ammoniacal liquor, or other such offensive matter.

Under section 108, it is an offence -

- (1) to drive a cart or carriage with such matter through any street between 5 am and 11.30 pm;
- (2) at any time, using for this purpose a cask, tank, cart or carriage not having a proper covering;
- (3) filling the cart or carriage so as to turn over or cast such matter in or on the street.

Citizens enjoy a power of arrest in such cases.

14. HOURS OF REMOVING NIGHT-SOIL: SECTION 109

Under section 109 it is an offence -

- (1) to empty a privy, or to go with carts or carriages for that purpose, except between 11.30 pm and 5.30 am;
- (2) to put in or cast out of any cart, tub or otherwise, any offensive matter, in or near any street.

15. PERSONS IN CHARGE OF STOCK TO REMOVE SUCH AS MAY DIE ON PUBLIC ROAD: SECTION 110

Section 110 makes it an offence -

- (1) for a person in charge of an animal that dies while travelling along any public road or highway to fail to bury it or remove it a distance of one hundred metres from the road or highway;
- (2) to throw a dead animal into a harbour, river, creek, waterhole or cove near a city or town, or cause it to be left on the shores thereof;

- (3) in any manner to pollute or render useless any well, spring or pool.

16. NO TURF, GRAVEL, TO BE REMOVED FROM STREETS WITHOUT PERMISSION: SECTION 111

Section 111 makes it an offence -

- (1) to form, dig or open a drain or sewer;
- (2) to remove material used in the formation of streets from any part of carriage or footways without leave;
- (3) wantonly to break up or otherwise damage the street.

17. DRAWING OR TRAILING TIMBER: SECTION 112

Section 112 deals with the drawing or trailing of timber, stone or other material or thing. It is an offence -

- (1) to haul or draw such material on a road, street, thoroughfare, bridge, causeway or public place otherwise than upon wheeled carriages;
- (2) to allow such material, when being carried upon wheeled carriages, to drag or trail on the street etc., and so injure it;
- (3) if such material so hangs over the carriage so as to obstruct the road beyond the breadth of the carriage.

18. ENTRANCES TO CELLARS, COAL-HOLES, TO BE COVERED AND SECURED: SECTION 113

Section 113 provides that entrances to kitchens, cellars or other parts of a building beneath the level of a footway of the street must be covered and secured. It is an offence -

- (1) to fail to keep the entrance secure by means of rails, flaps or trapdoors;
- (2) to leave the entrance open, or not sufficiently covered or secured;
- (3) to fail to repair or keep in repair the rails, flaps or trapdoors.

19. CELLARS OR OPENINGS BENEATH THE SURFACE OF FOOTWAYS PROHIBITED: SECTION 114

Under section 114, it is an offence to make any cellar, or any opening, door or window in or beneath the surface of the footway of any street or public place.

20. WELLS TO BE COVERED OVER: SECTION 115

Section 115 provides that it is an offence not to have wells securely and permanently covered over or otherwise secured.³

21. HOLES MADE FOR VAULTS, TO BE ENCLOSED: SECTION 116

Under section 116 it is an offence -

- (1) to dig, make or leave a hole for a vault, the foundations of a building, or any other purpose, and not enclose it;
- (2) to keep up any such enclosure for longer than is necessary;
- (3) to fail to fence or enclose any hole sufficiently when required to do so by a justice.

22. STALLS NOT TO BE SET ON FOOT OR CARRIAGE WAYS: SECTION 117

Section 117 sets out a variety of instances -

- (1) Setting or placing stalls, boards, chopping blocks, showboards, basketwares, merchandise, casks or goods of any kind on carriageways or footways;
- (2) hooping, placing, washing or cleansing any pipe, barrel, cask or vessel on carriageways or footways;
- (3) selling or placing on any carriageway or footway any timber, stones, bricks, lime or other materials, or things for building, or any other matters or things whatsoever;
- (4) hanging out or exposing any meat or offal or other thing or matter whatsoever over the carriageway or footway, or over the area of a house.

³ The section as printed in the present reprint deals with the situation where a person has a well "situated between his dwelling house, or the appurtenances thereof, and in any street or footway . . .". The word "in" is an error which has crept in during the reprinting process and the section as it stands does not make sense. The original section dealt with wells between a dwelling house and the street or footway.

**23. NOT TO PREVENT AWNINGS BEING ERECTED IN FRONT OF SHOPS:
SECTION 118**

Section 118 provides that nothing in the Act shall be deemed to prevent any person from placing an awning in front of his or her shop or house, provided that it complies with stated requirements.

**24. RAIN NOT TO BE ALLOWED FROM EAVES OF HOUSES ON FOOTWAYS:
SECTION 119**

Under section 119, it is an offence for houses and buildings not to be provided with gutters or otherwise so constructed as to prevent rain dropping from the eaves onto the footways of any street or public place.

25. BOARDS TO BE ERECTED, BUT NOT WITHOUT LICENCE: SECTION 120

Section 120 prohibits -

- (1) the erection of a board or scaffolding in any street or public place;
- (2) the erection of an enclosure for the purpose of making mortar, or depositing, sifting, screening or slacking any brick, stone, lime, sand or other building materials,

without a licence. Breach of this provision is an offence, and the local authority is given power to pull down the erection in question.

26. NO ROCK TO BE BLASTED WITHOUT NOTICE: SECTION 121

Under section 121, anyone who wishes to blast any stone, rock, tree or other matter must give notice according to a specified procedure. Blasting without giving notice is an offence.

Appendix IV

STATISTICS OF CHARGES BROUGHT UNDER THE *Police Act* IN THE PERTH AND EAST PERTH COURTS OF PETTY SESSIONS

The statistics in this Table relate to charges brought in the Perth and East Perth Courts of Petty Sessions during the year 1 July 1984 to 30 June 1985 and the calendar year 1989. They have been supplied to the Commission by the Australian Bureau of Statistics (Western Australia Office). No equivalent figures (ie figures detailing the charges under each section) are available for the other Courts of Petty Sessions in these years, or for any courts for subsequent years.

SECTION NO	NO OF CHARGES		
	1984-1985	1989	
PARTS I - IV			
12	NON-COMMISSIONED OFFICER AND CONSTABLE NOT TO RESIGN WITHOUT LEAVE OR NOTICE	-	-
13	MEMBERS OF THE FORCE DISMISSED OR CEASING TO HOLD OFFICE TO DELIVER UP ACCOUTRE- MENTS	-	-
15	TAKING BRIBE	-	-
16	PERSONATING OR ATTEMPTING TO BRIBE MEMBERS OF THE FORCE	9	26
16A	UNAUTHORIZED USE OF THE WORD "DETECTIVE"	1	-
18	HARBOURING CONSTABLES DURING THE HOURS OF DUTY	-	-
20	INTERFERENCE WITH POLICE	570	1167
	HINDERING POLICE	182	339
	RESISTING ARREST	384	742
	MISCELLANEOUS	4	86
31	WRONGFULLY OBTAINING ADMISSION INTO THE FORCE	-	-
33G	OFFENCES CONNECTED WITH POLICE APPEAL BOARD PROCEEDINGS	-	-
36	SPECIAL CONSTABLES REFUSING TO SUBSCRIBE THE ENGAGEMENT	-	-
PART V			
41(1)	RESISTING, PREVENTING OR OBSTRUCTING POLICE ON VESSELS	-	-

SECTION NO		1984-1985	1989
41(7)	RESISTING OR OBSTRUCTING POLICE EXERCISING POWERS TO ENTER AND DETAIN VESSELS	-	-
42	COMMON PROSTITUTES AND REPUTED THIEVES REFUSING TO LEAVE HOUSES WHERE GAMES CARRIED ON OR THEATRES	2	2
43	LOITERING	106	250
	S 43(1): EVIL DESIGNS	2	12
	LOITERING	100	236
	S 43(2)	4	2
44	DISTURBING THE PEACE ON BOARD SHIPS, IN LICENSED HOUSES	3	9
	DISORDERLY	1	6
	THREATENING WORDS	2	2
	THREATENING BEHAVIOUR	-	1
47	WILFUL NEGLECT OF DUTY BY POLICE	-	-
50	NEGLECTING OR REFUSING TO GIVE NAME AND ADDRESS	389	763
51	MAD DOGS	-	-
52	PREVENTING OBSTRUCTIONS IN THE STREETS DURING PUBLIC PROCESSIONS	-	-
PART VI DIVISION 1			
53	DRUNKARDS	2490	476
54	DISORDERLY CONDUCT	1708	2822
	INSULTING WORDS	3	-
	THREATENING WORDS	1	1
	OBSCENE LANGUAGE	2	3
	DRUNK	26	9
	STREET DRINKING	1	1
	URINATING	1	3
	DISORDERLY	1674	2805
54A	DISORDERLY ASSEMBLY	3	1
57	NEGLIGENT OR FURIOUS DRIVING	1	-
58A	DAMAGE TO ANIMALS, PLANTS, IN GARDENS	5	2
59	OBSCENITY AND OTHER OFFENCES	232	394
	DISORDERLY	118	260
	INSULTING WORDS OR BEHAVIOUR	93	38
	OBSCENE LANGUAGE	4	8
	THREATENING WORDS OR BEHAVIOUR	12	55
	PROSTITUTION	5	33

SECTION NO		1984-1985	1989
61	RESTRICTION ON GAMES ON CERTAIN DAYS	-	1
63	TAKING DOG INTO PUBLIC GARDENS	-	-
64	CHALLENGE TO FIGHT	1	-
	DESCRIBED AS "DISORDERLY"		
64A	VALUELESS CHEQUES	59	2
	FALSE PRETENCES	2	
	FALSE REPRESENTATIONS	35	
	OBTAINED CREDIT	21	
	"OBTAINED POLICE"	1	
65(1)	NO VISIBLE LAWFUL MEANS OF SUPPORT	4	-
65(3)	BEGGING	2	4
65(4)	POSSESSION OF WEAPONS	8	11
65(4a)	POSSESSION OF OFFENSIVE WEAPONS	83	151
	PARTICULAR WEAPONS MENTIONED INCLUDE KNIVES, A CROSSBOW, TRUNCHEON AND "NUNCHUCKAS"		
65(4aa)	POSSESSION OF PROTECTIVE JACKETS AND VESTS	-	-
65(4b)	POSSESSION OF IMPLEMENTS TO FACILITATE UNLAWFUL USE OF MOTOR VEHICLES	1	9
65(5)	POSSESSION OF DELETERIOUS DRUGS	4	3
65(6)	HABITUAL DRUNKARDS	-	-
65(7)	OCCUPYING ANY HOUSE FREQUENTED BY REPUTED THIEVES	-	-
65(8)	COMMON PROSTITUTES WANDERING IN THE STREETS AND BEHAVING IN A RIOTOUS OR INDECENT MANNER	-	-
65(9)	HABITUALLY CONSORTING WITH REPUTED CRIMINALS	-	-
66(1)	SECOND OFFENCE AGAINST S 65	-	-
	SEE S 65(1) ABOVE		
66(2)	IMPOSITION UPON CHARITABLE INSTITUTIONS OR PRIVATE INDIVIDUALS	5	3
66(2a)	WILFUL FALSE STATEMENTS TO OBTAIN UNEMPLOYMENT BENEFITS	-	-
66(2b)	CONTINUING TO RECEIVE UNEMPLOYMENT BENEFITS AFTER KNOWLEDGE THAT ENTITLEMENT HAS CEASED	-	-

SECTION NO	1984-1985	1989
66(3) FORTUNE TELLING	1	1
66(4) POSSESSION OF HOUSEBREAKING IMPLEMENTS AND EXPLOSIVE SUBSTANCES	16	11
66(5) EXPOSING OBSCENE PICTURES TO THE PUBLIC	-	12
66(7) VIOLENTLY RESISTING ARREST	-	-
66(8) BEING FOUND IN OR UPON ANY PLACE, STABLE OR outhouse FOR ANY UNLAWFUL PURPOSE	45	39
66(9) WANDERING ABOUT AND NOT HAVING ANY VISIBLE LAWFUL MEANS OF SUPPORT	-	-
66(10) NEGLECT OF DEPENDANTS	-	-
66(11) WILFUL AND OBSCENE EXPOSURE OF THE PERSON	64	64
66(12) FRAUDULENTLY MANUFACTURING OR SELLING ADULTERATED METALS AND SUBSTANCES	-	-
66(13) BEING IN OR UPON PREMISES WITHOUT LAWFUL EXCUSE	173	294
67(1) BREAKING OR ESCAPING OUT OF LEGAL CUSTODY	100	138
67(2) SECOND OFFENCE AGAINST S 66	-	1
67(3) VIOLENTLY RESISTING ARREST	-	-
67(4) OBSTRUCTING LICENCE HOLDERS	-	-
67A AIDING AN ESCAPED PRISONER	7	11
69 BEING SUSPECTED OF HAVING OR CONVEYING STOLEN GOODS	98	169
71 HAVING POSSESSION OF STOLEN GOODS RECEIVED FROM ANOTHER	-	2
76A HAVING POSSESSION OF GOLD, PEARL OR UNCUT DIAMOND SUSPECTED OF BEING STOLEN	-	-
76C BEING FOUND ON PREMISES WHERE STOLEN GOLD, PEARL OR UNCUT DIAMOND IS SEIZED	-	-
76D ACCESSORIES	-	-
76F KEEPING PREMISES FOR PURPOSES OF PROSTITUTION	18	22
76G OFFENCES CONNECTED WITH PROSTITUTION	7	5
SOLICITING	2	2
LIVING ON EARNINGS	4	3

SECTION NO			1984-1985	1989
	"PROSTITUTION"	1	-	
79A	UNLAWFULLY TAKING OR BRANDING ANIMALS		-	-
80	DAMAGE TO PROPERTY		698	831
81	REMOVING BOAT OR BOAT FURNITURE		2	4
82	DESTROYING PROPERTY WITH INTENT TO STEAL OR RETAINING OR DISPOSING OF PROPERTY		-	-
82A	TRESPASSING ON ENCLOSED LAND		-	-
82B	UNLAWFULLY REMAINING ON PREMISES		58	115
83	SELLING ADULTERATED OR UNWHOLESOME ARTICLES OF FOOD		-	2
84	REGULATION OF HOUSES OF PUBLIC RESORT		-	-
PART VI DIVISIONS 2, 4, 5, 6				
84C	KEEPING HOUSE FOR PURPOSE OF OWNER OR OCCUPIER BETTING WITH OTHER PERSONS		-	-
84D	RECEIVING MONEY ON CONDITION OF PAYING MONEY ON EVENT OF ANY BET		-	-
84G	EXHIBITING PLACARDS OR ADVERTISING BETTING HOUSES		-	-
84H	ADVERTISING AS TO BETTING OR LOTTERIES		-	-
86	UNLAWFUL GAMES		1	-
87	COMMON GAMING HOUSES		63	-
89	WARRANTS TO ENTER COMMON GAMING HOUSES: NON-COMPLIANCE		-	-
89A	SLOT MACHINES		7	-
89B	USE OF METAL WASHERS IN SLOT MACHINES		-	-
89C	CHEATING AT PLAY		-	-
[THE OFFENCES IN SECTIONS 86 TO 89C WERE REMOVED FROM THE <i>Police Act</i> BY THE <i>ACTS AMENDMENT AND REPEAL (GAMING) ACT 1987.</i>]				
PART VI DIVISION 7				
90	OBSTRUCTING POLICE		-	-
90A	FALSE REPORTS		88	8
	CREATE BELIEF	65	8	
	FALSE STATEMENT	22	-	
	HARASSING CALL	1	-	

SECTION NO	1984-1985	1989
90B FORFEITURE	-	-
PART VII		
96(1) EXPOSING ANIMALS FOR SHOW	-	-
96(2) ALLOWING ANIMALS TO BE AT LARGE	-	-
96(3) DRIVING CATTLE THROUGH TOWNS	-	-
96(4) ILL-USAGE OF STOCK	-	-
96(5) DRIVING WAGONS	-	-
96(6) CARTS STANDING LONGER THAN NECESSARY	-	-
96(7) POSTING BILLS	-	-
96(8) DISCHARGING FIREARMS	2	-
DISCHARGING ARROW		1
DISCHARGING MISSILE		1
96(9) RINGING DOORBELLS	-	-
96(10) FLYING KITES	-	-
96(11) TURNING ANIMALS LOOSE	-	-
96(12) LOITERING	-	-
96(13) LEADING AND RIDING HORSES	-	-
96(14) ROLLING CASKS	-	-
96(15) BURNING CORK	-	-
96(16) THROWING COALS	-	-
96(17) BEATING CARPETS	-	-
96(18) PICKING FLOWERS	-	-
96(19) EXPOSING FOR SALE SO AS TO HANG OVER FOOTWAY	-	-
96(20) DRIVERS WILFULLY DELAYING	-	-
97 DESTRUCTION OF ACCLIMATISED ANIMALS OR BIRDS	-	-
98 STREET MUSICIANS TO DEPART WHEN DESIRED TO DO SO	-	-
99 CANNONS NOT TO BE FIRED NEAR DWELLING HOUSES	-	-

SECTION NO		1984-1985	1989
100	HOGSTIES AND NUISANCES NOT REMOVED ON COMPLAINT	-	-
101	BUTCHERS' SHAMBLES AND SLAUGHTER- HOUSES	-	-
102	INSPECTION OF MEAT	-	-
103	PRIVATE AVENUES	-	-
104	BATHING PROHIBITED WITHIN CERTAIN LIMITS	-	-
105	DAMAGING PUBLIC BUILDINGS	-	-
106	WATERCOURSES	-	-
107	INJURING PUBLIC FOUNTAINS	-	-
108	SLOPS, NIGHT-SOIL, TO BE CONVEYED AWAY ONLY AT CERTAIN HOURS	-	-
109	HOURS OF REMOVING NIGHT-SOIL	-	-
110	PERSONS IN CHARGE OF STOCK TO REMOVE SUCH AS MAY DIE ON PUBLIC ROAD	-	-
111	NO TURF, GRAVEL, TO BE REMOVED FROM STREETS WITHOUT PERMISSION	-	-
112	DRAWING OR TRAILING TIMBER	-	-
113	ENTRANCES TO CELLARS, COALHOLES, TO BE COVERED AND SECURED	-	-
114	CELLARS OR OPENINGS BENEATH THE SURFACE OF FOOTWAYS PROHIBITED	-	-
115	WELLS TO BE COVERED OVER	-	-
116	HOLES MADE FOR VAULTS TO BE ENCLOSED	-	-
117	STALLS NOT TO BE SET ON FOOT OR CARRIAGE WAYS	-	-
119	RAIN NOT TO BE ALLOWED FROM EAVES OF HOUSES ON FOOTWAYS	-	-
120	BOARDS TO BE ERECTED, BUT NOT WITHOUT LICENCE	-	-
121	NO ROCK TO BE BLASTED WITHOUT NOTICE	-	-
		7134	7825