THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 85

Police Act Offences

DISCUSSION PAPER

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

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Preface

The Commission has been asked to review the offences created by Parts V, VI and VII of the *Police Act 1892*.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 6 October 1989.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

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Table of Abbreviations

Courts of Petty Sessions Report	Law Reform Commission of Western Australia *Report on Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II 1986)
Home Office Working Paper	(UK) Home Office Working Party on Vagrancy and Street Offences *Working Paper* (1974)
Home Office Report	(UK) Home Office *Report of the Working Party on Vagrancy and Street Offences* (1976)
Nichols	P W Nichols Police *Offences of Western Australia* (1979)
Murray Report	M J Murray *The Criminal Code: A General Review* (1983)
Russell	E Russell *A History of the Law in Western Australia and its Development from 1829 to 1979* (1980)
Stannage	C T Stannage *The People of Perth: A Social History of Western Australia's Capital City* (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 footnote 1 in that chapter.

Part I - General
Chapter 1
INTRODUCTION

1. TERMS OF REFERENCE

1.1 In accordance with its statutory function to make proposals for the review of areas of law with a view to reform,[1] the Commission suggested to the Attorney General that certain of the offences in the *Police Act 1892* were in need of modernisation.[2]

1.2 As a result, 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."

1.3 The Commission has also examined the ambit of the powers of arrest, entry, search and the like conferred by these Parts of the *Police Act*. These powers are closely related to the offences under review, and powers of entry and search have been referred to the Commission as part of its reference on Privacy.[3]

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1 *Law Reform Commission Act 1972* s 11(1).

2 For publicity concerning *Police Act* issues at the time of the giving of the reference, see eg "Judicial blast for use of 1824 law" *The West Australian*, 3 May 1986, dealing with *Delmege v Smith* (unreported) Supreme Court of Western Australia, 2 May 1986, Appeal No 339 of 1985 (protester against visit of United States Navy ships convicted under s 43 of being a person suspected of being about to commit an offence and failing to give a satisfactory account of himself, but conviction quashed on appeal); "Evil-designs stand upheld" *The West Australian*, 23 July 1986, 14, dealing with *Sullivan v Johnson* (unreported) Supreme Court of Western Australia, 21 July 1986, Appeal No 307 of 1986 (court upheld the defendant's conviction under s 43 for having "evil designs" in looking down the front of a woman's dress). These cases are discussed in paras 4.29-4.36 below.

3 See paras 3.31-3.32 below.

1.4 The Commission now issues this discussion paper and invites public comment. It emphasises that, where it has expressed a view, those views are provisional views only and are subject to modification in the light of comments received.

2. THE POLICE ACT 1892

1.5 The *Police Act 1892* serves the twin purposes of regulating the police force and providing for a large number of simple offences.[4] 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 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.

1.6 The next three Parts of the Act are those which form the subject of the Commission's reference. 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.

1.7 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, 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.[5]

1.8 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.[6] The offences set out in this Part deal with public nuisances of various kinds.

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4 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.

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

6 See s 95.

1.9 Part VIII contains provisions ancillary to the offence provisions set out in Parts V, VI and VII.

1.10 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,[7] but some offences can be committed by members of the public.[8] One particular provision, section 20, which makes it an offence to disturb, hinder or resist a member of the police force in the execution of his[9] duty, is closely related to the police powers and offences in Part V, and the Commission, with the approval of the Attorney General,[10] has treated this section as falling within its terms of reference.

3. THE COMMISSION'S WORK ON THE REFERENCE

1.11 Commission members and officers have held discussions on the Act with representatives of the Western Australia Police. Particular aspects have been discussed with a representative of the Department of Local Government. Commission representatives have also discussed the equivalent legislation in New South Wales, Victoria, the ACT and South Australia with police representatives and Attorney-General's Departments in those jurisdictions.

1.12 The Commission has also had the benefit of assistance from various other persons and organisations, both in Western Australia and elsewhere.[11]

1.13 Michael Buss, a barrister in private practice in Western Australia, assisted the Commission in the research and drafting of a number of the chapters of this discussion paper. The Commission wishes to record its thanks for his valuable contribution to this project.

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7 S 13.

8 Namely s 16 (personating or attempting to bribe members of the Police Force); s 16A (unauthorized use of the word "detective"); s 18 (harbouring constables during hours of duty); s 20 (interference with police).

9 Where sections of the *Police Act* or other non-gender-neutral statutes are indirectly quoted or summarised in this paper, the male pronouns and adjectives are reproduced without alteration.

10 Letter from Attorney General to Commission dated 9 September 1986.

11 Notably the Australian Bureau of Statistics (Western Australia Office), which provided statistical information on charges brought under particular sections of the *Police Act* in the Perth and East Perth Courts of Petty Sessions, reproduced in Appendix I; and the English Law Commission, which is working on a revision of the 19th century statutory codes of summary offences in England and Wales, which are the source of many of the provisions of the *Police Act 1892*: English Law Commission, Annual Report 1985-1986 para 2.67.

Chapter 2
POLICE LEGISLATION IN WESTERN AUSTRALIA

1. ANTECEDENTS

2.1 Few of the provisions of the *Police Act* have been developed in the context of contemporary life and modern conditions. Most are provisions of considerable antiquity and can ultimately be traced to provisions in United Kingdom legislation of the early 19th century, or of New South Wales statutes of the same period. The word "police" as used in the names of these early Acts does not refer to the police force, but is used in an older sense - a usage derived from the Greek "polis", meaning town or city.[1]

2.2 The major United Kingdom sources of the *Police Act* are the *Vagrancy Act 1824*, the *Metropolitan Police Act 1829* (the Act which set up Sir Robert Peel's police force in the London metropolis), the *Metropolitan Police Act 1839*,[2] and the *Metropolitan Police Courts Act 1839*.[3] Particular provisions were drawn from other 19th century United Kingdom statutes.[4]

2.3 The earliest Australian statute, the New South Wales *Police Act 1833*,[5] 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 "removing and preventing Nuisances and Obstructions".[6] 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.[7] 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*.

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1 Nichols xxi.

2 The *Metropolitan Police Acts 1829* and *1839* 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.

3 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.

4 Eg *Gaming Act 1845*; *Betting Act 1853*; *Gaming Houses Act 1854*; *Offences against the Person Act 1861*; *Malicious Damage Act 1861*.

5 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.

6 Many of these provisions were drawn from an Act of the Cape Colony and the New York Corporation Laws: see the notes appended to particular sections of the manuscript draft bill in the New South Wales Parliamentary Archives.

7 D Chappell and P R Wilson *The Police and the Public in Australia and New Zealand* (1969) 9.

2.4 In many instances, the ideas expressed in this legislation were not new. For example, sections 65 to 67 of the *Police Act 1892* are generally based on sections 3 to 5 of the United Kingdom *Vagrancy Act 1824*, which 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.[8] This Act replaced legislation dating back to the 16th century. By 1824 the *Vagrancy Act* had become a general catalogue of petty crimes,[9] but the original purpose of the legislation was to deal with the problems of the poorer classes.[10] Offences such as begging,[11] being found in a place, stable or outhouse for an unlawful purpose,[12] wandering about without having any visible lawful means of support,[13] leaving a spouse without lawful means of support or failing to maintain children,[14] all still found in the *Police Act*, thus seek to deal with English social problems of the 16th to 19th centuries.

2. EARLY LEGISLATION IN WESTERN AUSTRALIA

2.5 Until 1849 there was no legislation on the police in Western Australia. The justices of the peace and constables appointed by Captain Stirling relied on their common law powers.[15] In 1849, some enlargement and formal definition of police powers was thought necessary because of the imminent beginning of transportation of convicts to Western Australia,[16] and so the first Police Ordinance was enacted. The provisions were drawn mainly from the New South Wales *Police Act 1833*, the South Australian *Police Act 1844* (which had been based on the New South Wales Act) and the United Kingdom *Vagrancy Act 1824*. Enid Russell comments:

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8 This classification dates back to the (UK) Act 17 Geo II c 5 (1744). The references in the *Police Act* to idle and disorderly persons, rogues and vagabonds and incorrigible rogues were deleted by the *Police Act Amendment Act (No 2) 1975* ss 31-33, but the individual offences were otherwise unaffected.

9 See Home Office Working Paper Appendix A para 13.

10 On the history of the Vagrancy Acts, see 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.

11 S 65(3).

12 S 66(8).

13 S 66(9).

14 S 66(10).

15 Russell 186. The *Vagrancy Act 1824* (UK) was never received in New South Wales, being unsuitable for local conditions: *Mitchell v Scales* (1907) 5 CLR 405, and so, it appears, was likewise never received in Western Australia.

16 Russell 187.

> "The 1849 Police Ordinance . . . itself was a patchwork of various statutes . . . . The whole was added together in a confused jumble. Although the powers of arrest without warrant upon reasonable suspicion of an offence were a handy and probably necessary addition to the powers of the police, most of the substantive offences were inappropriate to the powers of the police, and to the conditions of the Colony, and were greeted with incredulity in the press. A provision forbidding the flying of kites within a townsite was particularly noticed."[17]

Even though seen as inappropriate then, these provisions were enacted, and are still on the statute book.

2.6 The *Police Ordinance 1849* was replaced by the *Police Ordinance 1861*. One reason which made new legislation desirable was the formation of a unified police force in 1853. The 1861 Ordinance was a completely fresh draft, but even more obviously based on other Acts.[18] Again, Enid Russell comments on the fact that the new Ordinance was not suited to local conditions:

> "[I]t is difficult to find any offences in the Ordinance that were designed to deal with local conditions. In fact, the 1861 Ordinance was, like its predecessor, a medley of Imperial enactments. The bulk of the Ordinance remains in a barely amended form in the present statute."[19]

3. THE 1892 ACT

2.7 In 1892 the 1861 Ordinance and its amendments were repealed and the present *Police Act* was enacted. It was stated in Parliament that the primary object was to consolidate the existing legislation,[20] but opportunity was taken to introduce a number of new provisions, principally those on betting and gaming, which had not previously appeared in Western Australian statute law.

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17 Id 186.

18 The draftsman worked successively through the provisions of the *Police Act 1833* (NSW), the *Vagrancy Act 1824* (UK), the *Metropolitan Police Courts Act 1839* (UK) and the *Metropolitan Police Act 1839* (UK). Most of the provisions in the 1849 Ordinance and its amendments were included, but not all. For example, there is no equivalent in the 1861 Ordinance of the following provisions in the 1849 Ordinance: s 17 (discharging firearms or fireworks); s 25 (cleansing butchers' shambles and slaughter houses); s 27 (tethering or depasturing livestock in streets); s 35 (arresting an offender whose name and residence is not known). The last three provisions were revived in the 1892 Act.

19 Russell 187.

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

2.8 Though the primary object may have been consolidation, the draftsman[21] did not build upon the 1861 Ordinance. Instead he took as his model the South Australian *Police Act 1869*. This Act[22] was firmly based on the United Kingdom and New South Wales sources, like all other 19th century Australian Police Acts. 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, and in particular the division between offences in force throughout the State and offences in force only in particular areas, are inherited from the South Australian statute.[23] The draftsman added the betting and gaming provisions and some of the provisions of the 1861 Ordinance not found in the South Australian Act which he wished to preserve.[24]

4. CHANGES TO THE ACT SINCE 1892

2.9 Though there have been many amendments to the *Police Act* since 1892,[25] its basic organisation remains unaltered, and the drafting style remains very much set in the 19th century.

2.10 Various provisions have been added to the Act over the years. The 1893 amendments relating to betting[26] and the 1902 amendments dealing with prostitution[27] were based on United Kingdom legislation, but the 1902 provisions on gold stealing,[28] extended to pearl stealing in 1907,[29] 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.[30] Provisions introduced

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

22 The *Police Act 1869* (SA) replaced the *Police Act 1863* (SA), which had itself replaced the original *Police Act 1844* (SA). On the early South Australian legislation see R Clyne *Colonial Blue: A History of the South Australian Police Force 1836-1916* (1987) 27-31, 82, 148.

23 It should be noted, however, that 41 Vic No 18 (1877) had amended s 26 of the 1861 Ordinance (bathing prohibited within certain limits) so as to provide that Municipal Councils could make by-laws as to the times at which and the conditions under which bathing would be permitted, and that on the making of such by-laws s 26 would cease to regulate bathing within that area.

24 Thus, some of the provisions of the 1861 Ordinance were excluded, eg s 52 (name and residence of owner to be painted on cart), s 53 (receiving boat's cargo from boatmen), s 55 (piercing casks).

25 65 statutes passed between 1893 and 1988 make amendments to the *Police Act* - 50 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. The *Acts Amendment (Events on Roads) Act 1988* is not yet in force.

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

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

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

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

30 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 2.11 below.

in more recent years include passing valueless cheques,[31] trespass[32] and provisions regulating public meetings.[33]

2.11 Other provisions have been removed. Provisions as to assault[34] and dog stealing[35] were transferred to the Criminal Code upon its enactment in 1902, and some of the procedural provisions were transferred to the new *Justices Act* in the same year. In subsequent years various provisions relating to animals,[36] the regulation of public meetings,[37] drugs[38] and gaming[39] have been removed from the *Police Act* and replaced by more specific legislation.

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

5. COMPARISON WITH THE LAW ELSEWHERE

2.13 All other Australian jurisdictions, at one time or another, have enacted legislation similar to the *Police Act*.[40] Whereas in Western Australia the old legislation has been retained, in most other jurisdictions it has been redrafted and modernised. A number of different facets of the reform process can be identified.

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

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

33 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 2.11 below.

34 Ss 55 and 56.

35 S 62.

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

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

38 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.

39 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*.

40 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 *Police and Police Offences Ordinance 1923* (NT), and this in turn was used as the basis of the *Police Ordinance 1927* (ACT) and *Police Offences Ordinance 1930* (ACT).
For generally similar legislation elsewhere, see *Police Offences Act 1884* (NZ), replaced in 1908 and 1927; *Vagrancy Act 1912* (Papua), *Police Offences Act 1912; Police Offences Act 1925* (New Guinea).

2.14 First, where the legislative provisions were contained in more than one statute, they were brought together into a single statute. The Queensland *Vagrants, Gaming, and Other Offences Act 1931* and the New South Wales *Summary Offences Act 1970* are the main examples.

2.15 Secondly, the provisions of the statute were redrafted in a more modern form and rearranged in a more coherent order. In addition to the Queensland and New South Wales statutes mentioned in the previous paragraph, this process can be seen in operation in the Tasmanian *Police Act 1905* and *Police Offences Act 1935* and the South Australian *Police Offences Act 1953.*

2.16 Thirdly, where police administration provisions and offence provisions had been included in the same legislation - that is, in the South Australian legislation and the Northern Territory legislation based on it - the police administration provisions were removed to a separate Act.[41]

2.17 Fourthly, in these and other instances, the term "Police Act" was generally abandoned in favour of the more suitable and more accurate "Summary Offences Act".[42]

2.18 Most important of all, in several jurisdictions the substantive provisions of the legislation have been reformed by repealing out-of-date offences and modernising others. The two jurisdictions which have enacted the most comprehensive reforms are New South Wales and the ACT.

2.19 In New South Wales, legislation passed in 1979 repealed the *Summary Offences Act 1970*[43] and replaced it with 16 "Cognate Acts". 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

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41 *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.

42 *Summary Offences Act 1970* (NSW)*; Summary Offences Act 1981* (NZ)*; Summary Offences Act 1977* (PNG). The *Police and Police Offences Ordinance 1923* (NT) was renamed the *Summary Offences Act* by the *Summary Offences Act 1978* (enacted 1979), and the *Police Offences Act 1953* (SA) was renamed the *Summary Offences Act* by the *Police Offences Act Amendment Act 1985*. The new Queensland legislation enacted in 1931 was named the *Vagrants, Gaming, and Other Offences Act*.

43 See para 2.14 above.

force.[44] 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 related to prostitution, were repealed. It may be that these reforms went too far: in 1983 some of the repealed offences were reintroduced on a more limited basis,[45] and the *Summary Offences Act 1988*, which continued this process, also increased penalties and reintroduced the option of a prison sentence for a number of offences. It also brought some of the individual statutes[46] 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.

2.20 The reforms in the ACT 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*, except for certain provisions which were transferred to the *Crimes Act 1900*[47] and a new *Unlawful Games Ordinance 1984*. This left a *Police Offences Ordinance* containing only six sections prescribing offences, nearly all dealing with prostitution.

2.21 Two other jurisdictions in which there have been significant reforms are New Zealand and South Australia. In both jurisdictions the legislation,[48] in substance, drafting and arrangement, is greatly superior to the *Police Act 1892*. 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 the *Police Offences Act 1958* was divided up into a number of individual enactments,[49] without much substantial reform - the need for reform has recently 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*.

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44 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.

45 *Offence in Public Places (Amendment) Act 1983* (NSW).

46 The *Offences in Public Places Act 1979*, the *Public Assemblies Act 1979* and the *Prostitution Act 1979* were all repealed.

47 A New South Wales statute applying in the ACT.

48 *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.

49 *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.

2.22 In contrast with most other jurisdictions, in Western Australia the *Police Act* in essence remains much as it was when originally drafted in 1892. At the time of the enactment of the *Criminal Code* a proposal to reform the *Police Act* was under consideration,[50] and 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.[51] In 1952 there was a move to redraft the Act and divide it into separate Acts dealing with police administration and offences.[52] In 1964 it was announced that the Government was undertaking a review of all statutes, including the *Police Act*.[53] On each occasion, nothing resulted.

6. THE CASE FOR CHANGE

2.23 A comprehensive review of the *Police Act* is clearly needed, in order to -

* clear away out of date offences and provisions which duplicate other legislation, so considerably reducing the length of the Act;

* revise offences which intrude unnecessarily upon civil liberties, or alternatively need to be extended;

* set out the major simple offences in contemporary language and in a style which makes them easier to understand.

In addition, reform along these lines will bring Western Australia up to date with developments in other Australian jurisdictions.[54]

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50 See Western Australian *Parliamentary Debates* (1902) vol 20, 2768.

51 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.

52 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.

53 See Western Australian *Parliamentary Debates* (1964) vol 168, 1496.

54 This paper will emphasise developments in South Australia, since the *Police Act 1892* was based on the *Police Act 1869* (SA), and the ACT and the Northern Territory, whose legislation was also based on the South Australian model.

2.24 The offences which remain can be separated from the police administration provisions and the other provisions found in the Act, and the Act can be given a more appropriate title.[55]

[55] Western Australia is the only jurisdiction in which police administration provisions are contained in the same statute as that setting out summary offences; and is in a minority in retaining the name "Police Act". Tasmania retains the name *Police Offences Act*. The ACT retains the name *Police Offences Ordinance*, although it now contains very few provisions (see para 2.20 above). New South Wales retains some provisions of its *Police Offences Act 1901*, but this is now only one of a number of statutes dealing with the area covered by the Western Australian *Police Act 1892* (see para 2.19 above).

Chapter 3
THE COMMISSION'S APPROACH

1. INTRODUCTION

3.1 In reviewing the offences in Parts V, VI and VII of the *Police Act*, the Commission has developed a number of general criteria which have assisted it to determine whether offences should be abolished, and what changes should be made to those that remain. These criteria are reviewed in section 2 of this chapter. Section 3 deals with a number of general issues relating to the offences in Parts V, VI and VII considered as a whole, and the relationship of these offences with the *Criminal Code*.

3.2 Parts V, VI and VII also contain a number of sections dealing with police powers of arrest, entry, search and seizure, and other matters such as compensation and restitution. Section 4 of this chapter discusses the Commission's general approach to these provisions.

2. THE INDIVIDUAL OFFENCES

(a) Whether offences should be abolished

(i) Duplication

3.3 Where an offence in the *Police Act* is broadly similar to some other offence, the law can be simplified by eliminating one of them. There is much duplication of offences within the *Police Act* itself.[1] This problem results from the style in which the Act is drafted and the fact that provisions have been drawn from different sources. Some provisions set out offences with great particularity whereas others are pitched at a more general level. Where there is duplication within the Act, duplicate provisions should be eliminated.

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[1] Eg ss 20, 41(1), 41(7), 66(7), 67(3) and 90 (see paras 5.1-5.12 below); 54, 59 and 44 (see paras 6.1-6.19 below); 66(8), 66(13), 82A and 82B (see paras 8.1-8.22 below).

3.4 In many cases, offences in the *Police Act* are duplicated by other, more recent legislation.[2] Very often, *Police Act* offences were not repealed even though overtaken by newer provisions. In such cases, the *Police Act* provision can be eliminated without affecting the scope of the criminal law.

3.5 Where there is duplication between a *Police Act* provision and an indictable offence in the Code, a different problem is raised. This is dealt with below.[3]

(ii) Relevance to contemporary society

3.6 Another factor by which the need for the offences in the *Police Act* may be assessed is their relevance to modern conditions in Western Australia. Some offences, judged from this standpoint, are many years out of date.[4]

(iii) Frequency of usage

3.7 It is useful to know whether offences are actually used - although the fact that charges are not brought under a particular section is not by itself proof that the offence is not needed, nor does the fact that a particular section is frequently used preclude reform. Statistics on the use made of particular sections in the *Police Act* are not easy to obtain - for example, neither the criminal statistics published by the Australian Bureau of Statistics nor the Annual Reports of the Western Australia Police Service contain detailed information of this kind.[5]

3.8 The Australian Bureau of Statistics (Western Australia) has however provided the Commission with details of the 7,134 charges under particular sections of the *Police Act* in Perth and East Perth Courts of Petty Sessions between 1 July 1984 and 30 June 1985.[6] These two courts together dealt with 75,576 of the 158,804 charges in Courts of Petty Sessions in the State as a whole during that year, that is, a little under 50 per cent. While it is likely that there will be

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2 Eg ss 57 (see paras 15.9-15.12 below); 65(5) (see paras 12.18-12.21 below); 66(5) (see paras 6.24-6.26 below); 83 (see paras 15.35-15.38 below); Part VII (see ch 16 below).

3 Paras 3.26-3.29.

4 Eg ss 61 (see paras 15.13-15.21 below); 65(3) (see paras 15.24-15.28 below); 65(7) and (9) (see paras 4.15-4.19 below); 66(2a) and (2b) (see paras 14.12-14.15 below); 66(3) (see paras 14.16-14.23 below); Part VII (see ch 16 below).

5 However, the Police Annual Reports for the years 1970-71 to 1982 do set out statistics dealing with court proceedings in seven specified country police districts, which distinguish between cases brought under the *Police Act* and various other Acts.

6 See Appendix I. As a result of changes to the computer program used to record information in these courts, such statistics are not available for any years subsequent to 1984-1985.

some variations in smaller population centres and rural areas,[7] these statistics are nonetheless a useful guide to the sections of the Act under which charges are brought.

(iv) Civil liberties implications

3.9 Parts V, VI and VII of the *Police Act* contain a number of offences that affect the liberties of the individual, for example freedom of assembly and association,[8] freedom of expression,[9] and the right to silence when charged with a criminal offence.[10] Important civil liberties issues are also raised by the powers of arrest, entry, search and seizure found in these Parts of the Act.[11] Offences and other provisions in the *Police Act* should therefore be judged according to whether they intrude unduly on civil liberties. The *Police Act* offences must attempt to strike a fair balance between community needs and civil liberties. Sometimes community needs can be fulfilled by giving the police power to take particular action without creating a criminal offence.[12]

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

3.10 In considering the individual offences, the Commission in many cases suggests changes of substance. Apart from such changes, there are important general issues which need to be addressed when considering the offences that are retained in the Act.

(i) The definition of offences

3.11 Those offences that are retained should be redrafted in the current style used by Parliamentary Counsel.[13] Particular attention should be given to ensuring consistency in the style used in drafting offences.

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

8 Ss 52, 54A (see ch 7 below), ss 67(4) and 82B(3) (see paras 8.23-8.28 below).

9 Ss 54 and 59 (see paras 6.1-6.19 below), s 66(5) (see paras 6.24-6.26 below).

10 S 71 (see paras 13.6-13.20 below, especially para 13.19).

11 See chs 17-18 below, especially paras 17.1-17.7 and 18.1-18.2.

12 For example, the Government has announced its intention to repeal s 53 (drunkenness), and enact alternative measures for dealing with this problem: see para 10.17 below.

13 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 9 above.

3.12 A special problem involved in the drafting of the offences in the *Police Act* is that the expression of the mental elements involved in the offences is unsatisfactory. Very often, no mental element is stated. Where a mental element is stated, the words used are not consistent as between different offences: words such as "knowingly", "wilfully" and "wantonly" are used indiscriminately.[14] Mental elements should be clearly and consistently expressed.

(ii) Penalties

3.13 The point made in the previous paragraph about redrafting the offences in the accepted current style applies also to the expression of the penalty prescribed for the offence. 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. The penalties should be reviewed when the Act is redrafted.[15]

(iii) Other drafting matters

3.14 There are other matters which should be given attention when the Act is drafted. Definitions[16] and terminology[17] should be standardised, and anachronisms such as references to "hard labour"[18] should be removed. The Act should be rearranged so that all the provisions on a particular subject are brought together.[19]

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14 Eg "wilfully": ss 41(1), 41(7), 47, 66(2a), 66(11); "wantonly": s 59; "knowingly": ss 63, 76F, 76G, 84(2); "wilfully and knowingly": s 84(1).

15 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*.

16 Eg there are different definitions of premises in ss 76I and 82B(4).

17 Eg (1) References to members of the police force: 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. (2) 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.

18 For similar recommendations in relation to the *Criminal Code* and the *Justices Act 1902*, see Murray Report 23; Courts of Petty Sessions Report para 7.5.

19 Eg the provisions on prostitution are distributed over a variety of sections - ss 59, 65(8), 76F, 76G.

3. PARTS V, VI AND VII CONSIDERED AS A WHOLE

(a) A *Summary Offences Act*

3.15 In the Commission's view, the offences which it proposes for retention, and such provisions as to police powers as are not absorbed into the *Criminal Code*, should be transferred from the *Police Act* to a separate Summary Offences Act - a proposal first made in 1906[20] and one which would bring Western Australia into line with most other Australian jurisdictions and New Zealand.[21] 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".[22] The *Police Act* would then deal only with matters concerning the administration of the police force.[23]

3.16 This paper will continue to refer to the *Police Act* when making proposals for the reform of particular provisions, but these references are to be understood as references to offences to be included in the *Summary Offences Act* if the proposal made in the previous paragraph is accepted.

(b) Relationship between the Police Act and the Criminal Code

(i) Generally

3.17 The offences in the *Police Act* have to be seen against the background of the *Criminal Code*. In 1892 the *Police Act*, its administration provisions apart, was viewed as a code of simple offences and the procedure for dealing with them. When the Code was enacted in 1902 it was intended to be a codification of all indictable offences, although it contained some simple offences. Today, neither Act is a complete code any longer. Simple offences can be found in many statutes, and a number of offences have been transferred from the *Police Act* to Acts

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20 See para 2.22 above.

21 See paras 2.16-2.17 above.

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

23 Ie Parts I-IV of the present Act, save for s 20, which is considered at paras 5.1-5.12 below. Some of the provisions of Parts V, VI and VII which do not create offences, such as s 50A (power to prosecute for breach of by-laws) and s 76 (unclaimed goods in possession of police), would be more appropriately retained in the *Police Act*.

dealing with specific areas.[24] In the same way, many indictable offences can now be found in legislation other than the Code.[25]

3.18 The Murray Report adopts the general principle that the Code should be limited to indictable offences of general application.[26] Consistently with this aim, it recommends that most of the simple offences in the Code should be repealed or transferred to other legislation - some to the *Police Act*. In the Commission's view, the proposed *Summary Offences Act* should similarly set out all simple offences of general application.

(ii) Common principles

3.19 The enactment of a *Summary Offences Act* would give express recognition to the important relationship between this Act and the Code. Wherever appropriate, common principles should apply to Code offences and the offences set out in this Act. This already happens in many areas. For example, the general principles of criminal responsibility set out in Chapter V of the Code, and other Code provisions such as those dealing with arrest, apply not just to Code offences but to all offences. The *Summary Offences Act* should endorse this approach. Thus, for example, definitions used should be consistent wherever possible.

3.20 At present, the *Police Act* often departs from the principles of the *Criminal Code*. It is possible to discern an underlying assumption that these principles need not apply in the *Police Act*. Some important general examples of this are dealt with in the following paragraphs.

* *Status criminality*

3.21 A number of the offence provisions in the *Police Act* single out people who fall into particular categories. For example, police have powers to remove any common prostitute, reputed thief, or other loose, idle or disorderly person from theatres and similar premises, and it is an offence for such a person to remain after being ordered to leave.[27] Such ideas can be traced back to the older notions concerning the purposes of the Vagrancy Acts.[28]

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24 See para 2.11 above.
25 Eg *Companies (Western Australia) Code*; *Misuse of Drugs Act 1981*.
26 Murray Report ii.
27 S 42. For other examples, see s 65(1), (7), (8) and (9).
28 See para 2.4 above.

3.22 In the Commission's view these offences are unsatisfactory because they depend in part on the category a person falls into, rather than on that person's conduct. A person's status should be irrelevant for the purposes of the criminal law unless it is linked with wrongful conduct. In line with the principles of the *Criminal Code*, the proposed *Summary Offences Act* should create criminal offences based on specified kinds of conduct which are thought deserving of punishment, not because a person is categorised in a certain way.

* *Mental elements*

3.23 In legislation such as the *Police Act* the definitions of offences do not generally state a mental element. This does not necessarily mean, however, that they are to be regarded as offences of strict liability. The provisions governing criminal responsibility set out in Chapter V of the *Criminal Code* apply to all persons charged with any offence against statute law.[29] They are available even where the particular offence makes no reference to a mental element, except where expressly or impliedly excluded by a statute passed after the coming into operation of the *Criminal Code*.[30] So that the scope of offences is clear, the Commission suggests that it is desirable for mental elements to be expressly stated when the Act is redrafted.

* *Burden of proof*

3.24 The Code adopts the general principle of common law that it is for the Crown to prove all the elements of the offence beyond reasonable doubt.[31] It is only in relation to specific defences, 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, and these cases are comparatively rare.[32] In the *Police Act*, on the other hand, it is a fairly common drafting device to place the burden of proving a particular matter on the defendant - not only where it would be within the defendant's knowledge and easy to prove, but

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29 S 36.

30 See J M Herlihy and R G Kenny *An Introduction to Criminal Law in Queensland and Western Australia* (2nd ed 1984) para 809, and ch 8 generally.

31 A general principle expressed in *Woolmington v DPP* [1935] AC 462; in Australia see *He Kaw Teh v R* (1985) 157 CLR 523.

32 See J M Herlihy and R G Kenny *An Introduction to Criminal Law in Queensland and Western Australia* (2nd ed 1984) para 621, and ch 6 generally.

in all kinds of cases.[33] The defendant is thus denied the right to which defendants are entitled under general principles of criminal law.[34]

3.25 In the Commission's view the *Summary Offences Ac*t should espouse the general principles found in the *Criminal Code*, and the burden of proof should not be reversed unless there are special reasons for so doing.[35]

(iii) Overlap between Police Act and Code provisions

3.26 A special problem arises where there is an overlap between Code offences and *Police Act* offences which deal with the same subject matter.[36]

3.27 The practical effect of overlapping offences of this kind is that the police are given a discretion as to whether to prosecute for an indictable or a simple offence. They may well see it as more economical of time and effort to prosecute for the simple offence, even if the penalty is lower (as is likely to be the case). If the police take this course of action, however, the defendant is being denied the right to a trial by jury which the law gives to a person charged with an indictable offence.

3.28 The situation outlined in the previous paragraph should be contrasted with provisions in the Code under which a defendant charged with an indictable offence may be tried summarily if the court considers that the charge can adequately be dealt with summarily and the defendant so

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33 Eg s 65(1) - in *Zanetti v Hill* (1962) 108 CLR 433 at 449, Menzies J said of this provision: "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 . . .". For other examples see ss 64A, 65(5), 66(4), 69, 76A, 76G(2).

34 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.

35 The same view as that adopted by the Commission is authoritatively stated by Glanville Williams "The Logic of "Exceptions" " [1988] *Camb LJ* 261.

36 The major instances are: damage to property (s 80 and *Criminal Code* ss 453 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).

elects. At present such provisions are found scattered throughout the Code, limited to particular offences, but the Murray Report recommended[37] that in place of such provisions there should be a general provision allowing a defendant to be tried summarily in appropriate circumstances. As a result of the *Criminal Law Amendment Act 1988*, particular offences in the Code now state one penalty for conviction on indictment and another for summary conviction. In such cases, where a person is charged in a Court of Petty Sessions and the court, having regard to the nature and particulars of the offence, the circumstances relating to the charge and the antecedents of the person charged, considers that the charge can adequately be dealt with summarily, the charge may be dealt with summarily at the election of the person charged.[38]

3.29 In the Commission's view, if it is 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. The continued existence of overlap between Code and *Police Act* offences, with the decision as to which to use being left in the discretion of the police, is inconsistent with this principle. The position should be rationalised by eliminating those *Police Act* offences which duplicate Code offences, instead amending the Code offence to allow for the alternative of summary prosecution.

4. POWERS AND OTHER PROVISIONS

3.30 The Commission's terms of reference require it to review the offences created by Parts V, VI and VII. The sections in those three Parts of the Act contain not only offences but also a variety of other provisions: police powers of arrest, entry, search and seizure, and provisions dealing with compensation, restitution, forfeiture and various procedural matters. Though in some cases these provisions are set out in separate sections which do not contain any offence, it is common for offences, powers and procedural and other provisions to be woven together in a single section. Section 41(1)[39] is a good example. These provisions, like the offence provisions, suffer from defects both of substance and of drafting.

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37 4-6.

38 *Criminal Code* s 5, as inserted by the *Criminal Law Amendment Act 1988*.

39 Quoted in Appendix II.

(a) Powers of arrest, entry, search and seizure

3.31 Powers of entry and search have been referred to the Commission as part of its reference on Privacy,[40] the terms of reference of which require the Commission:

> "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, with particular reference to but not confined to the following matters:
>
> . . .
>
> (c) powers of entry on premises or search of persons or premises by police and other officials . . ."[41]

3.32 The Commission has therefore chosen to make some comments on powers of arrest, entry, search and seizure.[42] Its comments are limited to the *Police Act* provisions and do not purport to be a comprehensive coverage of those topics as a whole.

(b) Other provisions

3.33 Other provisions in Parts V, VI and VII deal with compensation,[43] restitution,[44] forfeiture,[45] the recovery of stolen goods[46] and various procedural matters.[47] In view of its terms of reference, the Commission has not given extended consideration to these provisions. However, it would seem that the provisions on compensation and restitution are now unnecessary in the light of the general provisions for compensation and restitution inserted in the *Criminal Code* in 1985,[48] and that sections 90B and 90C (which apply generally to all the forfeiture provisions in Part VI) are unnecessarily elaborate now most of the forfeiture

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40 Project No 65.
41 The Commission has issued a Working Paper and Survey on Privacy and Statutory Powers of Intrusion.
42 See chs 17-18 below.
43 Ss 20, 80(3), 81, 82(1), 82(2), 82(3), 82A(1), 90A(3), 90A(4), 105, 106, 107, 110, 112, 114, 120.
44 Ss 76E, 82(3).
45 Ss 65, 66, 76E, 83.
46 Ss 72-75.
47 Eg ss 67, 76.
48 Ss 717-719, inserted by the *Criminal Law Amendment Act 1985*, adopting recommendations in the Murray Report 496-505.

provisions in that Part have been transferred to the *Gaming Commission Act 1987*.[49] Most of the procedural provisions are probably unnecessary.[50] The Commission suggests that the compensation and restitution provisions should be repealed and that the other provisions referred to in this paragraph should be reviewed when the Act is redrafted.

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49 Ss 90B and 90C were added to the *Police Act* when the Gaming Division of Part VI was redrafted by the *Acts Amendment (Betting and Gaming) Act 1982*. The purpose of these sections was to provide a comprehensive procedure for forfeiture or seizure under Part VI. The procedure includes an offence of failure to comply with an embargo notice: s 90B(3). When the gaming provisions were repealed by the *Acts Amendment and Repeal (Gaming) Act 1987*, ss 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." (s 32(1))

There is a similar provision in s 155(5) of the *Liquor Licensing Act 1988*. It may perhaps be useful as a drafting device to be able to refer in other legislation to ss 90B and 90C, but there are now very few forfeiture provisions in Part VI itself.

50 Ss 72-75 were based on the *Metropolitan Police Courts Act 1839* (UK) (now repealed). Ss 72 and 73 are now largely unnecessary in the light of ss 717 and 718 of the *Criminal Code*, and the other sections are probably obsolete. South Australia, the Northern Territory and the ACT adopted the equivalents of ss 72 and 74, but in each of these jurisdictions they have now been repealed.

The proviso in s 67, which provides that offenders under that section can be committed to the nearest gaol to await the next Sessions of the District Court of Western Australia, is an obscure survival from the *Vagrancy Act 1824* (UK) s 5, made more obscure by the omission of the reference in the original to the offender having been convicted. The Murray Report 101 recommends that the proviso be repealed.

S 76, dealing with the disposition of unclaimed goods in the possession of the police, is a useful and necessary provision, but it belongs with the police administration provisions in the early part of the *Police Act*.

The procedural provisions in Part VIII have also been largely superseded by provisions of the *Criminal Code*, the *Justices Act 1902* and other legislation such as the *Fines and Penalties Appropriation Act 1909*. Exceptions are s 124, which provides a penalty for every offence against the *Police Act* for which no special penalty is appointed (currently ss 43(1), 47 and 84C) and s 137, which provides that justices are not bound to convict if the offence proved is in their opinion of so trivial a nature as not to merit punishment.

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 he or she is about to commit, or is likely to commit, some other offence.

4.2 The offences dealt with in this chapter[1] have a number of common elements. In many cases they single out persons having no visible means of support, or other persons who fall into particular classes. Several of these offences require the defendant to give a good account of himself or herself in order to escape conviction.

4.3 These offences, which can nearly all be traced back to the United Kingdom Vagrancy Acts,[2] are out of step with modern ideas of civil liberties and inappropriate in current social conditions.

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

4.4 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.

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1 For other preventive offences, see ch 12.

2 On the history of the Vagrancy Acts, see para 2.4 above. "There was a strong comment of preventive criminal law in the regulation of vagabondage, a sense that vagrants and bandits were brothers in hardship and might change places": J H Langbein "The Historical Origins of the Sanction of Imprisonment for Serious Crime" (1976) 5 *J Leg Stud* 35, 47. Note also the instructions given to the newly-formed police force in England in 1829: "It should be understood at the outset, that the principal object to be attained is the prevention of crime. To this end every effort of the police is to be directed. The security of person and property, the preservation of public tranquillity and all the other objects of a police establishment, will thus be better effected than by the detection and punishment of the offender after he has committed a crime": quoted, C Wegg-Prosser *The Police and the Law* (1973) 24.

4.5 The effect of this provision is that persons who do not appear to have sufficient means of support can be made to furnish details of their means of support. If they fail to do so, they commit an offence.

4.6 It might at first sight be thought that this provision makes it a crime to be poor.[3] The vagrancy laws were concerned with keeping the number of people who had to be supported by public funds as low as possible, and a person's means of support was therefore a relevant subject of inquiry.[4] Social conditions in Australia today are very different.[5] The State accepts a responsibility to support those with insufficient means to support themselves, and there does not seem to be any reason why having insufficient means of support should, of itself, be a criminal offence.[6]

4.7 According to the High Court in *Zanetti v Hill*[7] the section is not directed to the punishment of poverty in itself.[8] It is concerned with people whose lawful means of support are insufficient for the way they are living because it assumes that such people are likely to resort to dishonest activities in order to maintain their lifestyle.[9] The offence is thus capable of being used as a device for investigating suspicious persons; but persons should not be liable to prosecution merely on suspicion of involvement in some unspecified wrongdoing. Suspected persons should be charged with the crime they are suspected of committing.

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3 "The Vagrancy Laws have a long and tangled history and have gradually gathered to themselves a miscellaneous collection of odd offences; but in essence they consist in blind, ill-tempered and vindictive hitting out at people who are guilty of the unpardonable offence of being poor": 'Barrister' *Justice in England* (1938).

4 S 65(1) is derived from 18th-century statutory provisions dealing with vagrancy, such as 25 Geo II c 36 (1752), which allowed justices to examine on oath a person taken into custody and charged with being a rogue or vagabond, idle or disorderly person or person suspected of felony, and to commit them to prison if they failed to convince the justices that they had a lawful way of getting their livelihood; and 23 Geo III c 88 (1783), which extended the category of rogues and vagabonds to include persons not giving a good account of themselves: see L Radzinowicz *A History of English Criminal Law and its Administration from 1750* vol 3 (1956) 73-74, 115).
Similar provisions were included in 19th-century Australian *Police Act* s, eg *Vagrancy Act 1835* (NSW) s 2; *Police Offences Act 1865* (Vic) s 35(1); *Police Act 1869* (SA) s 62(1); cf *Police Offences Act 1884* (NZ) s 26.

5 Dixon CJ in *Zanetti v Hill* (1962) 108 CLR 433, 437, discussing s 65(1), comments: ". . . to transfer the application of such provisions from rural England in Tudor times and later, to the very different conditions of city life in Perth and give it a just and respectable operation must involve many difficulties."

6 Very few charges are laid under s 65(1). There were only 4 in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

7 (1962) 108 CLR 433.

8 Id 441 per Kitto J.

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

4.8 A further argument against the existence of the offence in section 65(1) is that 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.[10] The High Court in *Zanetti v Hill* held that all that is necessary is for the prosecution to raise a reasonable or probable presumption that the defendant has no visible lawful means of support.[11]

4.9 In the light of these considerations, in the Commission's view it is undesirable that this offence should remain on the statute book. Most other Australian jurisdictions have abolished it,[12] and Western Australia should do likewise.

3. SLEEPING ROUGH: SECTION 66(9)[13]

4.10 Section 66(9) provides that -

> **"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.

4.11 This is an ancient offence which reflects the original purposes of the vagrancy laws in the United Kingdom.[14] The objections against formulating an offence in these terms were dealt with in relation to section 65(1).[15] The only other Australian jurisdiction which retains this offence is Tasmania.[16] The South Australian provision from which section 66(9) was derived,[17] and the ACT and Northern Territory sections based on it,[18] have been repealed. It appears that charges are not laid under section 66(9).[19]

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10 See the general discussion in paras 3.24-3.25 above.

11 Menzies J at 449 drew attention to this inconsistency. Kitto J at 442 dissented from the majority view, holding that proof beyond reasonable doubt was necessary.

12 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: *Police Offences Act 1935* (Tas) s 5 and Queensland: *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(i).

13 The title used here is that used in Home Office Working Paper (para 13) and Home Office Report (para 6).

14 See para 2.4 above.

15 See paras 4.6-4.7 above.

16 *Police Offences Act 1935* (Tas) s 8(1)(i).

17 *Police Act 1869* (SA) s 63(13).

18 *Police Offences Ordinance 1930* (ACT) s 23(1)(q); Police and Police Offences Ordinance 1923 (NT) s 57(1)(o).

19 There were no charges under this section in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

4.12 In the United Kingdom, the offence still exists, in a modified form.[20] In 1976 an English Working Party Report suggested that the offence should be limited to lodging, in circumstances such as to cause a nuisance, in a public place or, without the consent of the owner or occupier, on private premises or land.[21] In the Working Party's view the nuisance that might be caused by persons sleeping rough made abolition inappropriate. However, there has been no move to adopt this recommendation.

4.13 The recommendation of the Working Party reflects the fact that persons who sleep rough on private property may well cause unease or disturbance to the occupants, whereas those who sleep rough in other places, such as in parks or under bridges, are unlikely to cause disturbance to anyone. There is however no need to retain section 66(9) to deal with this problem, since those who sleep rough on private property can be dealt with by trespass offences.[22]

4.14 The Commission is therefore provisionally of the view that section 66(9) should be repealed.

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

4.15 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."**

4.16 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

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20 The *Vagrancy Act 1935* (UK) amended the offence to provide that there can be no conviction unless it is proved that the defendant -

(a) has on the occasion in question been directed to a reasonably accessible place of shelter where accommodation is provided free of charge, and has failed to apply for or been refused accommodation there; or

(b) is a person who persistently wanders abroad, notwithstanding that a place of shelter is reasonably accessible; or

(c) by or in the course of such lodging causes or appears likely to cause damage to property, infection with vermin or other offensive consequence.

21 Home Office Report paras 6-12. See also Home Office Working Paper paras 13-41.

22 See ch 8.

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.[23] The *Police Act 1892* inherited these provisions. Section 65(2), dealing with being in the company of aboriginal natives, was repealed in 1974[24] but section 65(7) is still in force.

4.17 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 have been convicted of vagrancy. This was apparently inserted in the Act because of the prevalence of razor gangs in Sydney in the 1920's.[25] This provision 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).[26] It was stated in Parliament that other States had found consorting laws to be an effective way of combating crime.[27]

4.18 In practice, it appears that little use is made of these offences.[28] Section 65(7) has been abolished in a number of jurisdictions,[29] and section 65(9) has been either abolished[30] or confined within a much narrower compass by restricting it to consorting with known criminals.[31]

4.19 It is undesirable in principle that persons should be condemned by the company they keep. Merely associating with particular people should not be criminal. Moreover, it is undesirable to categorise people according to their status.[32] In some cases these provisions refer to persons who are known to be in a particular category, but in other cases consorting with

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23 *Vagrancy Act 1835* (NSW) s 2.

24 By the *Police Act Amendment Act 1974* s 3.

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

26 By the *Police Act Amendment Act 1955* s 2.

27 Western Australian *Parliamentary Debates* (1955) vol 141, 328.

28 There were no charges for either offence in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

29 ACT, Northern Territory, New Zealand.

30 ACT.

31 *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).

32 See paras 3.21-3.22 above. On the singling out of people who have no visible lawful means of support, see paras 4.5-4.7 above.

persons who are merely reputed to fall into a particular category is enough for the offence to be committed.[33] The Commission provisionally proposes that both offences should be abolished.

5. SECTION 43(1) OFFENCES

4.20 Section 43(1), as interpreted by the courts, creates further preventive offences: being suspected of having committed an offence, being suspected of being about to commit an offence, evil designs and loitering. In each case failure to give a satisfactory account is an essential element of the offence. Unlike the provisions previously considered in this chapter, the essence of these offences is suspicious conduct on a particular occasion, not a person's lifestyle or associations. The interpretation of section 43(1) gives rise to a number of special problems.

(a) Analysis of section 43(1)

4.21 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 drunk, or disorderly, 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."**

4.22 It appears that 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 -

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[33] A reputed thief is a person who prior to the occasion in question has become the object of suspicion: *Ledwith v Roberts* [1937] 1 KB 232, dealing with an offence in s 4 of the *Vagrancy Act 1824* (UK) which has no exact equivalent in the *Police Act 1892*.

(1) Being found drunk (section 53);

(2) being found disorderly (section 54);[34]

(3) 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);[35]

(4) negligent, careless or furious driving (section 57);

(5) cruelty to animals (section 79).[36]

4.23 Section 43(1) goes on to confer on a police officer or constable power to arrest "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 . . ." There are no corresponding offences elsewhere in the *Police Act*. The section concludes by providing that the person so apprehended may be detained in custody until he can be brought before a justice to be dealt with for "such offence".

4.24 Section 45 of the South Australian *Police Act 1869*, on which section 43 was based, catalogued the circumstances in which a police officer or constable could arrest without warrant (including all the above instances and one or two others) but then provided that the person apprehended might be detained until he could be brought before a justice to be dealt with "according to law". The draftsman of the *Police Act 1892*, deliberately or otherwise, changed the wording of the provision in this important respect.[37] There are several pre-1869 statutory provisions which are clearly ancestors of section 43(1),[38] but these provisions either made no reference to what happened after arrest or provided, in the manner of the South Australian Act, that the defendant might be detained until he could be brought before a justice to be dealt with according to law.

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

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

36 In this respect, it is interesting to note that 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*.

37 Note also the use of the phrase "such offence" in s 44, considered at paras 6.3-6.4 below.

38 Eg *Vagrancy Act 1824* (UK) s 6; *Metropolitan Police Act 1829* (UK) s 7; *Metropolitan Police Act 1839* (UK) s 64; *Police Act 1833* (NSW) s 6, *Police Ordinance 1849* (WA) s 8; *Police Ordinance 1861* (WA) ss 12 and 65.

(b) Interpretation of section 43(1)

4.25 The question whether section 43(1) creates an offence as well as a power of arrest, and if so to what extent, was considered in *Hagan v Ridley*.[39] The defendant was charged under section 43(1) with loitering and the Full Court was concerned with the detailed requirements of that offence, but it also considered the antecedent question whether 43(1) created any offence. All the members of the court agreed that the requirement that the defendant be brought before a justice to be dealt with for "such offence" led inescapably to the conclusion that the section did create an offence. Though no penalty was provided, section 124 provided a general penalty for such cases. Dwyer CJ was content to state that section 43(1) created an offence of loitering and failure to give a satisfactory account, without speculating what other offences the section might create.[40] Walker and Wolff JJ did however canvass this issue. Walker J concluded that the offences created by section 43(1) are limited to the cases not otherwise dealt with by the Act - persons who are suspected of having committed or being about to commit an offence, persons suspected of having evil designs, and persons lying or loitering in a street, yard or other place.[41] Wolff J's judgment is not so clear, but appears to support Walker J's view.[42] Both judges made it clear that failing to give a satisfactory account is an element of each of these offences. Walker J specifically drew attention to the faulty drafting of section 43(1).[43]

4.26 In later cases courts have declared themselves bound by the ruling in *Hagan v Ridley*, and have confirmed that section 43(1) creates offences of loitering,[44] suspicion of being about to commit an offence[45] or evil designs.[46] There is no reported decision which suggests that section 43(1) creates any other offences.

(c) The Commission's provisional view

4.27 The Commission suggests that if there are to be offences of being suspected of having committed an offence, being suspected of being about to commit an offence, evil designs and loitering, then those offences should be separated from provisions dealing with powers of arrest

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39 (1948) 50 WALR 112.
40 Id 121.
41 Id 128-129.
42 Id 126.
43 Id 128. S 43(1) has also been judicially criticised by Olney J in *Delmege v Smith* (unreported) Supreme Court of Western Australia, 2 May 1986, Appeal No 339 of 1985.
44 *Di Camillo v Wilcox* [1964] WAR 44.
45 *Delmege v Smith* (unreported) Supreme Court of Western Australia, 2 May 1986, Appeal No 339 of 1985.
46 *Sullivan v Johnson (*unreported) Supreme Court of Western Australia, 21 July 1986, Appeal No 307 of 1986.

and drafted in a more satisfactory manner, with a penalty set out in the section rather than relying on the general penalty in section 124. However, with the possible exception of loitering, the Commission does not favour the retention of these offences in their present form.

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

4.28 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. The Commission is unaware of any constructive use to which such an offence has been put, and suggests that it is unnecessary.

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

4.29 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. No attempt to commit an offence is necessary. The wide potential of this offence is evident from *Delmege v Smith*,[47] in which the defendant was arrested while demonstrating against a visit by United States ships and was charged with being suspected of being about to commit an offence, namely disorderly conduct.[48]

4.30 The Commission's provisional view is that the criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement, a conspiracy or an attempt. In particular cases where it might be convenient to charge under this part of section 43, it would be preferable to create a more limited offence if one is needed.[49] Otherwise, the mischief with which this offence is concerned can be adequately dealt with by other offences.[50] The offence has no equivalent in the police legislation of any other Australian jurisdiction.

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47 (Unreported) Supreme Court of Western Australia, 2 May 1986, Appeal No 339 of 1985.

48 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.

49 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. It appears that in fact charges are seldom brought for the offence of being about to commit an offence. There were none in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

50 Eg loitering, if this offence is retained (see paras 4.37-4.38 below); trespass (see paras 8.1-8.22 below). In *Delmege v Smith* (unreported) Supreme Court of Western Australia, 2 May 1986, Appeal No 339 of 1985,

4.31 One suggested justification for the existence of the offence is that as the law currently stands a person cannot be charged with attempting to commit a simple offence, because the *Criminal Code* provisions on attempt[51] are limited to indictable offences. Yet this is not a sufficient reason for retaining the offence. It would be preferable to amend the law relating to attempt if this were thought necessary.

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

4.32 This part of section 43(1) was recently considered in *Sullivan v Johnson*,[52] where the appellant was convicted after trial on a charge that he was a person suspected of having evil designs, namely following female shoppers at a supermarket and looking down their dresses. The Supreme Court confirmed that the offence was not committed merely by having evil designs. It was also necessary to show that the defendant had failed to give a satisfactory account of himself. The court affirmed the magistrate's finding that the offence would be made out if the defendant engaged in morally reprehensible conduct for which he was unable to offer any satisfactory explanation.

4.33 *Sullivan v Johnson* is not typical of the kinds of cases for which the offence of evil designs has been used. Charges are not often laid for this offence,[53] but generally concern suspicious conduct towards children.[54] The importance of having a means of dealing with a person in such a case before any harm is done to any children is obvious, but in the Commission's view it is inappropriate to use for this purpose an offence of being suspected of having evil designs. It seems wrong in principle that a person can be convicted because of his or her supposed intentions alone.

Olney J said that the defendant should have been charged with disorderly assembly under s 54A, as to which see paras 7.2, 7.6-7.9, 7.18 below.

51 Ss 552-555.

52 (Unreported) Supreme Court of Western Australia, 21 July 1986, Appeal No 307 of 1986.

53 There were only 2 charges of evil designs in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

54 A hypothetical example suggested in the *Western Australian Police Manual* para 5-4.6 is where a person suspected of sexual perversion arranges to meet a child at a pre-arranged place and in fact turns up at that place and meets the child. *The Magistrate* (1937) 97 cites a case - apparently the first time a charge for having evil designs had been tried - in which the defendant was suspected of attempting a serious assault on a number of young boys. There was insufficient evidence to enable him to be charged with an indictable offence, but he was charged with having evil designs and convicted.

4.34 The dangers of formulating an offence in such terms are confirmed by the fact that it is wide enough to embrace conduct of the kind involved in *Sullivan v Johnson*. If serious enough to warrant the attention of the criminal law, the conduct of the defendant in that case could have given rise to a charge of disorderly conduct in a public place under section 54.[55] In other cases, loitering may be an appropriate charge.[56]

4.35 It is possible that the offence of evil designs may be used to compensate for the fact that a person cannot be charged with attempting to commit a simple offence. The Commission's comments on this in relation to the offence of being about to commit an offence[57] apply equally here.

4.36 No other Australian jurisdiction has an "evil designs" offence or anything similar.

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

4.37 Again it is clear that the offence involves the twin elements of loitering and failing to give a satisfactory account.[58] Loitering involves something more than merely standing or waiting openly in the street.[59] 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.[60] The motive for a person standing, waiting or looking may well be relevant to the question whether any account of himself or herself which the person subsequently gives is satisfactory.[61] Whether the account is satisfactory is a question for the court.

4.38 Nearly all the charges brought under section 43(1) are charges for loitering.[62] There may be some justification for the existence of an offence of loitering in a public place, as a preventive offence ancillary to offences of trespassing on premises without lawful excuse.[63] If the offence is to remain, it should be modernised. Victoria and Tasmania require that a person who is

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55 On s 54, see paras 6.1-6.19 below. A shop when open is a public place: *Ward v Marsh* [1959] VR 26.
56 See paras 4.37-4.38 below.
57 See para 4.30 above.
58 *Hagan v Ridley* (1948) 50 WALR 112.
59 Id 123 per Dwyer CJ.
60 See *Di Camillo v Wilcox* [1964] WAR 44, 48.
61 Ibid.
62 100 of the 102 charges brought under this subsection in Perth and East Perth Courts of Petty Sessions in 1984-85 were for loitering: see Appendix I.
63 See paras 8.1-8.22 below.

loitering should have an intent to commit an offence.[64] Other jurisdictions formulate the offence differently. In South Australia and the Northern Territory, where a person is loitering in a public place and a police officer believes, on reasonable grounds, that an offence has been or is about to be committed, the police officer may request the person to cease loitering, and the offence is committed if there is a failure to comply with this request.[65] In New Zealand an offence is committed by a person who is found in a public place behaving in a manner from which it can reasonably be inferred that he or she is preparing to commit a crime.[66] Alternatively, the offence could simply be abolished. Neither New South Wales nor the ACT has a loitering offence. The Court of Appeals of New York has recently held that a statute which prohibits loitering, without specifying some particular place or illegal purpose, is unconstitutional on the ground of vagueness, and that requiring the suspect to provide a satisfactory explanation of his or her presence was also unconstitutional in that it deprived the suspect of the right to remain silent.[67] The Commission seeks comment on whether any of the alternatives presented in this paragraph would be a desirable basis for an offence of loitering, or whether it should simply be abolished.

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64 *Vagrancy Act 1966* (Vic) s 7(1)(f); *Police Offences Act 1935* (Tas) s 7(1)(b).

65 *Summary Offences Act 1953* (SA) s 18; *Summary Offences Act 1923* (NT) s 47A(2). In the Northern Territory it is also an offence for a person loitering in a public place who does not give a satisfactory account when requested to do so by a police officer, to fail to comply with a request to cease loitering: s 47A(1).

66 *Summary Offences Act 1981* (NZ) s 28.

67 *People v Bright* (1988) 520 NE 2d 1355.

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]

5.2 Section 20 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 compensation[2] 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."**

5.3 Section 41(1), after giving the police power to stop and detain, enter and search vessels, arrest suspected persons and take charge of property suspected to be stolen,[3] provides that -

> **". . . if the master of any such ship or vessel, or any other person, shall resist or wilfully prevent or obstruct any officer or constable of the Police Force whilst stopping, detaining, entering, or endeavouring to stop, detain, or enter upon such ship, boat or vessel, or whilst searching and inspecting the same as and for the purposes aforesaid . . . 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**

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1 In addition to the offences dealt with in this section, see s 42, refusing to leave premises (paras 18.17-18.20 below); s 50, neglecting or refusing to give name and address (paras 17.40-17.44 below).

2 On compensation provisions see para 3.33 above.

3 On the power of entry and search, see paras 18.29-18.32 below; on the power of arrest, see paras 17.16-17.20 below; on seizure of property, see para 18.48 below.

hard labour, for a term not exceeding six months as any two or more Justices before whom such offender shall be convicted, shall determine."[4]

5.4 Section 41(2) gives the police further powers to enter and detain vessels[5] and section 41(7) provides that -

"Any person who resists, or wilfully obstructs, any member of the Police Force or other person lawfully assisting such a member of the Police Force in the exercise of the powers conferred by subsection (2) of this section, or who endeavours by any unlawful means to prevent any such power from being exercised shall be deemed to have committed a misdemeanour, and shall suffer such punishment by fine, not exceeding five hundred dollars, and such imprisonment, not exceeding six months, as any two or more Justices before whom such offender shall be convicted may determine." [6]

5.5 Section 66(7) provides that an offence is committed by:

"Every person apprehended for an offence against section sixty-five of this Act, and violently resisting any constable or other officer so apprehending him, and being subsequently convicted of the offence for which he shall have been so apprehended."

5.6 Section 67(3) provides that an offence is committed by:

"Every person apprehended for an offence against section sixty-six of this Act, and violently resisting any constable or other peace officer so apprehending him, and being subsequently convicted of the offence for which he shall have been so apprehended."

5.7 Section 90 provides that:

"Any person who shall wilfully prevent any constable or officer authorized under the provisions of this Act to enter any premises or place from entering the same, or any part thereof, or who shall obstruct or delay any such constable or officer in so entering, and any person who by any bolt, bar, chain, or other contrivance shall secure any external or internal door of or means of access to any premises or place so authorized to be entered, or shall use any means or contrivance whatsoever, for the purposes of preventing, obstructing, or delaying the entry of any constable or officer authorized as aforesaid into any such premises or place or any part thereof, shall be liable on conviction to a penalty of not more than two thousand dollars or

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4 The omitted offence is dealt with at paras 5.17-5.20 below. Like s 41(7) and s 71, s 41(1) creates a misdemeanour which is triable summarily.

5 As to which see paras 18.35-18.36 below. Ss 41(3) to (6) contain provisions ancillary to this power.

6 Again a misdemeanour: see fn 4 above.

in the discretion of the Justices before whom he shall be convicted of the offence to be committed to the nearest gaol with or without hard labour for any term not exceeding two years."

(b) Discussion

5.8 Section 20 is the most important of this group of offences.[7] Under this section it is an offence to disturb, hinder or resist any member of the police force in the execution of his duty. The only intention required is an intention to disturb, hinder or resist. It appears to be no defence that the defendant was unaware that the person in question was a member of the police force, or that he or she was on duty[8] and so the offence can be committed against a police officer in plain clothes.

5.9 The other offences all cover some or all of the same ground. Sections 41(1) and 41(7) deal with resisting or obstructing a member of the police force in the exercise of particular powers relating to ships. Sections 66(7) and 67(3) deal with resisting arrest for particular offences. Section 41(7) is wider than section 20 in one respect only: 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 him or her.

5.10 The reason why the *Police Act* contains all these overlapping provisions is that they are all to be found in the South Australian *Police Act 1869* (except for section 41(7), which is a modern addition). The South Australian Act drew them from a variety of sources in earlier English legislation.[9]

5.11 Section 90 appears at first sight to be a little different from the other provisions quoted above. It was taken from the United Kingdom *Gaming Houses Act 1854*, and its purpose was to

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7 It should be noted that there were 570 charges under s 20 in Perth and East Perth Courts of Petty Sessions in 1984-85, but no charges under ss 41(1), 41(7), 66(7), 67(3) or 90: Appendix I.

8 There is some division of opinion as to the applicability in Western Australia of *R v Reynhoudt* (1962) 107 CLR 381, in which the High Court, dealing with the offence of assaulting, resisting or wilfully obstructing a member of the police force in the execution of his duty under s 40 of the *Crimes Act 1958* (Vic), held that it is sufficient to prove intent in relation to the assault only, and that it is not necessary to show intent in relation to the other elements of the offence. However the same result appears to follow from s 24 of the *Criminal Code*, which provides that a person is not responsible for acts or omissions under an honest and reasonable but mistaken belief in the existence of a state of things. Nichols 13, 176 submits that since the mistake must relate to the act and not the intent, a person who disturbs, hinders or resists a constable but honestly and reasonably believes he or she is not a constable is not protected.

9 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*.

create an offence of obstructing police officers authorised to enter premises used for gaming. It was later separated from the other gaming provisions by the insertion of new provisions and division heads.[10] When the gaming provisions were transferred to the *Gaming Commission Act 1987*, section 90 was not repealed, apparently because it was seen as a general offence and not one restricted to gaming houses.[11] Yet in all the circumstances set out in great detail in section 90, an offence would also be committed under section 20.

5.12 In the Commission's view, there is no need to retain all these overlapping offences. The Commission suggests that the offences in sections 41(1), 41(7), 66(7), 67(3) and 90 should be repealed, leaving section 20 as the sole offence in this field. South Australia has taken similar steps: the only remaining offence of this nature in the South Australian *Summary Offences Act* is the equivalent of section 20,[12] and the other overlapping offences have been eliminated. The Northern Territory and the ACT, which, like Western Australia, inherited this group of overlapping offences, have also rationalised them,[13] and the other Australian jurisdictions likewise have only a single summary offence of this kind.[14]

5.13 Under section 172 of the *Criminal Code* it is an indictable offence to obstruct or resist any public officer[15] 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

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10 Sections 89A, 89B and 89C, repealed by the *Acts Amendment and Repeal (Gaming) Act 1987* ss 59-60, and the headings to Divisions 5, 6 and 7 in Part VI, inserted by the *Acts Amendment (Betting and Gaming) Act 1982* s 5.

11 S 22 of the *Gaming Commission Act 1987* is a modern equivalent of s 90.

12 *Summary Offences Act 1953* (SA) s 6.

13 In the Northern Territory even the equivalent of s 20 has been repealed, although the equivalent of s 66(7) remains: *Summary Offences Act 1923* (NT) s 57(1)(m). The major offence is found in s 121 of the *Criminal Code* (NT). In the ACT none of the above offences remains and the sole provision appears in s 58 of the *Crimes Act 1900* (ACT).

14 *Crimes Act 1914* (Cth) s 76; *Crimes Act 1900* (NSW) s 546C; *Summary Offences Act 1966* (Vic) s 52(1); *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.

15 "The term "public officer" means a person exercising authority under a written law, and includes -

(a) a police officer;

(b) a person authorized under a written law to execute or serve any process of a Court or tribunal;

(c) an officer within the meaning of the *Public Service Act 1978*;

(d) a member, officer or employee of any authority, board, corporation, commission, municipality, council or committee or similar body established under a written law; or

(e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not."

(*Criminal Code* s 1(1))

so is much wider. The Commission suggests that the *Police Act* offence should continue to deal specifically with the police.[16]

2. ESCAPING LEGAL CUSTODY AND ASSISTING ESCAPE

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

5.14 Section 67(1), one of the provisions of the old United Kingdom vagrancy laws, provides that:

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

commits an offence.

5.15 There are provisions in other legislation which create offences of escaping from lawful custody. The *Criminal Code*[17] 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. The Murray Report[18] recommended that this section be amended so as to apply to simple offences as well as indictable offences, and that the penalty be increased. The *Prisons Act 1981*[19] provides that a prisoner who escapes or prepares or attempts to escape from lawful custody is guilty of an offence.[20]

5.16 Section 67(1) has a much wider scope than the Code offence, in that it applies to a person in lawful custody who has not been convicted of an offence. Again, the section has a wider scope than the *Prisons Act* offence, in that it would apply to escape from lawful custody

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16 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.

17 S 146.

18 101.

19 S 70(c).

20 "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.

otherwise than in a prison. In the Commission's view, section 67(1) should therefore be retained.[21]

(b) Assisting escape: sections 67A and 41(1)

5.17 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."**

5.18 Section 41(1), after giving police powers to stop, detain, enter and search vessels and arrest suspected persons,[23] provides that:[24]

> **". . . 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 offenders shall be convicted, shall determine."**

5.19 There is some overlap between section 67A and various provisions of the *Criminal Code*. 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. 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 suggests that section 67A should be retained.

5.20 Section 41(1) deals with the more restricted situation where suspected persons are on board ship. There is some overlap with the more general provisions in section 67A and the Code, though neither of them in terms refers to rescuing or attempting to rescue. Section 41(1) is

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

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

23 See paras 18.29-18.32 (entry and search), 17.16-17.20 (arrest).

24 For the other offence created by this section, see para 5.3 above.

curious in that the offence is stated to be a misdemeanour, yet is triable before justices. Section 67A and the Code provision deal sufficiently with the problem and in the Commission's view there is no need to retain this offence.

3. FALSE REPORTS: SECTION 90A

5.21 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**
> **(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."**

5.22 Section 90A was inserted in the *Police Act* in 1945,[25] 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.[26] The section was re-enacted with amendments in 1962.[27] Charges are often brought under the section.[28] Similar legislation is in force in most other Australian jurisdictions.[29] In the Commission's view section 90A should be retained.

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

26 Western Australian *Parliamentary Debates* (1945) vol 115, 670-671.

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

28 There were 88 charges in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

29 *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 1923* (NT) s 68A.

5.23 Section 90A can be used to deal with various kinds of conduct, including false distress calls and bomb hoaxes. The *Criminal Code* contains indictable offences which can be used to deal with bomb hoaxes in relation to aircraft,[30] and the Murray Report recommends more general offences involving threats and demands, in order to provide more effective measures for combating terrorism.[31] If these recommendations are accepted the more specific offences involving aircraft can be repealed.[32] Though the Report suggests that the new offences would be triable summarily in appropriate cases, it contemplates that the offence in section 90A would remain, and recommends that the penalty should be increased to 18 months' imprisonment or a fine of $3,000.[33]

30 S 463A (threats to safety of aircraft); s 463B (false statements relating to aircraft).
31 Murray Report 228-230.
32 Id 430.
33 Id 229.

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 events on board ships:

> **"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**

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[1] Soliciting is dealt with in paras 9.5-9.27 below, and the extinguishing of lights set up for public convenience in para 11.13 below.

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 drunk, or 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 drunk, or 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, and so under the final words of section 44 it would not be an offence under that section. If, however, ships other than passenger boats and certain kinds of licensed premises are not public places, an offence may only be committed under section 44.[2]

(i) Conduct covered by sections 54, 59 and 44

6.5 As will be apparent, there is much overlap between these sections. Between them, the sections cover the following kinds of conduct -

(a) Disorderly conduct (section 54) or behaving oneself in an indecent or disorderly manner (section 44);

(b) singing any obscene song or ballad (section 59);

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[2] S 43 is similar to s 44 in that it gives the police power to arrest a person found drunk or disorderly, 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 4.25-4.26 above), but there is no authority suggesting that it creates offences of being found drunk, or disorderly, or using profane, indecent or obscene language or using threatening, abusive or insulting words or behaviour.

(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 behaviour (sections 59, 44).[3]

6.6 These are important provisions, and they are much used in practice.[4] They are a means by which the courts can set standards of public order and decency which they deem appropriate for the needs of society in Western Australia. Thus, for example, charges have been brought under section 54 against persons demonstrating against visiting American warships,[5] or causing disturbances at sports grounds.[6] There have been prosecutions under section 59 against comedians (for using obscene language),[7] striptease artistes[8] and other performers.[9]

6.7 The words and phrases used in these sections are often found in criminal offences in other jurisdictions, and so there is a wealth of authority on their interpretation.[10] 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.[11] It involves a breach of the peace, or a likelihood of a breach of the peace occurring.[12]

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3 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.

4 There were 1,708 charges under s 54 in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I. These included cases of insulting words, threatening words, obscene language, street drinking, urinating in the street and other disorderly conduct of an unspecified nature. There were 227 charges under s 59 (excluding five charges for soliciting). These charges covered broadly similar conduct: insulting words or behaviour, obscene language, threatening words or behaviour or disorderly conduct generally. In a number of cases charges were brought under both sections. There were three charges under s 44, one for disorderly conduct and two for threatening words.

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

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

7 *Carroll v Gutman* (unreported) Supreme Court of Western Australia, 19 July 1985, Appeal Nos 82-83 of 1985 (Austen Tayshus): *Keft v Fraser* (unreported) Supreme Court of Western Australia, 21 April 1986, Appeal No 428 of 1985 (Rodney Rude).

8 *Cullen v Fuller* (unreported) Supreme Court of Western Australia, 25 November 1986, Appeal No 439 of 1986 ('Baby Doll').

9 See eg "Have You Heard the One About Our Prude City?" *The West Australian*, 10 November 1984, 17.

10 See Nichols 44-46, 53-60.

11 *Melser v Police* [1967] NZLR 437, 444 per Turner J.

12 *Comerford v Pollard* (unreported) Supreme Court of Western Australia, 29 July 1982, Appeal No 131 of 1982, 3 per Olney J.

6.8 The sections cover obscene songs and ballads, writing or drawing obscene words and using obscene language. In order to determine what is obscene, the court must ask itself whether the thing complained of transgresses the generally accepted bounds of decency and goes so far beyond the accepted standards as to shock the tribunal of fact.[13] An offence is also committed where writing, drawing or language is indecent, rather than obscene. Indecent language need not be obscene,[14] but it is sufficient that it is offensive to a substantial degree to the contemporary standards of decency currently accepted in the community.[15] Indecent behaviour may also constitute disorderly conduct, and the test applied is the same as for obscenity.[16] Profane language is rather different - the word signifies attacking Christianity in language calculated and intended to shock and outrage ordinary feelings.[17]

6.9 Threatening, abusive and insulting behaviour are again 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;[18] 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.[19] The cases cover a wide range of situations. At one extreme are expressions of personal animosity;[20] at the other are expressions of political [21]or racist views.[22]

(ii) Where the conduct takes place

6.10 In most cases the provisions in sections 54, 59 and 44 are limited to happenings in a street or public place,[23] although 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

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13 *Mackinlay v Wiley* [1971] WAR 3, adopting the test laid down by Windeyer J in the High Court in *Crowe v Graham* (1968) 121 CLR 375, 395.

14 *R v Stanley* [1965] 2 QB 327.

15 *Robertson v Samuels* (1973) 4 SASR 465.

16 *Cullen v Fuller* (unreported) Supreme Court of Western Australia, 25 November 1986, Appeal No 439 of 1986.

17 Nichols 57.

18 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.

19 *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.

20 Eg *Moran v Stack* (unreported) Supreme Court of Western Australia, 31 March 1983, Appeal No 333 of 1982 ("gestapo bastard").

21 Eg *Brutus v Cozens* [1973] AC 854 (anti-apartheid demonstration at Wimbledon).

22 *Jordan v Burgoyne* [1963] 2 QB 744.

23 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".

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" 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,[24] though it is 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.[25] 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 lady who annoyed her neighbour by uttering obscene words as she hung up her washing in her own back yard.[26] 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.

6.11 In *Keft v Fraser*,[27] 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 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

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

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

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

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

> 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'."[28]

6.12 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*[29] 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.[30] 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*,[31] 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) Discussion

6.13 The offences under consideration play an important part in regulating the activities of individuals in society. People should not be prevented from saying or doing particular things just because other members of society disapprove. At the same time the licence to say and do as one wishes cannot be completely free from restriction in the interests of the community as a whole. It is important that disorderly conduct and associated offences strike the right balance.

6.14 It is possible to argue that the existing law does this quite successfully. The form in which it is set out is however most unsatisfactory. There is no logical reason why that law should be contained in three separate sections in which there are duplicate and overlapping provisions, especially when those sections also deal with quite different matters such as

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28 Id 10-12.
29 (Unreported) Supreme Court of Western Australia, 19 July 1985, Appeal Nos 82-83 of 1985.
30 (Unreported) Supreme Court of Western Australia, 21 April 1986, Appeal No 428 of 1985, 9.
31 (Unreported) Supreme Court of Western Australia, 25 November 1986, Appeal No 439 of 1986.

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*,[32] the sections are "legislative curiosities". The form in which they appear in the Act results from the draftsman having copied them from the South Australian *Police Act 1869*.[33]

6.15 In the Commission's view, even if no other reform is undertaken in this area, sections 54, 59 and 44[34] should be combined and redrafted in a modern form so as to eliminate the duplication and illogicality of the present provisions. This is what has happened in South Australia.[35] The individual offences found in the Western Australian sections have been retained but the drafting is clear and logical and the duplication has been removed. The position in other Australian jurisdictions is generally similar. The *Victorian Summary Offences Act 1966* is a good example. Section 17(1) provides -

> "Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon -
>
> (a) sings an obscene song or ballad;
>
> (b) writes or draws exhibits or displays an indecent or obscene word figure or representation;
>
> (c) uses profane indecent or obscene language or threatening abusive or insulting words; or
>
> (d) behaves in a riotous indecent offensive or insulting manner -
>
> shall be guilty of an offence."

6.16 In two Australian jurisdictions, attempts have been made to replace the specific offences by an all-embracing formula. In New South Wales, the reforms of 1979 attempted to restrict the scope of the criminal law in this area. Under section 5 of the *Offences in Public Places Act 1979* (which replaced the former offences involving offensive behaviour and unseemly words) an offence was committed only if a person without reasonable excuse, in, near or within view or

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

33 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.

34 And s 43(1), if it is to be read as creating offences of the kind being dealt with here.

35 *Summary Offences Act 1953* (SA) ss 7, 22.

hearing from a public place or school, behaved in such a manner as would be likely to cause reasonable persons justifiably in all circumstances to be seriously alarmed or seriously affronted. This provision was much criticised, in particular by the New South Wales Police Association, who claimed that they would be prevented from dealing with "such well-known after-the-pub-closes activities as urinating in shop doorways, using offensive and foul language and blocking the footpath"[36] and expressed the fear that they might lose control of the streets.[37] Section 5 was eventually amended to provide that an offence is committed if a person conducts himself or herself in, near or within view or hearing from a public place or school in such a manner as would be regarded by reasonable persons as being, in all the circumstances, offensive.[38] Section 4 of the *Summary Offences Act 1988* retains this offence but also makes it an offence to use offensive language in these circumstances. Prior to 1988 offensive language was only an offence if it was deemed to constitute offensive conduct. In the Australian Capital Territory the offences in the *Police Offences Ordinance 1930* similar to those in the Western Australian *Police Act* have been repealed and instead the *Crimes Act 1900*[39] sets out a single offence of behaving in a riotous, indecent, offensive or insulting manner in, near or within the view or hearing of a person in a public place.

6.17 The Commission seeks comment as to whether the various offences now found in sections 54, 59 and 44 should be reduced to a single all-embracing formula. Its provisional view is that such an attempt is unlikely to be satisfactory. A formula of this kind will inevitably be vague and open-ended and will require application to particular situations by the courts before its meaning becomes clear. The advantage of retaining the individual offences in a redrafted section is that there is already a considerable body of authority to assist in determining how they apply in particular situations. There may be some difference of opinion on whether the section should continue to refer to profane language, and one or two words which give the section an outdated appearance might be eliminated, for example the reference to obscene ballads. Subject to this, a provision modelled on the current legislation of South Australia or Victoria might be a better alternative.

6.18 Some consideration needs to be given to whether the redrafted provision should apply only where the conduct takes place in a public place, or within the view or hearing of persons in

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36 J M Smail, J Miles and K Shadbolt *Justices Act and Summary Offences (New South Wales)* para 9041.

37 Ibid; see also A R Lauer *The Offences in Public Places Act - A Policeman's Viewpoint*, paper given at the Sixth National Convention of Civil Liberties in Australia (no date).

38 *Offences in Public Places (Amendment) Act 1983* s 3 and Schedule 1.

39 S 546A.

a public place. The current legislation departs from this principle in a number of instances.[40] The South Australian legislation caters for some of these: it covers behaviour in police stations as well as public places, and a "public place" includes a ship or vessel (not being a naval ship or vessel) in a harbour, port, dock or river, and licensed premises.[41] The most important departure from the principle, however, is the offence of using threatening, abusive or insulting words or behaviour, which is an offence whether committed in a public or a private 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.[42] The Commission's view is that the same limitation should apply in Western Australia.

6.19 A final issue is whether the redrafted provision should expressly incorporate the principles set out in *Keft v Fraser* that a determination of whether conduct is disorderly should take account of circumstances such as where it takes place and the nature of the audience. The only jurisdiction which has such a provision at the present time is New Zealand. The *Summary Offences Act 1981*[43] provides:

> "In determining for the purposes of a prosecution under this section whether any words were indecent or obscene, the Court shall have regard to all the circumstances pertaining at the material time, including whether the defendant had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended."

The Commission seeks comment.

2. CHALLENGE TO FIGHT: SECTION 64

6.20 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,**

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40 See para 6.10 above.

41 *Summary Offences Act 1953* (SA) s 7.

42 *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.

43 S 4(3).

if they shall think fit, also require the offender to find sureties for keeping the peace."

6.21 A "prize-fight", as the term was understood in the 19th century, was a fight with fists (usually bare fists) for reward.[44] It should be noted that the section makes it 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.

6.22 Fighting in, subscribing to or promoting a prize-fight is an indictable offence under the *Criminal Code*.[45] The offence carries a penalty of imprisonment for one year, but the Murray Report recommended an increase to two years' imprisonment.[46] The *Boxing Control Act 1987* contains a number of summary offences relating to boxing. It is an offence to engage in a boxing contest when not registered as a boxer;[47] to arrange a boxing contest when not registered as an industry participant;[48] or to promote, arrange or conduct a boxing contest without a permit.[49]

6.23 There does not seem to be any reason to retain section 64. Though the equivalent section can still be found in the police legislation in South Australia[50] and the Northern Territory,[51] it has been abolished in the ACT and there are no equivalents in the other Australian jurisdictions. If it were thought necessary to have a summary offence to deal with prize-fighting, the *Criminal Code* could be amended to allow the alternative of a summary prosecution under section 73.[52] However, at the present day it seems anachronistic to retain offences dealing with prize-fighting. The offences in the *Boxing Control Act*, which are set in a modern context, deal adequately with the problem.

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

6.24 Section 66(5) provides that:

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

45 S 73.

46 70.

47 S 24.

48 S 33.

49 S 47(1).

50 *Summary Offences Act 1953* (SA) s 8.

51 *Summary Offences Act 1923* (NT) s 55.

52 On the general question of summary prosecution for Code offences, see paras 3.26-3.29 above.

> **"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.

6.25 The *Indecent Publications and Articles Act 1902* regulates and in appropriate cases prohibits the sale, distribution, publication and exhibition of indecent and obscene articles, pictures and printed or written matter.[53] It would seem that this provision has overtaken section 66(5), which could therefore be repealed.[54] The Murray Report[55] recommended the repeal of section 204 of the *Criminal Code*, which deals with obscene publications and exhibitions, for the same reason. The penalties under the *Indecent Publications and Articles Act* are lower than under section 66(5) but could be adjusted accordingly.

6.26 It has been suggested to the Commission that section 66(5) needs to be retained to deal with obscene tee-shirts, but in the Commission's view this is not a sufficient justification for retention of the section. If such cases are not covered by the *Indecent Publications and Articles Act*, they can be dealt with as disorderly conduct under section 54.[56]

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

6.27 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.

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53 The printing, sale, possession for sale, publishing, distribution or exhibition of an indecent article etc is an offence under s 2. The sale, possession for sale, publication, distribution or exhibition of restricted publications in a street or public place is an offence under s 11.

54 There were no charges under s 66(5) in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

55 129.

56 In *Khan v Bazeley* (1986) 40 SASR 481, it was held that the wearing in public of a tee-shirt bearing the words "Fuck 'em" and (underneath, in smaller print) "if they can't take a joke" constituted the offence of behaving in an offensive manner under s 7 of the *Summary Offences Act 1953* (SA).

6.28 This offence has existed in Western Australia since the earliest police legislation was enacted.[57] There is a similar offence in all other Australian jurisdictions.[58] The offence is committed if the exposure takes place in a street or public place, or in view thereof, or in any place of public resort. It has been held that 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.[59]

6.29 The offence is committed only if the exposure is wilful and obscene. The word "obscene" has essentially the same meaning as in section 59.[60] Nudity, in itself, is not obscene.[61] In *Cullen v Meckelenberg*,[62] an actor appeared in the nude in a scene of the play "Equus". The court said that though cases on obscenity were generally dealing with words, printed or spoken, rather than conduct, there was no reason why the word "obscene" in section 66(11) should be given a different meaning. Accordingly, the court held that what is obscene must be judged according to the current standards of decency of the community. It concluded that the defendant's conduct was not obscene.

6.30 The 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, and in England it has been held to be a synonym for "penis",[63] suggesting that only males can be convicted of the offence. In Western Australia, however, the offence has not been limited in this way.[64]

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57 *Police Ordinance 1849* ss 10-11. There were 64 charges under s 66(11) in Perth and East Perth Courts of Petty Sessions in 1984-85: See Appendix I.

58 *Summary Offences Act 1988* (NSW) s 5; *Vagrancy Act 1966* (Vic) s 7(1)(c); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(viii)(d); *Police Offences Act 1935* (Tas) s 8(1A)(a); *Summary Offences Act 1953* (SA) s 23*; Summary Offences Act 1923* (NT) ss 50, 57(1)(g); *Crimes Act 1900* (ACT) s 546B.

59 *Morgan v Smallman* (1874) 5 AJR 165.

60 See para 6.8 above.

61 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.

62 [1977] WAR 1.

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

64 Nichols 102. In *Valle v Whyte* (unreported) Supreme Court of Western Australia, 29 November 1983 Appeal No 313 of 1983 (fn 61 above) there was no suggestion that the offence could not be committed by women.

6.31 In the Commission's view, this is not an offence which should apply to both men and women in the same terms,[65] and the English cases which restrict the offence to men may have some justification. A woman in whose presence a man exposes himself is likely to regard the act as threatening, or at the very least as a serious affront, and in such circumstances a court would be likely to find that the exposure was wilful and obscene. A woman who exposes her body to a man is unlikely to provoke the same reaction, and therefore if the section were held to apply, or redrafted so as to apply, to men and women in the same terms there would be a danger that mere nudity in itself would be held to constitute wilful and obscene exposure. In the Commission's view, the section should either be redrafted to make this distinction clear, or be expressly limited to males.

6.32 The drafting of the section could also be amended in other respects. For example, the distinction between a public place and a place of public resort seems obscure and could be eliminated.

5. REGULATION OF HOUSES OF PUBLIC RESORT: SECTION 84

6.33 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 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.**
>
> **(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."**

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65 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, but the other jurisdictions do not.

6.34 Section 84 is derived from the United Kingdom *Metropolitan Police Act 1839*,[66] and was first incorporated in Western Australian legislation in 1861.[67]

6.35 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.[68] Despite the punctuation, it is clear that the words "of public resort" qualify the words "house, shop, or room" as well as "place".[69]

6.36 This offence has been abolished in New Zealand but still exists in several Australian jurisdictions.[70] In South Australia, the offence[71] has been modernised. It is still an offence for a person who keeps premises where provisions or refreshments are sold or consumed knowingly to permit drunkenness or disorderly conduct, but the provision about permitting prostitutes or persons of notoriously bad character to meet or remain there has been deleted. Since section 84(1) applies to a wider range of premises than the liquor licensing legislation, it may be useful to retain the offence, remodelled along South Australian lines. The Commission seeks comment.

6.37 Under section 84(2), it is an offence knowingly to permit a child apparently under the age of 16 to enter and remain in a shop or other place of public resort. The section formerly contained no qualification relating to the circumstances of the child's presence. In *Higgon v O'Dea*[72] 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 in 1963[73] so as to limit it to presence in specified circumstances.

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66 S 44.

67 *Police Ordinance 1861* s 58.

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

69 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 . . .".

70 *Summary Offences Act 1966* (Vic) s 20; *Police Offences Act 1935* (Tas) s 10; *Summary Offences Act 1923* (NT) s 66; *Police Offences Ordinance 1930* (ACT) s 34.

71 *Summary Offences Act 1953* (SA) s 20.

72 [1962] WAR 140.

73 By the *Police Act Amendment Act 1963* s 4.

6.38 Though the offence has been modernised, it now contains vague and uncertain criteria. Like section 84(1), it appears not to be used.[74] Children whose mental, physical or moral welfare is likely to be in jeopardy would be dealt with under the care and protection provisions of the *Child Welfare Act 1947*.[75] Even those jurisdictions which retain the section 84(1) offence do not have any equivalent of that in section 84(2).[76]

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74 There were no convictions for either offence in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

75 Ss 29-32.

76 Except Tasmania, where it is an offence for a person occupying or keeping any house, shop, room, place of public resort or other premises to fail to prevent men or women of notoriously bad fame or dissolute boys or girls from meeting or assembling therein: *Police Offences Act 1935* (Tas) s 10(c).

Chapter 7
OFFENCES RELATING TO PUBLIC ASSEMBLIES

1. OFFENCES

(a) Obstruction of the streets: section 52

7.1 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 -

(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.[1]

(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."

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[1] Para (b) was added by the *Acts Amendment (Events on Roads) Act 1988*, which has not yet been proclaimed.

(b) Disorderly assembly: section 54A

7.2 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 -**
>
> **(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 dispe rse 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."**

2. DISCUSSION

(a) Section 52

7.3 Section 52 has been in the *Police Act* since 1892. It was derived from the South Australian *Police Act 1869*,[2] which in turn was based on precedents in United Kingdom legislation.[3] In the South Australian Act it had appeared in Part VII, and so only applied in particular localities, but the draftsman of the 1892 Act inserted it in Part V - presumably because he felt that it was a provision which should apply generally and not just in the absence of by-laws effecting the same or a similar object. It seems that the need for a provision such as section 52 was confirmed by several incidents shortly before the passing of the Act.[4]

7.4 As originally drafted, the section allowed the Commissioner of Police to give directions and make regulations, and made it an offence for any person not to observe such directions and

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2 S 78.

3 *Metropolitan Police Act 1839* (UK) ss 51-52; *Town Police Clauses Act 1847* ss 21-22.

4 See Western Australian *Parliamentary Debates* (1892) vol 2, 61.

regulations after being made acquainted with them. In spite of amendments to the section in 1976 and 1979,[5] its drafting style 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, but then says that he may 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, but a decision on the equivalent English provision[6] 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.

7.5 The only other Australian jurisdiction to retain this provision in anything like its original form is the Northern Territory.[7] In the ACT the equivalent provision has been repealed. In South Australia and New South Wales the provision was redrafted in modern form, but the New South Wales provision has now been repealed.[8]

(b) Section 54A

7.6 Section 54A was added to the Act in 1970.[9] According to the Parliamentary debates, the section was necessary to deal with situations in which large numbers of milling disorderly people had gathered, and in which proving the offence of disorderly conduct under section 54 against particular individuals was impossible.[10] The section is a summary equivalent of the Code offences of unlawful assembly and riot[11] and the drafting of the section was obviously based on these offences. It appears that there was a need for a simple offence to deal with assemblies for which the higher penalties under the Code offences were not appropriate.[12]

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

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

7 *Summary Offences Act 1923* (NT) s 74.

8 *Summary Offences Act 1953* (SA) s 59; *Summary Offences Act 1970* (NSW) s 46 (repealed by *Summary Offences (Repeal) Act 1979* (NSW)).

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

10 Western Australian *Parliamentary Debates* (1970) vol 188, 1548. The second reading speech mentions particular incidents on the Scarborough beachfront. However in the late 1960's there were a number of demonstrations and marches against the Vietnam War which, it seems, also suggested the need for a provision such as s 54A.

11 *Criminal Code* ss 62-65.

12 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.

7.7 Section 54A provides that the offence of disorderly assembly is committed when any member of a disorderly assembly who, after being warned by a police officer to disperse immediately, neglects or refuses to do so. An assembly is disorderly not only where persons in the neighbourhood are given reasonable grounds to apprehend that the persons assembled will disturb the peace, but also where those persons will by that assembly needlessly provoke other persons to disturb the peace. This broadly reproduces the important distinction established at common law by the leading cases of *Beatty v Gillbanks*[13] and *Wise v Dunning*.[14] In *Beatty v Gillbanks*, members of the Salvation Army took part in a street parade in spite of the likelihood of opposition from another body calling itself the Skeleton Army, and disorder ensued. It was held that the Salvation Army members were not guilty of the common law offence of unlawful assembly[15] because the disturbances were caused by other people, whom the Salvation Army did not incite.[16] In *Wise v Dunning*, Wise led a Protestant crusade and by his language and gestures insulted the Catholics present, who as a result committed breaches of the peace. Wise did not commit breaches of the peace, and counselled his supporters not to do so, but declared his intention to continue to hold meetings. Wise was bound over to keep the peace under a local statute, but it has been suggested that the meeting may well have constituted an unlawful assembly.[17] The court said that, unlike the situation in *Beatty v Gillbanks*, the disorder was the natural and probable consequence of Wise's conduct.

7.8 *Beatty v Gillbanks* was considered in *Duncan v Jones*,[18] in which the defendant was prevented by the police from holding an open-air meeting because a similar meeting on the same site on a previous occasion had been followed by a breach of the peace. The defendant nonetheless attempted to hold the meeting. It was held that she was guilty of obstructing the police in the execution of their duty. The court distinguished *Beatty v Gillbanks*, saying that the case before them did not touch the question whether an assembly could properly be held to be unlawful merely because the holding of it was expected to give rise to a breach of the peace on the part of those opposed to the holding of the meeting.

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13 (1882) 9 QBD 308.

14 [1902] 1 KB 167.

15 There are no common law criminal offences in Western Australia. S 62 of the *Criminal Code* defines unlawful assembly in the same terms as s 54A of the *Police Act* .

16 The court, however, did not make it clear whether they were laying down a general rule that if others committed the disturbance those who held the meeting were not guilty, or whether they merely found on the facts of the particular case that the accused did not cause the disturbance because it was not the natural and probable consequence of their procession that the Skeleton Army should create the disturbance: H Street *Freedom, the Individual and the Law* (5th ed 1982) 60.

17 R Cross & P A Jones *Introduction to Criminal Law* (9th ed 1980) para 15.12.

18 [1936] 1 KB 218.

7.9 Situations of this kind could well occur in Western Australia - for example, as between conservationists and those supporting new mining activities, or between opposing ethnic groups. One view might be that in no circumstances should a person be guilty of a criminal offence because there is a possibility that those opposed to that person's activities will cause a disturbance. The cases referred to above do not take this view, but suggest that a person will be guilty of unlawful assembly as a result of a disturbance caused by others only if the disturbance was the natural and probable consequence of that person's conduct. Section 54A is probably more sympathetic to the assemblers than the common law. It provides that the offence is committed only if those who assemble will by that assembly needlessly provoke others to disturb the peace. Nonetheless, the use of the word "needlessly" is not entirely satisfactory, because it does not give the judge sufficient indication of when the offence is committed.

(c) Public Meetings and Processions Act 1984

7.10 The offences in sections 52 and 54A must now be seen against the background of the *Public Meetings and Processions Act 1984*. This Act replaced the much criticised section 54B of the *Police Act*, which had been enacted in 1976.[19] Under the *Public Meetings and Processions Act* 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.[20] 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.[21]

7.11 Should a meeting or procession in respect of which a permit has been granted become disorderly, the police can exercise the power given to them under section 54A of the *Police Act* to disperse the assembly, and any person who fails to comply with such an instruction commits an offence under that section.[22]

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19 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.

20 S 5(1).

21 S 4(1).

22 It is also an offence to act in a disorderly manner, or to obstruct the free passage of ambulances, fire brigade vehicles or police vehicles at a public meeting held or a procession conducted pursuant to a permit: *Public Meetings and Processions Act 1984* s 9.

7.12 There will be situations in which those who organise a meeting or procession elect not to apply for a permit. There are also instances which the 1984 Act does not cover, for example gatherings in public parks.[23] Section 54A can, of course, also be invoked here if the meeting becomes disorderly.

7.13 The provisions of the 1984 Act operate subject to any directions given under section 52 of the *Police Act*.[24] 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.

(d) *Road Traffic Act 1974* Part VA

7.14 Part VA of the *Road Traffic Act 1974*, introduced by the *Acts Amendment (Events on Roads) Act 1988*,[25] introduces 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*.[26]

3. SUGGESTED CHANGES

(a) Section 52

7.15 It is possible to argue that section 52 is no longer necessary. It has been abolished in some other Australian jurisdictions.[27] As against this, it can be argued that the section is a necessary adjunct to the provisions of the 1984 Act. It allows the police to issue instructions in cases where there has been no application under the 1984 Act or to which that Act does not apply. No other provision in the *Police Act* allows the police to issue instructions in such circumstances. The section cannot be used to frustrate the purposes of the 1984 Act.

7.16 If the section is to be retained, its drafting is greatly in need of modernisation. Consideration should be given to redrafting the section along the lines of the current South Australian provision, under which

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23 See Western Australian *Parliamentary Debates* (1984) vol 247, 7236.
24 *Public Meetings and Processions Act 1984* s 4(1)(a).
25 S 4.
26 Part VA of the *Road Traffic Act* is not yet in force.
27 See para 7.5 above.

> "The Commissioner . . . may give reasonable directions, either orally or in writing, or in any other manner, for -
>
> (a) regulating traffic of all kinds;
>
> (b) preventing obstructions;
>
> (c) maintaining order,
>
> in any street, road or public place on any special occasion."[28]

As in Western Australia, when a direction has been given, a member of the police force may give orders reasonably calculated to ensure compliance with the direction,[29] and failure to comply with an order is an offence.[30]

7.17 Under section 52, the power vested in the Commissioner may be exercised by any member of the police force of or above the rank of sergeant duly authorised for the purpose. This seems unduly wide when compared with the South Australian provision, under which the Commissioner may delegate the power to give directions only to police officers holding a rank not lower than that of inspector.[31] Consideration might be given to following the South Australian example and narrowing the scope of the Commissioner's power of delegation under section 52.

(b) Section 54A

7.18 Section 54A also acts as an adjunct to the 1984 Act. It provides a summary alternative to the indictable offences in the Code and is meant to deal with less serious situations than the Code offences. The Murray Report endorsed section 54A and suggested changes to the Code provisions to bring them more into line with it.[32] The Commission is in general agreement, but suggests that the drafting of the section could be improved by clarifying the meaning of the word "needlessly" as suggested above.[33]

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28 *Summary Offences Act 1953* (SA) s 59(2).
29 S 59(7).
30 S 59(8).
31 S 59(5).
32 66.
33 Para 7.9.

(c) Relationship with the Public Meetings and Processions Act 1984

7.19 Since there is an important relationship between sections 52 and 54A and the *Public Meetings and Processions Act*, it would perhaps be desirable for the provisions of that Act to be brought back into a reformed *Police Act* and set out adjacent to sections 52 and 54A.

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, and there is now much overlap and inconsistency between them.

(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 1849[1] and can ultimately be traced back to United Kingdom legislation.[2] It is limited to particular places - stables, outhouses, and similar places[3] - 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]

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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 principal 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). Section 66(13) instead requires proof of the absence of lawful excuse,[8] and so there is no need to establish a criminal purpose. All that is necessary 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. A curtilage is a courtyard, garden, field or piece of ground adjoining premises. All premises, and not just dwelling houses, may have a curtilage.[10]

8.6 Section 66(13) is a more comprehensive provision than section 66(8), although charges continue to be brought under both provisions.[11] Section 66(8), because it requires an unlawful purpose, may be seen as the more serious offence.

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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 4.20-4.38 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 *Hislop v Spurr* [1983] WAR 180.

11 45 charges were brought under s 66(8) and 173 under s 66(13) in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

(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.[12] In contrast to sections 66(8) and 66(13), which deal with being unlawfully on premises, section 82A deals with trespass on enclosed land. It appears that the section was drafted primarily with rural land in mind[13] although it is capable of being applied to other kinds of enclosed property such as industrial premises. The section would not cover the average suburban dweller whose property is 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.[14] It appears that the real purpose of section 82A was to give landowners increased powers to deal with the problem of

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

13 See para 8.9 below.

14 On s 80, see paras 11.1-11.9 below.

trespassing. According to the Minister's second reading speech, there was a special problem with trespassers on farms, and in particular with trespassers who entered to pick mushrooms.[15] Though under the pre-1963 law the owner of the property had power to arrest any person committing a summary offence on the property,[16] 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.[17] 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 consent. It is not necessary that the entrant should also have caused damage. As a sanction, the section creates another offence of neglecting or refusing to give a name and address on demand, or giving a false name and address.[18]

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, either as respects the entry or as respects the causing of damage. It is not clear why the section is limited to property of a kind dealt with in section 82,[20] or why it was necessary to provide that it is not to be read in derogation of that section.

8.11 It seems likely that few charges are brought under section 82A,[21] although the section 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 -**

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

16 S 49, as to which see para 17.23 below.

17 Western Australian *Parliamentary Debates* (1963) vol 165, 2590-2591.

18 S 82A(2).

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 13.49-13.52 below.

21 There were none in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

> **(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, such as 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 shopping

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22 For s 82B(3), see para 8.26 below.

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

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

centres) and industrial premises.[25] The definition of premises makes it clear that it covers both buildings and land not built on. The section is therefore an important weapon to be used against demonstrators of all kinds.[26]

(b) Discussion

8.15 These sections raise a number of issues. It is necessary to consider not only what offences should exist but also what rights the landowner should have to require unlawful entrants to give particulars of their name and address, or to demand compensation for damage incurred.

(i) Offences

8.16 The first question is whether trespassing on another's property should be a criminal offence at all. Trespass is, first and foremost, a civil wrong, and it is possible to argue that the criminal law should not intervene, leaving the landowner to seek an appropriate civil remedy - damages or an injunction - in the civil court. In England, the law still adopts this general principle. Particular offences involving trespass were introduced in 1977,[27] but trespass, without more, has never been a criminal offence.[28]

8.17 Most Australian jurisdictions have criminal offences which involve being unlawfully on premises, but none has the accumulation of overlapping provisions found in the Western Australian *Police Act*. Whereas in Western Australia new provisions have been tacked on to old ones to deal with emerging problems,[29] in other jurisdictions the older provisions have usually

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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.

26 There were 58 charges under s 82B in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

27 The *Criminal Law Act 1977* created the offences of using violence for the purpose of entry (s 6) and refusing to leave premises on being required to do so (s 7). S 39 of the *Public Order Act 1986* added a further offence of refusing to leave non-residential premises.

28 The introduction of an offence of trespass was canvassed by the Home Office in a Consultation Paper, *Trespass on Residential Premises* (1983), issued after an intruder entered the Queen's bedroom at Buckingham Palace. A Criminal Trespass Bill was published, but not ultimately passed by Parliament: A T H Smith *Offences against Public Order* (1987) para 14-06.

29 A process typical of the way the *Police Act* has been amended over the years. Another example is the addition of s 65(4a) to deal with the inadequacies of s 65(4): see paras 12.5-12.11 below.

been replaced by a comprehensive modern provision.[30] These provisions usually provide that it is an offence without lawful excuse to enter the premises of another without the consent of the owner, occupier or person in charge or to remain there after being requested to leave.[31]

8.18 The Commission suggests that a general provision of this kind should replace the existing offences outlined above. Such a provision would cover the conduct at present covered by sections 66(8), 66(13) and 82B.[32] It would not cover section 82A, which requires that the trespasser do damage or injury to property, but this is already covered by the offence of damage to property.[33]

(ii) Rights of landowners to demand particulars

8.19 As has been pointed out above,[34] the most important feature of section 82A is not the offence it creates but the power that it gives to the owner, occupier or person in charge of enclosed land to demand the name and address of a person whom he or she has cause to suspect of having entered without consent. There is no similar power under section 82B.

8.20 The only other Australian jurisdictions where landowners possess a similar power are Tasmania and South Australia.[35] In South Australia, an authorised person asking a trespasser for his or her name and address must give the trespasser details of the authorised person's name, address and authorisation if the trespasser requests.[36]

8.21 Even if a general offence of being unlawfully on premises is to replace the present collection of offences, it does not follow that it is appropriate to extend the landowner's power to

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30 Thus only Tasmania, Queensland and Victoria retain equivalents of s 66(8): *Police Offences Act 1935* (Tas) s 7(1)(a); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(viii)(a); *Vagrancy Act 1966* (Vic) s 7(1)(i).

31 See *Inclosed Lands Protection Act 1901* (NSW) s 4; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4A(1); *Summary Offences Act 1953* (SA) s 17(1); *Police Offences Act 1935* (Tas) s 14B; *Trespass Act 1987* (NT) s 5; *Summary Offences Act 1966* (Vic) s 9(1)(d). South Australia, Queensland and New South Wales have additional offences of using offensive language or conduct while trespassing: *Summary Offences Act 1953* (SA) s 17a(2); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4A(2); *Inclosed Lands Protection Act 1901* (NSW) s 4A. The only jurisdictions with other trespass offences are South Australia (trespassing and interfering with enjoyment: *Summary Offences Act 1953* s 17a(1))and Northern Territory (trespass on prohibited land: s 6; trespass after direction to leave: s 7 and trespass after warning to stay off: s 8).

32 There should be a general definition of "premises" which could include enclosed land as well as buildings.

33 As to which see paras 11.1-11.9 below.

34 Para 8.9.

35 *Police Offences Act 1935* (Tas) s 14C; *Summary Offences Act 1953* (SA) s 17a(2a).

36 *Summary Offences Act 1953* (SA) s 17a(2b).

demand a name and address to all such cases. This would put a considerable amount of power in the hands of a private person. In most Australian States the landowner has no right to demand a name and address in any circumstances, and it might be preferable to take away this power in Western Australia. The landowner could still exercise the power to arrest for trespass, and call the police, who could demand the name and address of the trespasser. Another alternative would be to allow the landowner to retain the power to demand a name and address, but only in the circumstances in which this is permitted at present under section 82A. If the landowner does retain any power to demand a name and address, consideration might be given to requiring the landowner also to give details of his or her own name and address, as in South Australia. The Commission seeks comment.

(iii) Compensation for damage

8.22 The Commission has already pointed out that damage done by a trespasser can be taken care of by offences dealing with damage to property.[37] Compensation for damage resulting from a criminal offence is now dealt with in the general compensation provision of the *Criminal Code*[38] and there is no need for a specific provision of the kind found in section 82A.

2. HINDERING LAWFUL ACTIVITIES

8.23 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)

8.24 Section 67(4) provides that:

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

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37 See para 8.18 above.

38 S 719, as to which see para 3.33 above.

> **(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."**

8.25 Section 67(4) was inserted in the Act in 1978.[39] 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,[40] but it appears that the Government was principally concerned about the activities of anti-whaling protesters in Albany.[41]

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

8.26 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.**

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

40 See Western Australian *Parliamentary Debates* (1978) vol 218, 765.

41 Id (1978) vol 219, 966-968.

8.27 This offence, introduced in 1980[42] alongside 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.[43] In spite of the overlap, no move was made to amend section 67(4) when section 82B(3) was introduced.

(b) Discussion

8.28 Section 67(4) is drafted in obscure and vague terms, but its potential breadth is considerable.[44] Section 82B(3) is even wider.[45] There is no equivalent of either provision in the police legislation of any other Australian jurisdiction. Demonstrators can be dealt with by other offences, such as disorderly conduct or the offence of being on premises without lawful excuse suggested above.[46] The Commission invites comment as to whether sections 67(4) and 82B(3) should be repealed or redrawn in narrower terms.

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

43 See paras 8.12-8.14 above.

44 There were no charges under s 67(4) in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

45 Though there were 58 charges under s 82B in Perth and East Perth Courts of Petty Sessions in 1984-85 (see Appendix I), it appears that few, if any, of them were for an offence under s 82B(3).

46 See the comments made during the discussions on the bill: Western Australian *Parliamentary Debates* (1980) vol 230, 2332, 2379.

Chapter 9
PROSTITUTION

1. INTRODUCTION[1]

9.1 Prostitution is not in itself unlawful, but certain activities connected with prostitution are criminal offences. Some offences are to be found in the *Criminal Code*,[2] and other offences may be created by local by-laws,[3] but the major offences - soliciting, the keeping of premises for the purposes of prostitution and living on the earnings of prostitution - are contained in the *Police Act*.

9.2 The law is broadly similar in most other Australian jurisdictions, and the offences in the *Police Act* can generally be found in equivalent legislation in South Australia, Queensland, Tasmania and the Territories. In New South Wales[4] and Victoria,[5] however, legislation aimed at decriminalising prostitution has abolished or modified some of the traditional offences.

9.3 In recent years there have been a number of reports dealing with the practice of prostitution in Western Australia.[6] 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.[7] In 1987 the then Minister

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1 The following reports are referred to in this chapter in the abbreviated form indicated: (1) Western Australia: *Report of the Royal Commission into Matters Surrounding the Administration of the Law Relating to Prostitution* (1976) (Norris 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); (2) Victoria: *Final Report of the Inquiry into Prostitution* (1985) (Neave Report); (3) United Kingdom: Criminal Law Revision Committee, Working Paper on *Offences Relating to Prostitution and Allied Offences* (1982) (CLRC Working Paper); Criminal Law Revision Committee *16th Report: Prostitution in the Street* (1984 Cmnd 9329) (CLRC Report).

2 The keeping of premises for the purposes of prostitution (s 209); the procuring or detention of women for the purposes of prostitution (ss 191, 194).

3 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.

4 See *Prostitution Act 1979* (NSW), now replaced by *Summary Offences Act 1988* (NSW) Part 3. For further recommendations as to reform see Parliament of New South Wales *Report of the Select Committee of the Legislative Assembly upon Prostitution* (1986). These recommendations have not yet been implemented.

5 See *Prostitution Regulation Act 1986* (Vic). The Act implements, with some changes, the recommendations of the Neave Report, but some provisions of the Act are as yet unproclaimed. See M Neave "The Failure of Prostitution Law Reform" (1988) 21 *ANZJCrim* 202, 209-212.

6 Norris Report (1976); *Report of O F Dixon on Allegations of Graft and Corruption Within the Police Force* (1982); Edwards Report (1986); WAC Report (1988).

7 See Norris Report 17-20.

for Police announced that the Government was contemplating the adoption of a new policy on the regulation of prostitution.[8] It appears that it 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. In 1988, however, the Western Australian Minister for Police announced that the Government had decided not to proceed with its original intention, and would not introduce changes without general community support and understanding.[9]

9.4 The Commission's reference is confined to reviewing the offences in the *Police Act*. Other offences related to prostitution, such as those in the Code, are not within the scope of its enquiry. Nor is it concerned to make any proposals as to the overall policy for the regulation of prostitution, which is an issue on which the Government has indicated its general views. The proposals discussed in this chapter are therefore 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.

2. SOLICITING AND LOITERING

(a) Offences

9.5 Two offences in the *Police Act* cover soliciting for the purposes of prostitution or other similar conduct.

(i) Soliciting in the street: section 59

9.6 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."**

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8 "Minister plans change to brothel law" *The West Australian*, 1 August 1987.

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

9.7 Section 59, according to the marginal note, deals with "obscenity and other offences". Apart from soliciting, the section covers 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,[10] and the extinguishing of lights put up for public convenience.[11] The mischief sought to be prevented is nuisance and disruption to the public at large.

9.8 The offence in section 59[12] can only be committed by a "common prostitute".[13] A common prostitute is one who carries on a business or trade as a prostitute - that is, a person who offers herself commonly for lewdness for the purpose of gain.[14] The term appears to be confined to women. The section covers both soliciting, importuning and accosting persons for the purpose of prostitution, and loitering about for the purpose of prostitution. Soliciting means an invitation by words, conduct or merely by the woman's presence, to engage in sexual activities for money. Thus in *Behrendt v Burridge*[15] a woman who sat in a window illuminated by a red light, dressed in a low-cut top and a mini skirt, committed the offence. Loitering means lingering in a particular area without any apparent reason.[16] It involves a certain persistence or repetition.[17] The offence must be committed in a street or place, or (as in *Behrendt v Burridge*) within the view or hearing of any person passing therein.[18]

(ii) Persistently soliciting or importuning for immoral purposes: section 76G(1)(b)

9.9 Section 76G(1) provides that:

> **"Every person who -**
>
> **. . .**

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10 Dealt with at paras 6.1-6.19 above.

11 Dealt with at para 11.13 below.

12 Subsequent references in this chapter to s 59 are references to the soliciting offence contained in that section.

13 The legislation in the Northern Territory and Tasmania is in the same terms: see *Summary Offences Act 1923* (NT) s 53; *Police Offences Act 1985* (Tas) s 8(1)(c). For legislative provisions on soliciting in the other jurisdictions see *Summary Offences Act 1953* (SA) s 25; *Police Offences Ordinance 1930* (ACT) s 23(1)(ja); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 5(1)(b) and (e); *Summary Offences Act 1988* (NSW) s 19; *Prostitution Regulation Act 1986* (Vic) s 5; *Street Offences Act 1959* (UK) s 1; *Summary Offences Act 1981* (NZ) s 26.

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

15 [1976] 3 All ER 285.

16 *Hagan v Ridley* (1948) 50 WALR 112, discussed at para 4.25 above. This is an authority on the meaning of loitering in the context of s 43, but it is probable that the meaning attributed to loitering in other contexts is applicable here.

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

18 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.

(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,[19] and may be dealt with accordingly."

9.10 When originally enacted,[20] section 76G (which deals both with living on the earnings of prostitution and with soliciting or importuning) was confined to male persons.[21] It appears that the original purpose of the provision was to penalise the prostitute's pimp who touted for clients, but it has been mainly used to deal with homosexual soliciting.[22]

9.11 In 1968, the Standing Committee of Commonwealth and State Attorneys General resolved that each State should take whatever steps were necessary to meet the requirements of the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, so that Australia might accede to the Convention.[23] In Western Australia it was necessary to extend section 76G to females who lived on the earnings of prostitution,[24] and the section was accordingly amended by removing the word "male" from the introductory words.[25] However, this also had the effect of extending the offence of persistently soliciting or importuning, originally designed to be limited to soliciting by men, to women,[26] so creating an overlap with section 59 which originally did not exist.

9.12 There are a number of differences between section 76G(1)(b), as it now stands, and section 59. Section 59 is confined to common prostitutes, whereas section 76G(1)(b) refers to "every person". Section 59 is limited to soliciting or loitering for the purpose of prostitution, whereas section 76G(1)(b) simply refers to soliciting or importuning for immoral purposes. On the other hand, the ambit of section 76G(1)(b) is limited by the adverb "persistently".

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19 S 66 sets out a number of offences for which on conviction the offender is liable to a fine not exceeding $1,000 or imprisonment for any term not exceeding 12 months.

20 By the *Police Act Amendment Act 1902* s 8, which was modelled on s 1 of the *Vagrancy Act 1898* (UK). The offence was incorporated as s 76G of the *Police Act 1892* by the *Police Act Amendment Act 1952* s 7 and Schedule.

21 In England, the Northern Territory and Tasmania the equivalent offence is still confined to males: *Sexual Offences Act 1956* (UK) s 32; *Summary Offences Act 1923* (NT) s 57(1)(ha); *Police Offences Act 1935* (Tas) s 8(1A)(c).

22 CLRC Working Paper para 3.32.

23 See Western Australian *Parliamentary Debates* (1968) vol 180, 1137.

24 For living on the earnings of prostitution, see paras 9.35-9.38, 9.43-9.44 below.

25 *Police Act Amendment Act 1968* s 2.

26 The equivalent offence has also been extended to females in Queensland and the ACT: *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 5(1)(b); *Police Offences Ordinance 1930* (ACT) s 23(1)(ja).

(b) Discussion

(i) Should soliciting continue to be an offence?

9.13 In New South Wales, the offence of soliciting[27] was abolished in 1979.[28] In 1983, however, a more limited offence of soliciting was reintroduced,[29] and the *Summary Offences Act 1988* expanded it. This Act now provides that soliciting is an offence if it takes place near or within view from a dwelling, school, church or hospital[30] or in a school, church or hospital.[31] Soliciting in such circumstances in a manner that harasses or distresses the person solicited carries a slightly higher penalty.[32]

9.14 In all other Australian jurisdictions, soliciting in any public place is an offence[33] - with the limitation in the ACT that the soliciting must be persistent.[34] In Victoria the Neave Report recommended the abolition of the offence of soliciting in most circumstances,[35] but the *Prostitution Regulation Act 1986* retained it.[36]

9.15 There is comparatively little street prostitution in Western Australia.[37] A recent report suggests that it is on the increase,[38] but the problem disclosed by the report is largely confined to under-age prostitutes, and may well be connected with the restriction of social security benefit for persons under 18. In the Commission's view it is really a child welfare problem, and it would seem that it could be adequately dealt with under the provisions of the *Child Welfare Act 1947*.[39]

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27 *Summary Offences Act 1970* (NSW) s 28.

28 By the *Summary Offences (Repeal) Act 1979* (NSW) s 3.

29 *Prostitution Act 1979* (NSW) s 8A, inserted by the *Prostitution (Amendment) Act 1983*.

30 S 19(1).

31 S 19(2).

32 S 19(3).

33 For the legislative provisions, see fn 13 above.

34 *Police Offences Ordinance 1930* (ACT) s 23(1)(ja). For discussion of introducing such a limitation in Western Australia, see paras 9.23-9.24 below.

35 Paras 8.17-8.35.

36 S 5.

37 Edwards Report 7-15.

38 See Western Australia Police Service Annual Report 1988, 15, which stated that there were 67 prosecutions for soliciting in that year in comparison to 4 in 1986-87. The report referred in particular to the increase in soliciting by under-age prostitutes. It led to suggestions that there should be a new offence committed by kerb-crawlers who solicit child prostitutes, and that persons convicted of this offence should get maximum publicity: see eg "Bid to Jail 'Kerb Crawlers'" *Sunday Times* 11 December 1988, 1.

39 S 29 gives the police and authorised officers of the Department for Community Services power to arrest without warrant any child appearing or suspected to be in need of care and protection. Under s 31A a person who, either by wilful misconduct or habitual neglect or by any wrongful or immoral act or omission, has encouraged or contributed to the commission of any offence by any child, or has caused or suffered any child to become a child in need of care and protection, commits an offence. Since the offence is punishable

9.16 The Commission is of the view that the offence of soliciting should be retained broadly in its present form.[40] Street soliciting is undesirable, because of the nuisance caused to others, and retaining the offence will ensure that it can be properly controlled.

(ii) The ambit of the soliciting offence

9.17 On the assumption that soliciting is to remain an offence, a number of questions as to the ambit of the offence arise. Irrespective of the answers to those questions, the Commission is of the view that the drafting and arrangement of the present law is unsatisfactory. At present there are two offences, which overlap; and each offence is incorporated in a section of the *Police Act* which deals also with matters other than soliciting. When the offences are redrafted, soliciting should be dealt with in a separate section or sections, and if there is to be more than one offence there should be no duplication between them.

* *The potential defendants*

9.18 Section 59 penalises soliciting by "common prostitutes", which would appear to mean that the offence can be committed only by women.[41] (In contrast section 76G(1)(b) originally applied only to male persons, but now applies to "every person".[42]) In the Commission's view the term "common" prostitute now seems outmoded. All other Australian jurisdictions except the Northern Territory and Tasmania have dropped this term from their soliciting offences.[43] The section should apply to male and female prostitutes alike, and it seems that if the section referred simply to "any prostitute" this would be its effect. In *Poiner v Hanns ex parte Poiner*[44] it was held that the offence of loitering for the purpose of prostitution[45] covered both male and female prostitution. The essential concept in prostitution was the gratification of sexual appetites for gain, and the question whether a man or a woman was involved or whether homosexual or heterosexual activities were contemplated was of little consequence.

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with imprisonment, the police may exercise their powers of arrest without warrant under s 564 of the *Criminal Code*.

40 On the question whether the offence should be restricted to persistent soliciting, see paras 9.23-9.24 below.

41 See para 9.8 above.

42 See paras 9.10-9.11 above.

43 See fn 13 above.

44 [1987] 2 Qd R 242.

45 *Vagrancy, Gaming, and Other Offences Act 1931* (Qld) s 5(1)(e).

9.19 A consequence of reforming section 51 along these lines would be that section 76G(1)(b) would no longer be needed to deal with soliciting for the purpose of prostitution. The question remains whether it should be retained to deal with soliciting by men for the purpose of homosexual activity not involving prostitution. This has hitherto been its chief use. If it is to be retained for this purpose, it may be that the limitation which was (inadvertently, it seems[46]) removed in 1968 should be restored, so limiting the offence to male persons.[47] In order to do this it would be necessary to separate it from the other offence in section 76G, living on the earnings of prostitution, and the Commission has already suggested that this is desirable whether or not the limitation to male persons is restored.[48] It would also be desirable to amend the section so as to refer specifically to soliciting or importuning for sexual purposes.[49] Otherwise, it might be thought to cover activities not directly associated with sex, for example the illicit sale of pornographic material.

* *The penalty*

9.20 The maximum penalty provided by section 59 presently stands at $40 or one month's imprisonment. In contrast a person committing an offence against section 76G(1)(b) is deemed to have committed an offence against section 66, which carries a maximum penalty of $1,000 or 12 months' imprisonment.

9.21 A fine of $40 may not be a sufficient deterrent against soliciting, and may force the courts to use the alternative of imprisonment to enforce the law. In order to further the Government's declared aim of reducing the rate of imprisonment,[50] the maximum fine for soliciting or loitering should be increased to a more realistic figure.

9.22 The penalty for a conviction under section 76G(1)(b) should be set out in the section itself. It is unnecessary that a person who has committed an offence under section 76G should be deemed to have committed an offence under another section.

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46 See para 9.11 above.

47 Indecency between males is still a criminal offence: *Criminal Code* s 184. There is no equivalent offence involving indecency between females.

48 See para 9.17 above.

49 The Criminal Law Revision Committee so recommended: CLRC Report paras 54-55.

50 See Ministerial Statement by Attorney General, Western Australian *Parliamentary Debates* (1987) vol 267, 5209-5214.

* *Should soliciting be an offence only if it is persistent?*

9.23 A question that arises in relation both to section 59 and to section 76G(1)(b) is whether soliciting or loitering should only attract a criminal penalty if engaged in persistently.

9.24 Section 76G(1)(b) has always required that the soliciting or importuning should be persistent. It can be argued that the same approach should be adopted in dealing with soliciting for the purposes of prostitution under section 59, and that such conduct should be criminal only when it is persistent, as in the ACT.[51] The chief argument against imposing such a limitation is that it may make it harder to prove the commission of an offence. As against that, however, the law should not intervene unless a person's activities are causing a public nuisance, which would not be so unless those activities are being carried out over a period of some time. As a matter of practice, police are unlikely to take proceedings unless there is evidence of a degree of persistence, and the insertion of an express requirement that the conduct be persistent might not therefore effect any substantial change in the existing practice. The insertion of a requirement of persistence in section 59 would also bring it into line with section 76G. One effect of this would be that solicitation by men, for whatever purpose, would have to be persistent before it constituted an offence. The Commission seeks comment.

(iii) Should soliciting offences also extend to potential clients?

9.25 Soliciting offences have traditionally penalised only those who solicit, and not potential clients. Section 59 is limited to "common prostitutes" and thus obviously has no application to their clients. It is unlikely that a potential client could be convicted under section 76G(1)(b). At one time it was thought that the equivalent English section was wide enough to cover men who accosted women for the purposes of sexual intercourse,[52] but in *Crook v Edmondson*[53] it was held that it did not apply in such circumstances.

9.26 Street prostitution is a serious problem in some cities in other jurisdictions, and soliciting legislation in the United Kingdom and Victoria now covers potential clients. In the *United Kingdom, the Sexual Offences Act 1985* makes it an offence for a man persistently to solicit a

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51 *Police Offences Ordinance 1930* (ACT) s 23(1)(ja).
52 CLRC Working Paper para 3.39.
53 [1966] 2 QB 81.

woman (or different women) for the purpose of prostitution in a street or public place.[54] The same Act creates another offence to deal with the special problem of kerb-crawling. The offence is committed if a man solicits a woman for the purpose of prostitution 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] The Victorian *Prostitution Regulation Act 1986*, unlike the United Kingdom legislation, does not discriminate between the sexes. It makes soliciting by a client an offence in the same way as soliciting by a prostitute, and seeks to cover both heterosexual and homosexual prostitution.[56]

9.27 The chief argument in favour of soliciting offences covering clients as well as prostitutes is that both contribute equally to the potential nuisance of soliciting in a public place, and that it is unfair and discriminatory to penalise only the prostitute. As against this, it has been said that the rationale of soliciting offences is that soliciting is offensive to public order and decency and prostitutes would normally parade more openly than their potential clients;[57] and that problems will occur if the proposed offence is so widely defined that men who, for example, were simply speaking to women in the street might be at risk.[58] The Commission seeks comment as to whether the soliciting offences of the *Police Act* should be extended to potential clients and, if so, what form that legislation should take.

3. 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"**

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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 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.

57 Home Office Working Paper para 243.

58 Ibid para 268; CLRC Working Paper para 3.45. Such considerations resulted in the United Kingdom legislation on soliciting by men requiring in most circumstances that the soliciting be persistent, and so being more narrowly drawn than that on soliciting by women.

commits an offence.

9.29 This offence, like most of the other provisions in section 65, can be traced back to the United Kingdom *Vagrancy Act 1824*.[59] Section 65, as originally drafted, provided that in a number of situations persons were deemed to be "idle and disorderly persons" and therefore to have committed a criminal offence. It is possible that a prostitute soliciting in the street could be guilty of conduct falling within the scope of section 65(8), but the subsection does not deal with soliciting as such, and appears to be essentially a public order provision. As such, it appears odd that it is confined to "common prostitutes".[60]

9.30 The section does not appear to be used.[61] It is not needed to deal with soliciting, which is dealt with more specifically by sections 59 and 76G(1)(b). 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.[62] In most Australian jurisdictions the equivalent provision has been repealed,[63] and in England repeal of the old *Vagrancy Act* provision has been recommended.[64] The Commission suggests that section 65(8) can likewise be repealed.

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

(a) Offences

9.31 The offences so far covered in this chapter deal with soliciting for the purpose of prostitution and associated activities, rather than prostitution itself, which is regulated by the offences of keeping premises for the purposes of prostitution and living on the earnings of prostitution.

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59 S 3.

60 For the Commission's view as to the use of this term, see para above.

61 There were no convictions under s 65(8) in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

62 See paras 6.1-6.19.

63 The equivalent provision has been repealed in South Australia, the ACT, New South Wales and also in New Zealand. Apart from Western Australia, the only jurisdictions to retain it are the Northern Territory and Queensland: *Summary Offences Act 1923* (NT) s 56(1)(h); *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 5(1)(a).

64 Home Office Report para 80. The Law Commission is currently working on the implementation of this and other recommendations in the report: Law Commission Annual Report 1985-1986 para 2.67, and letter from Law Commission dated 19 August 1987.

(i) Keeping premises for the purpose of prostitution

9.32 Section 76F, added to the *Police Act* in 1902,[65] sets out a number of offences relating to the keeping of premises for prostitution. It 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."**

9.33 Keeping premises for the purpose of prostitution is also an indictable offence under section 209 of the *Criminal Code*. The mischief both of these provisions seek to prevent is the basic immorality of the industry of prostitution, and more specifically the problems caused by the frequent arrivals and departures of prostitutes and their clients. Other Australian jurisdictions generally have similar provisions.[66]

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

66 *Summary Offences Act 1953* (SA) ss 28-29; *Police Offences Ordinance 1930* (ACT) ss 18-19; *Suppression of Brothels Act 1907* (NT) s 3 (South Australian statute applying to the Northern Territory); *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.

9.34 The *Police Act* offence specifically provides that it is immaterial whether the premises are kept or occupied by one person or more than one person.[67] The position is the same under the Code offence. The offence under section 76F is therefore committed where a woman keeps premises for the prostitution of one woman, whether herself or another.[68] However, a woman carrying out prostitution by herself in her own home would not commit the offence.[69] Premises may be kept for the purpose of prostitution even though sexual intercourse does not take place.[70] The offence is also committed where premises are kept to enable men and women to meet there for the purposes of arranging sexual intercourse for money elsewhere.[71] The section does not however cover premises used for the running of an "escort agency", where there was no meeting of men and women on the premises, which were used merely for the making of arrangements by telephone for men and women to meet elsewhere.[72] To include such activity within the section would broaden its scope beyond what must have been intended.[73]

(ii) Living on the earnings of prostitution

9.35 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.**

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67 This provision was inserted to overcome the limitations of the common law, under which premises could not be a brothel unless they were used for the prostitution of more than one woman: *Moore v Giudotti* (1900) 2 WALR 123.

68 Eg *Storey v Wick* [1976] WAR 47, where a woman leased premises for the purpose of the prostitution of another woman whose fees she shared.

69 *Parker v Jeffrey ex parte Parker* [1963] QWN 32, and see also the discussion in *Storey v Wick* [1976] WAR 47.

70 Eg it has been held that the offence is committed where women carried out a striptease before male customers (in cubicles) who were permitted, and expected, to masturbate during the performance: *Gascoigne v Duffy* (1983) 27 JPWA Journal No 1 12; and where the services provided are limited to the provision of "relief massages": *Kelly v Purvis* [1983] QB 663.

71 *Samuels v Bosch* (1972) 127 CLR 517, dealing with the similar offence in s 28 of the *Summary Offences Act 1953* (SA).

72 *Powell v Devereaux* (unreported) Supreme Court of Western Australia, 12 June 1987, Appeal No 1053 of 1987; *R v Gray* [1984] 2 NZLR 410.

73 *Powell v Devereaux* (unreported) Supreme Court of Western Australia, 12 June 1987, Appeal No 1053 of 1987, 13. A prosecution for the offence of living on the earnings of prostitution might succeed in such a case.

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

9.36 Though the section, as originally enacted,[74] was confined to male persons,[75] both men and women may now be convicted of living on the earnings of prostitution,[76] as is the case in other Australian jurisdictions.[77]

9.37 The offence will be committed where a person lives with a prostitute and is wholly or mainly kept by her, but also applies in other situations, such as the supply of goods and services. Prostitutes, like everyone else, need food, clothing, accommodation and so on, and so the courts have attempted to distinguish between the supply of goods and services which in their nature can only relate to prostitution, in which circumstances the supplier would commit the offence;[78] and the supply of goods and services which are not exclusively referable to prostitution but which will be used to further it in some way, in which case the supplier will only commit the offence where the charge made for the goods or services is exorbitant because the woman is a prostitute.[79]

9.38 Section 76G(2) 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 knowingly living on the earnings of prostitution unless he can satisfy the court to the contrary. It has been held that there is no need to prove that a person lives with or is habitually in the company of a prostitute in a way which shows that that person is aiding, abetting or compelling her prostitution with others. Proof that someone lives with or is habitually in the company of a prostitute is sufficient to raise

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

75 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.

76 See para 9.11 above.

77 *Summary Offences Act 1953* (SA) s 26; *Police Offences Ordinance 1930* (ACT) s 23(1)(j); *Summary Offences Act 1923* (NT) s 57(1)(h); *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* s 12 when that section is proclaimed.

78 Eg *Calvert v Mayes* [1954] 1 QB 342 (the owner-driver of a taxi allowed his taxi to be used by American servicemen and prostitutes on short journeys during which sexual intercourse took place; the defendant was paid the proper fee, but without the presence of the prostitutes and the opportunities for sexual intercourse his income would have been very much reduced).

79 Eg *R v Thomas* [1957] 2 All ER 181, in which a man let a prostitute have the use of a room for prostitution between 9.00 pm and 2.00 am each night. The court said that the offence of living on the earnings would be committed if the rent was grossly inflated. It has however been suggested that the accommodation was provided for prostitution and nothing else, and whether the rent was inflated or not should have been irrelevant: *Shaw v DPP* [1962] AC 220, 265 per Viscount Simonds.

the presumption.[80] Thus where a man lived with a prostitute and accepted money from her for the maintenance payments he made to his children the presumption applied.[81]

(b) Discussion

(i) Introduction

9.39 The effect of the two offences discussed above 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.[82] 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.[83]

9.40 Except for New South Wales and Victoria, the position in the other Australian jurisdictions is similar. New South Wales has abolished the offence of keeping a brothel,[84] although keeping a disorderly house is still an offence at common law,[85] and using massage parlours and the like for the purpose of prostitution is an offence under statute.[86] Living on the earnings of prostitution remains an offence.[87] In Victoria there is now a statutory scheme whereby brothels may be legal if they satisfy licensing and planning requirements.[88] The licensing requirements have not been brought into force, but under existing legislation neither keeping a brothel nor living on the earnings of prostitution is a criminal offence where the prostitution in question takes place in a brothel with a permit.[89] The new legislation appears to have had the effect of crowding out single operators in favour of brothels run by "big business".[90]

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80 *R v Clarke* [1976] 2 All ER 696.

81 *R v Wilson* (1983) 78 Cr App R 247.

82 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).

83 For discussion of the points made in this paragraph, see WAC Report 5-6.

84 *Summary Offences Act 1970* (NSW) s 32, repealed by *Summary Offences (Repeal) Act 1979* s 3.

85 Neave Report para 6.44. 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.

86 *Summary Offences Act 1988* (NSW) s 17.

87 Id s 15.

88 *Prostitution Regulation Act 1986* (Vic) Parts 3 and 4.

89 *Vagrancy Act 1966* (Vic) ss 10-11. For the effect on these offences of bringing the licensing scheme into operation see M Neave *The Failure of Prostitution Law Reform* (1988) 21 ANZJCrim 202, 209-210.

90 On the new legislation, see M Neave "The Failure of Prostitution Law Reform" (1988) 21 *ANZJCrim* 202.

9.41 The Commission's proposals on sections 76F and 76G are founded on the basis that the present policy of the law will be maintained. Other changes such as the introduction of offences covering the operation of escort agencies, or the modification of section 76F to permit a prostitute to work and reside in different places, have therefore not been discussed.[91]

(ii) Keeping premises for the purpose of prostitution

9.42 In the Commission's view, section 76F is in general a satisfactory expression of the present policy concerning the keeping of premises for the purpose of prostitution. The Murray Report, in dealing with section 209 of the *Criminal Code*, commented that the problem was appropriately dealt with in the context of the *Police Act* offence.[92] It said that charges were invariably laid under the *Police Act* and never under the Code offence,[93] and recommended that section 209 of the Code should be repealed, leaving the problem to be dealt with by section 76F of the *Police Act*.

(iii) Living on the earnings of prostitution

9.43 In the Commission's view, section 76G is unsatisfactory in a number of technical respects. As already suggested,[94] living on the earnings of prostitution and persistently soliciting for immoral purposes should be dealt with in separate sections, and that part of section 76G which deems an offence to have been committed under section 66 is unnecessary and should be removed.

9.44 The reversal of the onus of proof by section 76G(2) is also undesirable. The Commission has already commented generally on provisions in the *Police Act* which reverse the onus of proof.[95] In this instance, however, the removal of subsection (2) would make proving that a person was living on the earnings of prostitution much more difficult. Other Australian

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91 See para 9.4 above.
92 Murray Report 132.
93 18 charges were laid under s 76F in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.
94 See para 9.17 above.
95 See paras 3.24-3.25 above.

jurisdictions, even those which have reformed or modernised their prostitution legislation, retain the subsection.[96] The Commission invites comment on whether the provision should be retained.

96 See *Summary Offences Act 1988* (NSW) s 15(2); *Prostitution Regulation Act 1986* (Vic) s 12(3) (not yet in force).

Chapter 10
GAMING AND DRUNKENNESS

1. INTRODUCTION

10.1 The *Police Act* contains offences relating to gaming and drunkenness. Like prostitution, these are areas where views as to the proper limits of legislative regulation may differ. The offences in the *Police Act*, which date back to the 19th century, are unlikely to accord with contemporary views - as is shown by the fact that the gaming offences have been recently reformed and proposals for decriminalisation of drunkenness are currently under discussion.

2. GAMING: SECTIONS 84C, 84D, 84G AND 84H

(a) Introduction

10.2 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 1890s.[4]

10.3 The 1892 Act originally went so far as to prohibit 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

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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 para 5.11 above.

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*).

General.[5] The *Police Act Amendment Act 1894*[6] went even 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]

10.4 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]

10.5 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 1980s was very different from that in the 1890s. A number of statutes gave official approval to betting and gaming,[13] and the *Police Act* no longer applied in these cases.

10.6 This change in attitude was recognised by an important series of legislative changes in the 1980s. 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

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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.

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*.

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] repeals the provisions of the *Police Act* dealing with gaming, slot machines and cheating at play.[16] They are replaced by more modern provisions located in the *Gaming Commission Act*.[17] The betting provisions, amended in minor respects, remain in the *Police Act*.

(b) Offences

10.7 There are now four offences in the *Police Act* which deal with betting.[18] 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."**

10.8 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 84C 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**

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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.

18 There were no convictions for any of these offences in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

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."

10.9 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."

10.10 Section 84H creates an offence of advertising as to betting or lotteries:

"(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

(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*."[19]

(c) Discussion

10.11 The question for the Commission is whether the provisions that remain in the *Police Act* require further amendment. These sections have been reviewed on two occasions recently,[20] but they have been left in existence with only minor alteration. The Commission seeks comment as to whether their substance is regarded as satisfactory.

10.12 The drafting of these sections still adheres very closely to the language of the 19th-century statute on which they were modelled.[21] This makes them difficult to understand. Even if no amendment of substance is required, the Commission suggests that these sections should be redrafted in contemporary form.[22]

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19 The other provisions do not create offences. S 84B defines betting houses. S 84E deals with the recovery of money handed over for betting. S 84F makes it clear that the Act does not apply to the stakes which are due to the owner of a horse winning a race. For s 84A see para 10.6 above.

20 See para 10.6 above.

21 *Betting Act 1853* (UK).

22 The 1987 amendments have produced one drafting point which requires particular attention. S 84C deals with the keeping of premises for the purpose of betting. Prior to 1987, this provision was numbered s 84C(1), and s 84C(2) made it clear that a person permitting premises to be used for betting was liable on conviction to a specified penalty. It appears that s 84C as now drafted still intends that the conduct in question should be a criminal offence, though it does not clearly say so. Since no penalty is specified, the general penalty in s 124 would apply. In the Commission's view s 84C as it stands at present is unsatisfactory. It should be redrafted to make it clear that a person who acts as specified in the section commits an offence, and an appropriate penalty should be provided by the section rather than relying on s 124.

3. DRUNKENNESS: SECTIONS 53, 65(6), 44

(a) Offences

10.13 Section 53 of the *Police Act* makes it an offence to be found drunk in a public place:

> **"Every person who shall be found drunk in any street, public place, or in any passenger boat or vehicle, shall for the first offence be liable on conviction to a penalty not exceeding ten dollars, or to imprisonment, with or without hard labour, for any term not exceeding seven days, and for any second or subsequent offence to a penalty not exceeding twenty-five dollars, or to imprisonment, with or without hard labour, for any term not exceeding twenty-one days."**

10.14 Section 53 provides two penalties, one for a first offence and a higher penalty for a second or subsequent offence. A still higher penalty is provided for habitual drunkards by section 65(6), which provides that:

> **"Every habitual drunkard having been thrice convicted of drunkenness within the preceding twelve months"**

is liable on summary conviction to a fine not exceeding $500 or to imprisonment for any term not exceeding six calendar months with or without hard labour.[23]

10.15 Offences of drunkenness also appear in other provisions of the *Police Act* conferring powers of arrest. Under section 44[24] a member of the police force, in the circumstances specified, may enter ships or licensed premises and apprehend a person found drunk. A person so apprehended is liable to a specified penalty under section 44 unless the Act prescribes a different penalty. Persons found drunk on board ships are included within the scope of section 53, but it would appear that persons found drunk on licensed premises are outside section 53 and may therefore be convicted under section 44. Under section 43(1),[25] any officer or constable of the police force may apprehend without warrant a person he finds drunk in any street, public vehicle or passenger boat. It is possible to read section 43(1) as saying that being found drunk constitutes an offence under that section. This offence would merely duplicate that provided by section 53, though the penalty under section 43(1) would be higher. The preferable view is that

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23 The details of the penalty appear in the introductory words of s 65.
24 Quoted in para 6.3 above.
25 Quoted in para 4.21 above.

section 43(1) merely gives power to arrest a person found drunk who will then be charged under section 53.[26]

(b) Discussion

10.16 In several Australian jurisdictions, the offences of being found drunk and being a habitual drunkard have been abolished. Instead, police are given power to detain persons found drunk for sufficient time to enable them to sober up. Legislation along these lines was introduced in New South Wales in 1979,[27] the ACT[28] and the Northern Territory in 1983[29] and South Australia in 1984.[30]

10.17 The Attorney General has announced that, as part of a programme of changes aimed at reducing the rate of imprisonment in Western Australia, legislation will be introduced to decriminalise drunkenness substantially along the lines of that now in force in the Northern Territory.[31] Sections 53 and 65(6) of the *Police Act* are to be repealed. To the extent that sections 43(1) and 44 also create offences of being found drunk, those offences should also be abolished.[32] Section 669 of the *Criminal Code* will require consequential amendment.[33]

10.18 Two recent reports on aboriginal deaths in custody also recommended that legislation to decriminalise drunkenness should be introduced.[34] In view of the findings in these reports, it is obvious that some such step needs to be taken.

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26 See paras 4.25-4.26 above.

27 *Intoxicated Persons Act 1979* (NSW).

28 *Crimes Act 1900* (ACT) s 351, inserted by *Crimes Amendment (No 3) Ordinance 1983* s 12.

29 *Police Administration Act 1978* (NT) ss 127A-133, inserted by *Police Administration Amendment Act 1983*.

30 *Public Intoxication Act 1984* (SA).

31 Ministerial Statement by Attorney General, Western Australian *Parliamentary Debates* (1987) vol 267, 5211.

32 For the Commission's proposals as to the other aspects of s 43(1) see paras 4.27-4.38 above; and as to the other aspects of s 44 see paras 6.1-6.19 above.

33 S 669(1)(b) gives a court power to convict and discharge, conditionally or unconditionally, a "first offender" as defined by s 669(1b). A person may still be a "first offender" under this definition despite a previous conviction under s 53, whatever penalty was imposed. A previous conviction for another offence will in specified circumstances prevent the convicted person from being a "first offender".

34 *Report of the Interim Inquiry into Aboriginal Deaths in Custody (Western Australia)* (1988) 57-59*; Royal Commission into Aboriginal Deaths in Custody: Interim Report* (1988) 25-31.

Chapter 11
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] Neither the 1849 or the 1861 Ordinances had contained an equivalent provision. The section was redrafted in modern form in 1970,[4] without any alterations of substance. At this point the section still required that the destruction or damage should be wilful or malicious, but the words "wilfully or maliciously" were omitted in 1980.[5]

11.3 Damage to property is also an indictable offence. The *Criminal Code* provides that any person who wilfully and unlawfully destroys or damages any property is guilty of an indictable

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1 S 80(3) allows the court to alter the payment of compensation by the convicted person: see para 3.33 above. 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.

4 See *Police Act Amendment Act (No 2) 1970* s 7.

5 By the *Police Amendment Act 1980* s 5: see para 11.4 below.

offence punishable with imprisonment for two years, or three years if committed by night.[6] If the amount of the injury done does not exceed $4,000, or the court considers that the charge can adequately be dealt with summarily, the charge may be dealt with summarily at the election of the person charged,[7] in which case that person is liable to imprisonment for 18 months or a fine of $6,000. It is clear that section 80 is much used, whereas charges under the Code provisions are comparatively rare.[8]

11.4 There are several difficulties with the section as presently drafted. One is that since 1980 the section 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.[9] This appears to have had the desired effect.[10] However, the change has also had the effect of making non-intentional damage an offence even where intoxication was not involved. It is true that such a defendant would not be criminally responsible "for an event which occurs by accident"[11] but this only applies if there was no negligence. It is doubtful whether inadvertent damage to property should be the subject of a criminal offence, and the Commission suggests that the section should expressly specify a mental element, whether by restoring the requirement of wilfulness[12] or at least requiring recklessness.[13]

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6 S 453, which also sets out a long list of special cases in which a greater punishment can be imposed. The Murray Report 286-288, 292-296 recommends that this offence should be retained, with the penalty increased to one of ten years' imprisonment, and that arson and the other special cases should disappear.

7 S 465, as substituted by *Criminal Code Amendment Act (No 2) 1987*, implementing recommendations in the Murray Report 295-296, 308. The former s 465 only gave the person charged a right to elect summary trial if the amount of the injury did not exceed $500 or the accused admitted guilt.

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 1984-85 there were 698 charges brought under s 80 in Perth and East Perth Courts of Petty Sessions: see Appendix I, and 1466 charges of property damage in other Courts of Petty Sessions: Australian Bureau of Statistics (Perth) *Court Statistics: Courts of Petty Sessions (excluding Perth and East Perth Courts) Western Australia 1984-85* (1987) table 2. Most of these charges would have been under s 80. There were only 57 charges of property damage in higher courts: Australian Bureau of Statistics (Western Australia) *Court Statistics: Higher Criminal Courts - Western Australia 1984-85* (1986) table 1. Arson is excluded from this figure.

9 Western Australian *Parliamentary Debates* (1980) vol 229, 1882.

10 Self-induced intoxication is no answer to a change 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 *Criminal Code* (WA)).

11 *Criminal Code* s 23.

12 There would be no need also to restore the concept of maliciousness as this would not in effect add anything to "wilfully".

13 Equivalent offences in all other Australian jurisdictions except two incorporate a mental element: see *Crimes Act 1900* (NSW) s 247; *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).

11.5 Section 80(2) sets out two specific defences. First, it provides that the defendant can escape liability where he acted under a fair and reasonable supposition that he had a right to do the act complained of. It is not certain whether the defendant bears the onus of proving the existence of such a supposition, or whether the prosecution must disprove it. The Commission has already suggested that reversal of the onus of proof is in principle undesirable,[14] and the matter should be placed beyond doubt.[15]

11.6 Secondly, the defendant may escape liability where the act 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. Those who hunt, fish or shoot are therefore absolved from criminal liability for negligent property damage. Such an exception seems anomalous at the present day,[16] and 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.[17] Moreover, if the section were to be expressly limited to intentional damage,[18] there would be no need for this special defence.

11.7 If section 80 were to be reformed along the lines suggested above, it would become virtually indistinguishable from the Code offence, except for the penalty. Since the Code offence offers the alternative of summary prosecution, it is questionable whether both offences are required.[19]

11.8 Three courses of action are possible:

(1) Section 80 could be repealed, with the result that all prosecutions for damage to property will be brought under section 453;

(2) Both sections could be retained;

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14 See paras 3.24-3.25 above.

15 South Australia abolished the equivalent defence when the offence was redrafted by the *Police Offences Act 1953* s 43. The section itself has now been repealed: see para 11.9 below.

16 Especially when there is no immunity from civil liability in such circumstances: see *League Against Cruel Sports Ltd v Scott* [1986] QB 240.

17 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 in 1953: see fn 15 above.

18 See para 11.4 above.

19 As the result of the 1987 amendment (see fn 7 above), the penalty for summary conviction under s 453 of the *Criminal Code* is now higher than that under s 80. But this would not justify the retention of both provisions.

(3) Both sections could be retained, subject to a qualification that where the amount of the injury done did not exceed a stated sum, say $400, the only alternative should be a prosecution for the simple offence under the *Police Act*.[20]

11.9 The major difference between these alternatives is whether the choice as to the form of prosecution should lie with the police or the defendant. The existence of the separate *Police Act* offence gives the police power to decide whether the defendant is to be prosecuted summarily or given the right to a jury trial, whereas when a prosecution is brought for the Code offence the defendant has this choice. The Commission has suggested above[21] that it is more consistent with general principle for the choice to lie in the hands of the defendant and the court. This could be achieved by repealing the *Police Act* offence. Having one offence rather than two is consistent with principles of order and economy, and it would bring Western Australia into line with most of the other Australian jurisdictions. South Australia recently repealed its summary offence of damage to property,[22] so that in future all prosecutions will be brought under the *Criminal Law Consolidation Act 1935*.[23] This had already been done in the ACT and the Northern Territory, the other two jurisdictions with legislation based on a South Australian precedent. Of the other jurisdictions, only Victoria and Tasmania still have separate summary offences of damage to property.[24]

2. DAMAGE TO ANIMALS OR PLANTS IN GARDENS: SECTION 58A

11.10 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**
>
> **(c) any building, structure, or other property,**

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20 Ie a provision similar to s 378A of the Code, which makes theft of property not exceeding $400 a simple offence.

21 Paras 3.24-3.29.

22 *Criminal Law Consolidation Act Amendment Act 1986* (SA) s 10(2) and Schedule.

23 S 85(3).

24 See fn 13 above.

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."

11.11 This provision was enacted in 1902,[25] to fill a gap which would otherwise exist in the law relating to damage to property, since section 80 only covers damage to property which belongs to another.[26] Section 58A covers many cases where the property would often 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;[27] but since it also covers damage to various 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 - an inconsistency of a kind all too often found in the *Police Act*.[28]

11.12 The Commission suggests that section 58A should be retained to deal with cases of damage to property which cannot be dealt with under the offence of damage to property.[29] The section could be redrafted so as to remove instances where the offence of damage to property would also be committed, such as the provision relating to damage to a building, structure or other property. If it were thought that the importance of preventing damage to, or the destruction of, fauna and flora - especially those unique to Western Australia[30] - required special emphasis, this could be achieved by providing a higher penalty under section 58A than in other cases of damage to property.

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25 By the *Police Act Amendment Act 1902* s 10.

26 There were 5 charges under s 58A in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I. It should be noted that the offence of cruelty to animals under s 4 of the *Prevention of Cruelty to Animals Act 1920* is limited to domestic and captive animals: see the definition of "animal" in s 3.

27 Conduct of this kind is also prohibited under a number of by-laws, eg National Parks Board By-laws 1963 by-laws 13 to 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.

28 Before 1980, s 80 also contained a mental element: see para 11.4 above. Even then the sections were inconsistent in the words used to convey the mental element.

29 Whether retained in the *Police Act*, or appearing only in the *Criminal Code*: see para 11.9 above.

30 When the *Police Act Amendment Act 1954* s 3 increased the maximum penalty under s 58A, one of the reasons put forward for so doing was an incident involving the killing and maiming of quokkas on Rottnest: Western Australian *Parliamentary Debates* (1954) vol 138, 577.

3. EXTINGUISHING WANTONLY ANY LIGHT SET UP FOR PUBLIC CONVENIENCE: SECTION 59

11.13 Extinguishing wantonly any light set up for public convenience is one of a number of offences set out in section 59.[31] The section deals with such matters as singing obscene songs, using indecent language, soliciting and using threatening, abusive and insulting words or behaviour. It is hard to see any common ground between such offences and that now under consideration. The offence appears to be out of place in a century where lights are placed on most urban and suburban streets. If any light were deliberately extinguished it would normally be by way of some physical activity which would constitute the offence of damage to property. The Commission sees no necessity for retention of this offence.[32]

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31 S 59 is quoted in para 6.2 above. S 59 was modelled on s 59 of the *Police Act 1869* (SA).

32 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 1923* (NT) s 52.

Chapter 12
POSSESSION OF CRIME-RELATED PROPERTY

1. INTRODUCTION

12.1 In this and the next two chapters, the Commission deals with a number of offences the common element of which is a dishonest intent. This chapter considers offences involving the possession of crime-related property. Chapter 13 deals with offences akin to stealing, and chapter 14 with offences involving fraud and deception.

12.2 This chapter 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 preventive 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 break or enter a dwelling-house, and to commit a crime therein;
>
> (b) Being armed as aforesaid by night, and being so armed with intent to break or enter any building whatever, 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;
>
> (d) Having in his possession by day any such instrument with intent to commit a crime;
>
> (e) Having his face masked or blackened or being otherwise disguised, with intent to commit a crime; or

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[1] Cf ch 4 above, dealing with the more general preventive offences in the Act.

(f) Being in any building whatever by night with intent to commit a crime therein;

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 seven years."

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. On summary conviction the defendant is liable to imprisonment for 18 months or a fine of $6,000.[2]

12.4 The Murray Report[3] 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)

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"

commits an offence.

12.6 Section 65(4) has been in the Act ever since 1892. In 1956 section 65(4a) was added.[4] This section provides that an offence is committed by

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2 *Criminal Code* s 426A(1).
3 262-263.
4 By the *Police Act Amendment Act 1956*.

> **"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."**

12.7 Section 65(4) has a wide potential scope, but it is drafted in very vague terms and its meaning is uncertain. It can also 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 out of date and undesirable.[5] It has also drawn attention to the fact that where offences are drafted in this 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.[6]

12.8 Section 65(4a) was added because of the need for an offence to deal with the carrying of lethal weapons.[7] It was redrafted in its present form[8] to make it clear that it covered weapons carried for defensive as well as offensive purposes. It now deals comprehensively with the problem of carrying weapons.[9]

12.9 In view of the existence of section 407 of the *Criminal Code*, it would be possible to repeal both of these offences.[10] Section 407 contains offences dealing comprehensively with offensive weapons and disguises, and the alternative of summary prosecution is available in the circumstances stated above.[11] Section 407 would cover the great majority of instances covered by sections 65(4) and (4a). The Code offences expressly state the mental element involved and are therefore better drafted than the offences in the *Police Act*.[12]

12.10 Even if the view stated in the previous paragraph is not adopted, the Commission believes that it is undesirable to retain section 65(4) in its present form. Its interpretation is unclear, it is out of step with contemporary society and general criminal law principles, and insofar as it seeks to regulate the carrying of weapons it has been superseded by section 65(4a).

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5 See paras 4.5-4.7 above.
6 See para 4.8 above.
7 Western Australian *Parliamentary Debates* (1956) vol 144, 1372.
8 By the *Police Act Amendment Act (No 2) 1975* s 31, following the decision in *Chadbourne v Ansell* [1975] WAR 104.
9 There were 83 charges under s 65(4a) in Perth and East Perth Courts of Petty Sessions in 1984-85, but only 8 under s 65(4): see Appendix I.
10 The replacement of s 407 by a general preparation offence would not affect the argument in this paragraph.
11 Para 12.3.
12 See the general discussion of mental elements in paras 3.23 above.

It should be replaced by an offence limited to the possession of any article of disguise. The Act would then provide separate offences dealing with offensive weapons and articles of disguise. This is the position in most other Australian jurisdictions.[13] 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.

12.11 In neither section is there any limitation as to the place in which the defendant is found in possession of the article in question. Nor is there any such limitation in section 407. In the United Kingdom, by contrast, the equivalent offence[14] is specifically limited to the carrying of offensive weapons in public places. This was the provision which was used as a model when section 65(4a) was redrafted in 1975.[15] There is thus a strong argument for limiting both that section and the redrafted section 65(4) to persons in public places.

3. PROTECTIVE JACKETS AND VESTS: SECTION 65(4aa)

12.12 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.

12.13 The section defines "exempt person" so as to exclude from the ambit of the offence members of the police and armed forces, persons who have permission from the Commissioner of Police,[16] and those who have possession only for the purpose of delivering the article to such persons.

12.14 The section was inserted in 1983,[17] apparently because concern had been expressed at the Police Commissioners' Conference, supported by all Australian governments, that if bullet-proof vests became available police would be deprived of an advantage when confronted with

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13 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 1923* (NT) 56(1)(d) and (e).

14 *Prevention of Crime Act 1953* (UK) s 1.

15 See fn 8 above.

16 The only persons who have been given permission under this provision are merchants promoting particular makes of protective jackets or vests.

17 By the *Police Amendment Act 1983* s 4.

armed and dangerous offenders.[18] Though no other Australian police legislation contains a similar offence, the Commission suggests that section 65(4aa) should be retained.

4. IMPLEMENTS TO FACILITATE UNLAWFUL USE OF MOTOR VEHICLES: SECTION 65(4b)

12.15 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.[19]

12.16 This section was inserted in 1972.[20] 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.[21] No other Australian police legislation contains a similar offence.

12.17 The Commission asks whether section 65(4b) should be retained. If it is to be retained, the drafting could be simplified by deleting the references to particular objects and referring simply to any implement or device to facilitate the unlawful driving or use of a motor vehicle.[22]

5. DELETERIOUS DRUGS: SECTION 65(5)

12.18 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.

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18 Western Australian *Parliamentary Debates* (1983) vol 243, 2699.

19 Unlawfully using, or taking for the purpose of using, or driving or otherwise assuming control of a vehicle without the consent of the owner is an offence under s 390A of the *Criminal Code*.

20 By the *Police Act Amendment Act 1972* s 3.

21 Western Australian *Parliamentary Debates* (1972) vol 193, 424.

22 It has been suggested that under the present wording 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: Nichols 77.

12.19 Section 65(5) has been in the *Police Act* since 1892. There is no definition of what is meant by a deleterious drug, but 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.[23] 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.[24]

12.20 Prosecutions under the section are not frequent.[25] It appears that in the past the section has been used to prosecute for glue sniffing, but 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.[26] A contrary holding would have meant that any person found in possession of glue would have the onus cast on him or her to prove a lawful excuse.

12.21 The Commission invites comments as to whether section 65(6) should be retained. The possession, sale, supply and use of prohibited drugs is comprehensively dealt with in the *Misuse of Drugs Act 1981*, which provides both simple and indictable offences.[27] If there is a need for legislation to regulate the possession of other drugs, then it would be preferable to extend the *Misuse of Drugs Act*.

6. HOUSEBREAKING IMPLEMENTS AND EXPLOSIVE SUBSTANCES: SECTION 66(4)

12.22 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.

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23 *McAvoy v Gray* [1946] VLR 442.

24 For another exceptional case, see s 66(4), considered in paras 12.22-12.26 below.

25 There were only 4 charges under s 65(5) in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

26 *Patton v Mounsher* (unreported) Supreme Court of Western Australia, 16 September 1988, Appeal No 1269 of 1988.

27 Under s 6 possessing (with intent to sell or supply to another), manufacturing, preparing, selling, supplying or offering to sell or supply a prohibited drug is an indictable offence. The possession or use of a prohibited drug, except in specified circumstances, is a simple offence.

12.23 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*.[28] Originally it was limited to implements of housebreaking, but explosive substances were added in 1962.[29] The section does not expressly state any mental element.

12.24 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*. Section 407(c) 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.

12.25 It would be possible to rationalise these provisions by repealing section 66(4), leaving all cases involving housebreaking implements to be dealt with under the Code provisions. Explosive substances are not included in section 407 but could be added. The alternative of summary prosecution is available under section 407 in appropriate circumstances.[30]

12.26 If section 66(4) is not to be repealed, it needs to be reformed in a number of respects. Consistently with the general principles stated by the Commission,[31] the mental element should be expressly stated and the burden of proof placed on the prosecution. The equivalent United Kingdom provision is limited to possession of such articles by the defendant when not at his or her place of abode,[32] and consideration should be given to imposing a similar limitation on section 66(4).

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28 S 4.

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

30 See para 12.3 above. The replacement of s 407 by a general preparation offence would not invalidate the argument in this paragraph.

31 See para 3.23 above.

32 *Theft Act 1968* (UK) s 25.

Chapter 13
OFFENCES AKIN TO STEALING

1. INTRODUCTION

13.1 The *Police Act* contains a number of simple offences which are related to stealing, or involve the stealing of specific items of property.

13.2 Traditionally, a person charged with the offence of stealing has been entitled to trial by jury. Under the law as it stood until the passing of the *Criminal Code Amendment Act (No 2) 1987*, a person accused of stealing could elect to be tried summarily if the value of the property did not exceed $500, or the accused person admitted guilt and it appeared to the court that the offender could be adequately punished on summary conviction.[1] An accused person could however insist on the right to be tried by a jury, however small the value of the property in question.

13.3 In this context, the existence of simple offences akin to stealing in the *Police Act* could perhaps be regarded as a valuable alternative to the Code provisions. On the other hand, the use of a simple offence would deprive the defendant of the right to a jury trial.

13.4 The *Criminal Code Amendment Act (No 2) 1987* limited the right to jury trial for minor stealing offences. The Attorney General in his second reading speech said that while the Government was reluctant to limit the right to elect trial by jury, it was persuaded that there was no longer any adequate justification for this in the case of minor thefts. Far more serious offences created both by the Code and by other statutes were triable only in Courts of Petty Sessions.[2] The Act therefore, in addition to amending the Code to allow an accused person to elect summary trial in a greater range of cases than before,[3] inserted a new section[4] providing as follows:

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1 *Criminal Code* s 426 (prior to amendment).
2 Western Australian *Parliamentary Debates* (1987) vol 267, 6310.
3 See ss 426 and 426A.
4 S 378A(1).

"Any person who steals anything capable of being stolen, where the value of the property in question does not exceed $400, is guilty of a simple offence, and is liable to imprisonment for 6 months or to a fine of $2 000."

13.5 The *Police Act* offences have to be examined in the light of these developments. In each case, it must be asked whether a special simple offence is any longer justified.

2. BEING SUSPECTED OF HAVING OR CONVEYING STOLEN GOODS: SECTIONS 69 AND 71

(a) The offences

13.6 Under section 69 -

"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 Justice may be imprisoned, with or without hard labour, for any term not exceeding two years."

13.7 By section 71 -

"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."

13.8 The *Police Ordinance 1861*[5] derived these sections from the United Kingdom *Metropolitan Police Courts Act 1839*.[6] They survive in unchanged form in the present Act, save for increases in penalties. Every other Australian jurisdiction has an equivalent of section 69,[7] though there have been some modifications in New South Wales and the Australian Capital Territory.[8] Some jurisdictions never adopted an equivalent of section 71,[9] and the only one besides Western Australia to retain it is Queensland.[10] In the United Kingdom there is now no equivalent of either offence.[11]

13.9 Under section 69 the prosecution must prove that the defendant had the property on his or her person, or in any place, or was conveying it in any manner - in a word, that the property was in the defendant's possession. It must also be proved 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.[12] 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,[13] though the behaviour of the person in relation to the property may give rise to suspicion.[14] Once the elements of possession and suspicion have been established,[15] 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.

13.10 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

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5 Ss 41, 43.

6 Ss 24, 26.

7 *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; *Summary Offences Act 1923* (NT) s 61.

8 See *Crimes Act 1900* (NSW) s 527C; *Crimes Act 1900* (ACT) s 527A.

9 South Australia, Northern Territory, ACT.

10 *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 25(2).

11 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.

12 *Hughes v Dempsey* (1915) 17 WALR 186.

13 *Yeo v Capper* [1964] SASR 1.

14 *Forrest v Normandale* (1973) 5 SASR 524.

15 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.

misdemeanour.[16] There is no express requirement that the defendant should give a satisfactory account of how he or she came by the property.

(b) Discussion

(i) Section 69

13.11 The justification for the offence in section 69 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 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. 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]

13.12 It has been emphasised that the offence should not be used as a means of dealing summarily with acts capable of supporting a charge of stealing or receiving. In *O'Brien v Reitze*[18] Wickham J quoted words used by the Supreme Court of South Australia in *Lenthall v Newmann*:[19]

> "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."

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16 Like ss 41(1) and 41(7) (see paras 5.3-5.4 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 draftsman of the 1892 Act removed the reference from s 69 but not from s 71.

17 *Unlawful Possession* The Magistrate, 31 May 1935, 37; cf Nichols 112.

18 [1972] WAR 152, 155.

19 [1932] SASR 126, 132.

Wickham J emphasised that the prosecution should carefully consider before laying a charge under section 69 whether the complaint should not more properly be one for the Code offences of stealing or receiving.[20]

13.13 The fact that stealing property worth $400 or less is now a summary offence may lessen the danger foreseen by Wickham J, but it does not eliminate it. In cases where the property is worth more than $400, section 69 would be the only alternative to a prosecution on indictment, and even in cases where a charge could be laid for the simple offence of stealing there may be a temptation to use section 69 instead because it carries a higher penalty. This could be overcome if the defendant in such cases were given a right to elect jury trial. However such a right is unusual. The only two such provisions in the *Criminal Code*, sections 496(5) and 551, are both recommended for repeal by the Murray Report.[21]

13.14 Another factor that may encourage the use of section 69 where the charge would more properly be one of stealing is that under section 69, once the elements of possession and suspicion have been proved, the onus shifts to the defendant to give a satisfactory account of how he or she came by the property. 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. It seems unfair that there should be a risk of a person being adjudged guilty of an offence in such circumstances, especially 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.[22]

13.15 Summarising the points made in the previous paragraph, one writer, speaking of the equivalent English provision,[23] said: "Such provisions are an intolerable and it is submitted unnecessary departure from the normal rules of criminal evidence and proof and should be abolished."[24] The English provision was indeed abolished two years later.[25] Especially after the reform of the law of theft brought about by the *Theft Act 1968*, it had become redundant.[26]

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20 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.

21 326-327 and 343.

22 See paras 3.24-3.25 above.

23 *Metropolitan Police Courts Act 1839* (UK) s 24.

24 L H Leigh *Police Powers in England and Wales* (1st ed 1975) 137.

25 See para 13.8 above.

26 The offences created by the *Theft Act* include the new offence of handling stolen goods (s 22), which replaced the offence of receiving. Under s 27(3), on a charge of handling, in order to prove that the

13.16 The Commission provisionally suggests that section 69 should be abolished, even though it is undoubtedly made use of,[27] and continues to exist in other Australian jurisdictions. The existence of cases where the evidence is insufficient for a charge of stealing does not amount to a sufficient justification for retaining it.

13.17 If, contrary to the Commission's provisional view, the offence is retained,[28] then it should be redrafted in contemporary form. It should be particularly noted that in New South Wales and the Australian Capital Territory, the two jurisdictions in which comprehensive reform of *Police Act* provisions has taken place, an important modification was introduced when the equivalent of section 69 was redrafted. Instead of requiring the defendant to give a satisfactory account, once possession and suspicion are proved, the legislation in those jurisdictions provides that it is a good defence if the defendant satisfies the court that he or she had no reasonable grounds for suspecting that the property was stolen or otherwise unlawfully obtained.[29] Another modification that could be introduced is to provide expressly that there can be no conviction under the section where the evidence is sufficient to warrant a charge of stealing in respect of property of more than $400 in value. If this only emerges during the course of the trial, then it should proceed as a committal hearing.[30]

(ii) Section 71

13.18 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. These situations could however be brought under section 69 if it was redrafted along the lines of the equivalent provision in New South Wales and

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defendant knew or believed the goods to be stolen goods, evidence is admissible that the defendant has in his possession, or has assisted in disposing of, stolen goods from a theft which has taken place during the last year, or that the defendant has been convicted of theft or handling in the last five years.

27 There were 98 charges under s 69 in Perth and East Perth Courts of Petty Sessions in 1984-85, though none under s 71: Appendix I.

28 It should be noted that the Murray Report 283, in recommending the repeal of ss 429, 434 and 435 of the *Criminal Code* (which create offences involving the possession of particular kinds of property) assumes the continued existence of s 69.

29 *Crimes Act 1900* (NSW) s 527C; *Crimes Act 1900* (ACT) s 527A.

30 Cf *Summary Offences Act 1966* (Vic) s 60, under which, where it appears that the offence charged does not properly come within the meaning and intention of the Act but that an offence of a more serious or heinous kind has been committed, the court may allow the proceedings to continue as a committal hearing. As Wickham J pointed out in *O'Brien v Reitze* [1972] WAR 152, 155-156, there is no precise equivalent of s 60 in the *Police Act 1892*. S 127 provides that certain offenders may be committed to a court of superior jurisdiction, but it only applies in cases where a person is charged before a justice with an offence cognisable by such a court.

the ACT, both of which cover the situation where a person gives custody of property to another.[31] Section 71, however, 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. Even so, the appropriateness of extending a provision based on unlawful possession of goods at the time in question to unlawful possession at some time in the past is questionable. 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 rebut an allegation that he or she had reasonable cause to believe that the property was stolen or unlawfully obtained.

13.19 Section 71 has other disadvantages. It appears to be 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*,[32] preliminary examinations were much more inquisitorial in nature.[33] But this explanation merely underlines how out of date the ideas behind sections 69 and 71 are.

13.20 If section 69 were repealed, section 71 should obviously be repealed also. Even if section 69 were retained in a modified form, there would be no need to retain section 71. Situations in which the facts are in substance the same as unlawful possession under section 69, such as possession by a custodian or carrier, could be incorporated within that section. Other situations potentially covered by section 71 should not be within the scope of the criminal law.

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31 *Crimes Act 1900* (NSW) s 527C; *Crimes Act 1900* (ACT) s 527A.

32 *Indictable Offences Act 1848* (UK) and *Summary Jurisdiction Act 1848*, enacted in Western Australia by 14 Vic Nos 4 and 5 (1850).

33 See J H Langbein *Prosecuting Crime in the Renaissance* (1974) 5-125. For an example of preliminary examination in the early 19th century, see C Dickens *The Pickwick Papers* (1836-37) ch 25.

3. POSSESSION OF GOLD, PEARL OR UNCUT DIAMOND SUSPECTED OF BEING STOLEN: SECTIONS 76A, 76C AND 76D

(a) The offences

13.21 Sections 76A to 76E of the *Police Act* were first enacted in 1902.[34] In their original form they dealt only with stolen gold. They were extended to pearl in 1907,[35] and uncut diamonds in 1981.[36]

13.22 These sections were originally enacted at a time when gold stealing was rampant on the Golden Belt, and there was a need for legislation to stamp it out which, to be effective, had to be "thorough and searching and stringent".[37] A more particular reason for the enactment of the legislation was the decision in *R v Hahn*,[38] 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.

13.23 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**

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34 As ss 2 to 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.

35 By the *Police Act Amendment Act 1907*.

36 By the *Police Amendment Act 1981*.

37 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.

38 (1901) 3 WALR 78.

(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."

13.24 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 he or she is 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."

13.25 In furtherance of the aim of passing legislation that was "thorough and searching and stringent", 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."

13.26 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."**

13.27 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.[39] 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*,[40] as a result of which it was contemplated that diamond mining would become a major commercial enterprise in Western Australia.[41]

13.28 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, though

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39 Western Australian *Parliamentary Debates* (1907) vol 32, 992.

40 Renamed the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* in 1983.

41 Western Australian *Parliamentary Debates* (1981) vol 236, 6296.

the latter two terms are also used elsewhere in the Act.[42] Definitions of "pearl" and "uncut diamond" are tacked on to section 76E, which gives the court a power of restitution.[43]

(b) Discussion

13.29 The essence of section 76A, like section 69 on which it was modelled, is that it creates an offence to deal with persons who are in possession of property under suspicious circumstances but cannot be charged with stealing. Suggestions have been made that the section should be amended to cover cases where a person was formerly in possession of property of the kind covered by the section, but the police did not form a suspicion that it was stolen or unlawfully obtained until after the person disposed of it. However, to require the defendant in such a situation to produce evidence of his or her state of mind and actions at some time in the past, in order to prove that the goods in question were lawfully obtained, is to impose a burden that it may well be impossible to discharge. It is quite clear, both from the debates in Parliament on the legislation which eventually became section 76A,[44] and from the authorities on its interpretation,[45] that it was conceived of as a section creating an offence of being in possession of goods at the time the suspicion in question was formed.[46] 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 there and then, not at some time previously.

13.30 Far from being extended, it can be argued that section 76A is undesirable and unnecessary, and should be repealed, along with sections 76B-76E. Section 76A can be criticised on the same grounds as section 69.[47] There is the same possibility that section 76A will be used as a means of dealing summarily with acts capable of supporting a charge of stealing. The value of the property involved is most unlikely to be less than $400, and so the case will be one in which the defendant, if charged with stealing, would have a right to jury trial. The dangers of denying this right by bringing a summary prosecution under the *Police Act* are therefore likely to be greater under section 76A than under section 69.

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42 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.

43 On restitution provisions, see para 3.33 above.

44 Western Australian *Parliamentary Debates* (1902) vol 21, 1587-1588.

45 *McArthur v McGee* (1907) 9 WALR 218; *Dunleavy v Dempsey* (1916) 18 WALR 90; cf *McDonald v Webster* [1913] VLR 506.

46 See generally *Police Department v Capelli* (unreported) Kalgoorlie Court of Petty Sessions, 7 November 1986, Charge No 1963-69 of 1986.

47 See paras 13.11-13.17 above.

13.31 Section 76A, like section 69, places the onus of proof on the defendant once the prosecution has proved possession of the property in question and that it was reasonably suspected of being stolen or unlawfully obtained.[48] In this respect section 76A probably gives the defendant a harder task than section 69. Under section 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), whereas under section 69 the defendant must give a satisfactory account of how he or she came by the property. There are similar provisions in sections 76C and 76D. Under section 76C, once presence at the material time is proved, the defendant has to give an account of his or her presence there to the satisfaction of the court, and 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, and 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.

13.32 It follows from these arguments that if section 69 is repealed sections 76A to 76E should likewise be repealed.

13.33 If section 69 is retained, perhaps with modifications as suggested above,[49] there may still be insufficient justification for retaining sections 76A to 76E. The original problem which led to the enactment of these sections, namely the difficulty of proving possession of property found on the person's premises, could and should have been met by amending section 69 rather than creating a new section. *R v Hahn*,[50] which by its narrow interpretation of section 69 on this point was responsible for the enactment of section 76A,[51] was later held by the Full Court to be wrongly decided.[52] The New South Wales and ACT equivalents of section 69,[53] which have been redrafted in more modern form, apply where a person has anything in his custody (or that of another person) or has anything in or on premises, whether belonging to or occupied by himself or not. It may be suggested that one advantage of having a separate section dealing with

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48 Though the section does not expressly say so, the standard of proof is presumably on the balance of probabilities.

49 Para 13.17.

50 (1901) 3 WALR 78.

51 See para 13.22 above.

52 *Kavanagh v Claudius* (1907) 9 WALR 55.

53 *Crimes Act 1900* (NSW) s 527C; *Crimes Act 1900* (ACT) s 527A.

gold, pearl and uncut diamonds is that the maximum fine under section 76A is much higher than under section 69 and reflects the value of the property in question. It would however be simple enough to have one section dealing with all forms of unlawful possession with differential penalties catering for different types of property.

13.34 As for sections 76C and 76D, their aim is obviously to provide a way of convicting those who are assisting in some way in the commission of the offence. Yet there should be no need for special provisions of this kind. Sections 7 to 10 of the *Criminal Code* deal comprehensively with the law relating to parties to offences, and apply to simple as well as to indictable offences.

13.35 The legislation in question was passed to deal with the problems of gold stealing and, later, pearl stealing. Conditions have now changed. The gold rush era, which gave rise to the problems of gold stealing, has long since departed. Gold mining remains an important industry, and gold stealing still occurs, but charges are generally brought under the *Criminal Code*[54] rather than section 76A of the *Police Act*. In view of the large amounts involved, summary prosecution is an inappropriate form of proceeding and the penalty under that section is inadequate.[55] The pearling industry has changed its character since the early years of the century and the need for special legislation does not seem nearly as great as it did then. Though the addition of uncut diamonds is more recent, it seems that the major reason for adding them was that a special offence dealing with gold and pearl already existed.

13.36 The Commission therefore suggests that even if section 69 is retained, redrafted as suggested, sections 76A to 76E should be repealed. Special penalties could be prescribed for the unlawful possession of gold or other special items of property.

4. UNLAWFULLY TAKING OR USING ANIMALS: SECTION 79A

13.37 Under section 79A -

> **"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**

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54 Either s 378 (stealing) or s 414 (receiving).

55 In 1986-87, there were 10 gold-related convictions and $155,103 was recovered: Western Australia Police Service Annual Report 1987, 34.

> **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.

13.38 This section was first enacted by the *Police Act Amendment Act 1893*,[56] 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.[57]

13.39 The section covers a variety of different kinds of conduct, analysed by Nichols[58] 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.

13.40 Though the sidenote reads "unlawfully taking or branding animals" there is no mention of branding as such. The concept of "taking" will obviously include some cases in which the defendant could be charged with stealing.[59] In these cases section 79A gives the alternative of a

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56 S 14. It was incorporated in the *Police Act 1892* by the *Police Act Amendment Act 1952* s 7 and Schedule.

57 Western Australian *Parliamentary Debates* (1892) vol 3, 417.

58 138.

59 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": id 139.

summary prosecution.[60] In cases where the property involved is worth $400 or less, stealing is now a simple offence,[61] but in many cases the animals listed in section 79A will be worth more than this, and so a charge of stealing will be prosecuted on indictment.[62] There is thus a danger that section 79A could be used where a charge of stealing would be more appropriate. Section 79A is however 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 Code offence of unauthorised use of a vehicle.[63]

13.41 Section 79A is very similar to section 428 of the *Criminal Code*, which 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 one hundred dollars for every animal so used or taken."

13.42 There is obviously no need for both offences. The Murray Report was critical of section 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 section 79A of the *Police Act*, the report recommended the repeal of section 428.[64]

13.43 The Commission agrees that it is unnecessary to retain both offences. It therefore suggests that if section 428 of the Code is repealed, section 79A should be retained,[65] but modified in minor respects. The wording of the Code offence - "any person who unlawfully uses

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60 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.

61 *Criminal Code* s 378A, as to which see para 13.4 above.

62 Unless the value of the property does not exceed $4,000 or the court considers that the charge can adequately be dealt with summarily, and the defendant elects to be prosecuted summarily: *Criminal Code* s 426(2).

63 *Criminal Code* s 390A, which defines the offence in terms of unlawfully using or taking for the purpose of using, or driving or otherwise assuming control of any vehicle. S 390B creates an offence of unauthorised use of aircraft. The Murray Report 248 recommends that these two provisions be combined into a general offence dealing with the unauthorised use of conveyances.

64 Murray Report 283.

65 There were no charges under s 79A in Perth and East Perth Courts of Petty Sessions in 1984-85: Appendix I, 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 1985-86 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*.

or takes for the purpose of using" - seems to be preferable to the more complicated formulation in the *Police Act*.

5. REMOVING BOAT OR BOAT FURNITURE: SECTION 81

13.44 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."**

13.45 Section 81 is an old offence, and 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 1970[66] 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", as a result of which it was held that no offence was committed where the boat was not in public waters.[67]

13.46 It is difficult to judge what use is made of section 81. It was stated in Parliament in 1970 that there had been 109 offences in the past year,[68] and boat theft continues to be a problem,[69] yet the Commission's statistics reveal only two charges brought under this section in Perth and East Perth Courts of Petty Sessions in 1984-85.[70]

13.47 As with section 79A, there would be some cases under section 81 in which a charge of stealing could also be laid, but the real purpose of the section is to provide an offence of unauthorised use of boats equivalent to the Code offence of unauthorised use of a vehicle.[71]

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66 By the *Police Act Amendment Act 1970* s 4.

67 *Wills v Williams* [1971] WAR 29.

68 Western Australian *Parliamentary Debates* (1970) vol 185, 2872.

69 "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.

70 See Appendix I.

71 S 390A.

13.48 The Murray Report recommends the replacement of this offence by a more general offence of unauthorised use of a conveyance, which would include vessels.[72] If this offence includes fittings and equipment on a conveyance, and provides for the alternative of summary prosecution, there will be no need to retain section 81. If an offence in these terms is not enacted, section 81 should be retained. The compensation provisions in section 81 are no longer necessary in the light of the general compensation provisions in the Code.[73]

6. DESTROYING PROPERTY WITH INTENT TO STEAL, OR RETAINING OR DISPOSING OF PROPERTY: SECTION 82

13.49 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, 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**

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72 248.

73 See para 3.33 above.

> **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."**

13.50 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.

13.51 This section was copied from the South Australian *Police Act 1869*,[74] which was in part based on provisions in the United Kingdom *Larceny Act 1861*.[75] 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 that the section was drafted with rural conditions particularly in mind.

13.52 There is no justification for retaining section 82. There is no evidence that it is ever used.[76] Any conduct coming within section 82 could be prosecuted either as stealing or as damage to property. In the case of stealing, where the value of the property involved does not exceed $400 the offence is now a simple offence,[77] and this reform makes section 82 largely unnecessary. In the cases of damage to property covered by section 82, it would be possible to bring a summary prosecution under either section 80 or section 58A of the *Police Act*.[78] In South Australia, and in the ACT and the Northern Territory, which also copied the offence from South Australia, the equivalent of section 82 has been repealed.

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74 S 69.

75 Sub-ss (1) and (2) are based on ss 34 and 32. The source of sub-s (3) is not clear.

76 There were no charges under s 82 in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

77 See para 13.4 above.

78 On ss 80 and 58A, see paras 11.1-11.12 above.

Chapter 14
FRAUD AND DECEPTION

1. VALUELESS CHEQUES: SECTION 64A

14.1 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."**

14.2 This section was enacted in 1959[1] 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 of false

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1 By the *Police Act Amendment Act 1959* s 3.

pretences,[2] but in cases where the cheque was returned marked "insufficient funds" it was not possible to prove the intention to defraud required for that offence.[3]

14.3 Section 64A solves this problem by placing the onus on the defendant to prove that he or she has reasonable grounds for believing that the cheque would be paid in full on presentation and that he or she had no intent to defraud. It has already been pointed out that reversing the onus is a device used in a number of places in the *Police Act*, and that this departure from the general principles of the criminal law should not be regarded as acceptable in an Act dealing with simple offences when it would not generally be regarded as acceptable in the *Criminal Code*.[4] However in section 64A an attempt has been made to limit the effect of this by restricting the scope of the section in a number of ways. It only applies to the obtaining of any chattel, money or valuable security,[5] and only where the cheque is passed within sixty days of opening the account.[6] No prosecution can take place without the written consent of the Commissioner of Police or an authorised commissioned officer.[7]

14.4 In these respects section 64A is narrower than equivalent provisions in other jurisdictions. South Australia,[8] the Northern Territory,[9] New South Wales[10] and Victoria[11] all have similar legislation but none have the sixty day limit: the offence is committed when the cheque is not met however long the account has been open. The New South Wales provision is, like section 64A, limited to the obtaining of any chattel, money or valuable security, but the South Australian, Victorian and Northern Territory provisions also apply to the obtaining of any credit, benefit or advantage, and the Northern Territory provision also to the discharge or attempted discharge of any debt or liability. Only Victoria requires a special consent to prosecution.

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2 S 409.

3 Western Australian *Parliamentary Debates* (1959) vol 152, 841-842.

4 See paras 3.24-3.25 above.

5 The most common form of the offence is the purchase of goods by means of a cheque that is subsequently dishonoured.

6 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.

7 There were 59 charges under s 64A in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

8 *Summary Offences Act 1953* (SA) s 39.

9 *Summary Offences Act 1923* (NT) s 60.

10 *Crimes Act 1900* (NSW) s 178B.

11 *Summary Offences Act 1966* (Vic) s 37.

14.5 There are a number of options for reforming section 64A. It can be argued that the section should be not only retained but expanded to cover the obtaining of any credit, benefit or advantage. It would then cover the obtaining of services by deception (for example, a room in a hotel) or the discharge of a debt. On the other hand, it can be argued that the section is undesirable because it reverses the onus of proof, and that with changes in banking practices, such as the practice of requiring cheques to be supported by cheque cards guaranteeing that the cheque will be met on presentation, the section is no longer needed.[12]

14.6 A third possible view is that the section should be retained in its present form. Though the section provides a means of dealing with fraudulent conduct where proving an intent to defraud is extremely difficult, since it departs from general principles concerning the onus of proof, the limits at present placed on section 64A should remain. Where the facts fall outside those limits, it should be necessary to prove the intent to defraud required by the Code offence of obtaining goods or credit by a false pretence or wilfully false promise.[13] There is no requirement that false pretences should always be tried on indictment: the defendant may elect to be tried summarily where the value of the property in question does not exceed $4,000, or in any other case where the court considers that the charge can adequately be dealt with summarily.[14] The Commission seeks comment.

2. IMPOSITION UPON CHARITABLE INSTITUTIONS OR PRIVATE INDIVIDUALS: SECTION 66(2)

14.7 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.

14.8 This section can be traced back to the United Kingdom *Vagrancy Act 1824*[15] and has been in force in Western Australia since 1849.[16] Charges are still occasionally laid under it.[17]

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12 In the ACT, the offence was preserved when the *Police Offences Ordinance* was reformed in 1983, being inserted in the *Crimes Act 1900* as s 178B, but this provision was repealed in 1985.

13 *Criminal Code* s 409.

14 Id s 426.

15 S 4.

16 See *Police Ordinance 1849* s 10.

14.9 The equivalent offence has been abolished in New South Wales, the Australian Capital Territory and Tasmania,[18] but remains in force elsewhere.[19]

14.10 The offence is closely related to the Code offence of false pretences.[20] The ambit of the conduct covered by section 66(2) is uncertain,[21] but it has been suggested that it should not be given its widest literal meaning, otherwise Courts of Petty Sessions would have unlimited jurisdiction to try offences involving false pretences.[22] In two particular respects, section 66(2) is wider than the Code offence. It covers the obtaining not only of money but also of any other benefit or advantage; and it is sufficient that the defendant impose on an institution or individual with a view to obtaining money or a benefit or advantage, whereas under the Code offence it must be shown that something was actually obtained as a result of a false pretence or false promise.

14.11 The offence of false pretences may now in certain circumstances be tried summarily at the election of the defendant.[23] The Commission suggests that there is therefore no need to retain the simple offence in section 66(2), notwithstanding that in a few minor respects section 66(2) is wider than the Code offence.

3. 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 -

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17 There were 5 charges under this section in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

18 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).

19 *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 1923* (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.

20 S 409.

21 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.

22 *Hansen v Archdall* (1930) 44 CLR 265, 275-276 per Rich J (dissenting on the facts of the case).

23 See para 14.6 above.

> **(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

> **"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 1933[24] 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]

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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.

14.15 It would appear that these sections are now obsolete. No charges are brought under them;[27] the economic conditions against which they were enacted have changed; the kinds of relief then provided, such as "sustenance relief", are no longer made available,[28] and it is not clear whether other forms of relief provided under more recent legislation would constitute "a scheme for the relief of unemployed destitute or indigent persons".[29] The kind of problem that these offences sought to address is now dealt with in the *Commonwealth Social Security Act 1947*. The Commission is of the view that sections 66(2a) and (2b) should be repealed.

4. 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"**

commits an offence.

14.17 This is a very old offence. The United Kingdom provision from which it was derived[30] can be traced back at least as far as the *Witchcraft Act 1735*.

14.18 Under the section fortune telling per se is an offence. 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.[31] 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.[32]

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27 There were no charges under either of these sections in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

28 Nichols 89.

29 The only authority is *Police Commissioner v Curran* (1973) unreported, 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).

30 *Vagrancy Act 1824* (UK) s 4.

31 *Barbanell v Naylor* [1936] 3 All ER 66.

32 *Monck v Hilton* (1877) 2 ExD 268, 276 per Cleasby B.

14.19 The fact that the defendant maintains that he or she is not pretending[33] to tell fortunes, and has an honest belief in his or her power to tell fortunes, has been held to be immaterial,[34] though 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, 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.[35] It appears that it is the practice of the police to prosecute only where persons are telling fortunes for money.[36]

14.21 The then Minister for Police requested the Commission to examine the desirability of replacing section 66(3) by the provision introduced in South Australia in 1985.[37] Section 259a(1) of the South Australian *Criminal Law Consolidation Act 1935* now provides:

> ". . . where a person, with intent to defraud, purports to act as a spiritualist or medium, or to exercise powers of telepathy, clairvoyance or other similar powers, that person shall be guilty of a misdemeanour and liable to imprisonment for a term not exceeding two years."

Section 259, which provides that an offence is committed by "any person who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult science to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found" remained in force. New Zealand has a provision very similar to section 259a and has no equivalent of the older provisions.[38] The South Australian provision, but not the New Zealand provision, incorporates the additional safeguard that prosecutions can only be brought by or with the consent of the Attorney General. In South Australia the offence is an indictable offence; in New Zealand it is not.

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33 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.

34 *Isherwood v O'Brien* (1920) 23 WALR 10; *Zahradnik v Bateman* (unreported) Supreme Court of Western Australia, 30 November 1982, No 265 of 1982.

35 There was only one charge in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I. For a more recent prosecution, see "Woman has bond with future" *The West Australian*, 25 June 1987, 21.

36 P W Nichols "Clairvoyance No Help" (1983) 26 *JPWA Journal* No 7, 8.

37 Letter from Mr G Hill, Minister for Police, to Attorney General 25 September 1986.

38 *Summary Offences Act 1981* (NZ) s 16.

14.22 The South Australian and New Zealand provisions are not limited to fortune telling but also cover spiritualist mediums, clairvoyants and the like. In this respect they have a much more modern appearance than provisions referring to subtle crafts inherited from legislation dealing with witchcraft. The major difference from the Western Australian section, however, is that fortune telling would no longer be an offence unless it was proved that there was an intention to defraud. In the Commission's view, it is essential that the offence should incorporate this requirement. Unless there is an intention to defraud, fortune telling and the like should not 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 as a result. The reform of the law in South Australia did not lead to a boom in fortune telling or any other undesirable consequences.

14.23 The Commission is of the view that it is undesirable to retain section 66(3) in its present form. Fortune telling per se should not be a criminal offence. The Commission seeks comment as to whether it should be abolished without replacement, as it was in New South Wales and the ACT,[39] or replaced by a provision based on that found in South Australia and New Zealand. If such a provision is adopted, the Commission is of the view that it should be a simple offence, as in New Zealand, rather than an indictable offence, as it is in South Australia.

5. FRAUDULENTLY MANUFACTURING OR SELLING ADULTERATED METALS OR SUBSTANCES: SECTION 66(12)

14.24 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.

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[39] A similar reform has been proposed in England: Home Office Report paras 19-21, and see Home Office Working Paper paras 73-85.

14.25 This provision 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*. Other Australian jurisdictions had similar provisions, but Queensland[40] and Victoria[41] are the only other jurisdictions to retain the offence at the present day.

14.26 The offence covers both the fraudulent manufacture and the fraudulent selling of spurious or mixed metal as gold. Insofar as it covers fraudulent selling or fraudulently offering for sale, there is an overlap between this offence and the Code offence of false pretences,[42] which in certain circumstances is triable summarily at the election of the defendant.[43] Insofar as it covers fraudulent manufacture, it may perform a useful function in that it enables the producer, rather than the seller, to be prosecuted, and makes it unnecessary to wait for a sale or attempted sale, although even here there may be some overlap with the offence of making counterfeit money in the *Commonwealth Crimes (Currency) Act 1981*.[44] It appears that no charges are in practice brought under the section.[45]

14.27 The Commission seeks comment as to whether the offence needs to be retained. If it is retained, it may be that it should be limited to fraudulent manufacture, so as to eliminate the overlap between it and the Code offence of false pretences.

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40 *Vagrants, Gaming, and Other Offences Act* (Qld) s 4(1)(xi).
41 *Vagrancy Act 1956* (Vic) s 7(1)(j).
42 S 409.
43 See para 14.6 above.
44 S 6.
45 There were no charges in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

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 whosoever, with or without a warrant, may apprehend any reputed common prostitute, thief, loose, idle or disorderly person, who, within view of such person apprehending, shall offend against this Act, and shall forthwith deliver him to any constable or police officer of the place where he shall have been apprehended, to be taken and conveyed before a Justice, to be dealt with according to law, and any constable 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 provision in this section that a constable deemed guilty of neglect of duty was, on conviction, to be punished in such manner as the Act directs 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,[1] 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.[2] 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.

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1 By the *Police Act Amendment Act 1978* s 7.

2 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.

15.4 These problems aside, the Commission is of the view that 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 arresting officers either to grant bail or to bring the person arrested before a court,[3] and creates an offence of failing to bring the arrested person before a court or person able to grant bail as soon as is practicable.[4] The Commission is of the view that the offence in section 47 should be repealed.[5]

3. MAD DOGS: SECTION 51

15.5 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."**

15.6 This provision was first enacted in the *Police Ordinance 1861*[6] and was then carried over into the 1892 Act. The draftsman of the 1861 Ordinance derived it from the United Kingdom *Metropolitan Police Act 1839*.[7] The wording of the present section is exactly the same as the 1839 Act in all essential respects.

15.7 It would seem that there is no need to retain section 51 in the *Police Act*. Australia has been free of rabies for many years, and it seems clear that the provision was not drafted with local conditions in mind. No other Australian *Police Act* has a similar provision.

15.8 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 place[8]- 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.[9] A dog that is in a place in

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3 S 6.

4 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 magistrate - provisions which likewise made the offence in s 47 unnecessary.

5 For the Commission's other recommendations on s 47 see paras 17.21-17.22 below.

6 S 63.

7 S 61.

8 Ss 31, 32, 33 and 33A.

9 S 31.

contravention of the Act may be seized,[10] 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.[11] 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*. As regards other animals reasonably suspected to be in a rabid state, the *Health Act 1911*[12] gives public health officials power to destroy animals known or suspected to be infected, and the *Local Government Act 1960*[13] 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,[14] and gives power to destroy diseased animals.[15]

4. NEGLIGENT OR FURIOUS DRIVING: SECTION 57

15.9 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, 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."**

15.10 This provision was derived from the South Australian *Police Act 1869*,[16] but the earlier Western Australian Police Ordinances had both included somewhat similar provisions.[17] 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". [18]

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10 S 29(3).
11 S 29(13).
12 S 251(4).
13 S 243(1)(b).
14 Part V.
15 S 48.
16 S 56.
17 *Police Ordinance 1849* s 19; *Police Ordinance 1861* s 59(5), based on *Metropolitan Police Act 1839* (UK) s 54(5).
18 Western Australian *Parliamentary Debates* (1975) vol 209, 228 (T A Hartrey).

15.11 Originally section 57 was the only provision required for the control of road traffic.[19] With the advent of the motor vehicle, first the *Traffic Act 1919*[20] and then the *Road Traffic Act 1974*[21] 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 that 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.[22] However, the offences of reckless driving, dangerous driving and careless driving[23] are all confined to motor vehicles. The only provision dealing with other vehicles or animals is regulation 1306 of the *Road Traffic Code 1975*, which 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. Failure to comply with this regulation is an offence carrying a maximum penalty of $400 for a first offence.[24]

15.12 There seems no point in retaining section 57. 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.[25] Other cases are covered by regulation 1306 of the *Road Traffic Code*, and the penalty is the same as that provided by section 57. Of the other Australian jurisdictions, only the Northern Territory and New South Wales retain an equivalent section.[26] The Commission's provisional view is that section 57 is obsolete and should be repealed.

5. RESTRICTION ON GAMES ON CERTAIN DAYS: SECTION 61

15.13 Section 61 provides that:

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19 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 15 and Appendix III.

20 S 26 (reckless driving).

21 Ss 60 (reckless driving), 61 (dangerous driving), 62 (careless driving).

22 S 5(1).

23 See fn 21 above.

24 *Road Traffic Code 1975* reg 1901.

25 There was one charge under s 57 in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I. Further details of the case are not available. (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.

26 *Summary Offences Act 1923* (NT) s 49; *Police Offences Act 1901* (NSW) s 99.

"(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 -

(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, skitla, 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.[27] 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 centres,[28] the section

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27 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.

28 Western Australian *Parliamentary Debates* (1972) vol 193, 424.

was altered so as to permit opening on Sundays between 10.00 am and 6.00 pm.[29] 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 *Factories and Shops Act 1963*. The permitted hours were extended in 1975.[30]

15.16 The *Acts Amendment and Repeal (Gaming) Act 1987*[31] 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. The section 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.[32] This matter has been referred to the Commission as part of its review of the offences in the *Police Act*.

15.18 Looked at simply as a matter involving trading hours, it is arguable that the present restrictions should be repealed leaving such businesses to open when they choose.[33] Alternatively, a guide to the appropriate trading hours for premises covered by section 61 may perhaps be found by examining the hours at which shops are permitted to trade under the *Retail Trading Hours Act 1987*, or the hours at which licensed premises are permitted to remain open under the *Liquor Licensing Act 1988*.

15.19 On the other hand, section 61 may be seen as a way of controlling the congregation of large groups of people late at night.[34] If this is now the predominant purpose behind section 61 there is some reason for regulating the times of opening and closing, but no reason for imposing more restricted hours on Sundays, or prohibiting opening on Christmas Day or Good Friday - however much this may be deprecated by some sections of the community.

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29 *Police Act Amendment Act 1972* s 2.

30 By the *Police Act Amendment Act (No 2) 1975* s 27.

31 S 49.

32 See letter from Minister for Police to Attorney General dated 27 November 1986, referred to the Commission by the Attorney General.

33 There is no legislation in other States dealing with the conditions under which an amusement centre may be run: Department for Community Services *Report on Pinball Parlours and Amusement Centres* (1988).

34 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 32 above.

15.20 One factor which would affect this issue is whether an extension of the opening hours of amusement parlours would encourage young people to remain at amusement parlours for longer periods, and whether this would place them at risk in any way. This question caused the Department for Community Services to commission a survey,[35] which found that the frequenting of amusement centres does not place young people at risk, and that the centres are safe and well-regulated. The State Government has recently announced a code of ethics for amusement leisure centres[36] 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 prominent position and enforce it. It can therefore no longer be argued that the extension of opening hours would have a detrimental effect on the habits of young people.

15.21 The Commission seeks comment on whether, in the light of these considerations, the trading hours at present permitted by section 61 should be extended.

6. TAKING A DOG INTO PUBLIC GARDENS: SECTION 63

15.22 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."**

15.23 This section was originally inserted in the *Police Ordinance 1861*[37] 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*. 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. The fine, $1, has remained unaltered since 1892 (when it was increased from five to ten shillings) and in present day conditions is a

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35 Department for Community Services *Report on Pinball Parlours and Amusement Centres* (1988).
36 Media Statement from Department of Premier and Cabinet, 19 December 1988.
37 S 60.

trifling amount. Local authorities have power under the *Dog Act 1976* to make by-laws specifying places where dogs are prohibited,[38] and in practice this is the means by which the presence of dogs in particular places is regulated. The Commission's provisional recommendation would be that section 63 should not be retained.

7. BEGGING: SECTION 65(3)

15.24 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.

15.25 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.[39] The offence was introduced into Western Australian law by the *Police Ordinance 1849,*[40] which drew it from the United Kingdom *Vagrancy Act 1824*.[41]

15.26 It may be questioned whether the offence is necessary at the present day. 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.[42] 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.

15.27 There are two major arguments against abolition. One is that begging can still be a nuisance, albeit perhaps a minor one, to members of the public, and that the offence of begging should be retained to discourage it. The other is that there are rules which regulate street

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38 S 51(b).
39 See Home Office Working Paper Appendix A.
40 S 9.
41 S 3.
42 See Home Office Working Paper paras 56-58. There were only 2 charges under s 65(3) in Perth and East Perth Courts of Petty Sessions in 1984-85: see Appendix I.

collections,[43] and breach of those rules is a simple offence.[44] It is remotely possible that if begging were unrestricted, persons charged with breaches of the street collections rules might be able to claim they were begging and not collecting. These considerations led an English committee to recommend 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.[45]

15.28 The Commission seeks comment as to whether the offence should be abolished, or reformulated as suggested.

8. WILFUL NEGLECT: SECTION 66(10)

15.29 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.

15.30 This again is a very old offence. It can be traced back to the provisions of the English Poor Law in the 16th century.[46] In Western Australia the offence dates back to the *Police Ordinance 1849*.[47]

15.31 This offence is no longer necessary because it has been overtaken by more modern legislation. 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 able to do so, if that other party is unable to support herself or himself adequately;[48] parents of a child have the primary duty to maintain the child.[49] The Western Australia *Child Welfare Act 1947*[50] 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

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43 See the *Street Collections (Regulation) Act 1940*.
44 Id s 8.
45 Home Office Report paras 13-18, and see Home Office Working Paper paras 62-69.
46 See Home Office Working Paper Appendix A.
47 S 9.
48 S 72. Part VIII contains detailed provisions on maintenance of spouses.
49 66B. Part VII Division 6 contains detailed provisions on maintenance of children.
50 S 31A(1).

a child in need of care and protection. The *Criminal Code*[51] 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.

9. REPEATED OFFENCES: SECTIONS 66(1) AND 67(2)

15.32 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 against section 67.

15.33 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.

15.34 This complex scheme is unnecessary. The Commission suggests that many of the offences in sections 65, 66 and 67 should be abolished.[52] In the case of those offences that are retained, the penalty provided will be a maximum, as is the normal practice. It should be high enough to allow the courts to impose appropriate sentences both for first offenders and for those with previous convictions for the same or other offences. Sections 66(1) and 67(2) can be repealed.

10. PERSONS SELLING ADULTERATED OR UNWHOLESOME ARTICLES OF FOOD: SECTION 83

15.35 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:-**

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51 S 262.

52 See paras 4.4-4.19, 5.1-5.13, 6.24-6.26, 8.1-8.18, 8.24-8.28, 9.28-9.30, 10.13-10.18, 12.5-12.26, 14.7-14.27, 15.24-15.31.

> **(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.**"

15.36 Section 83 was contained in the South Australian *Police Act 1869*[53] which was used as a model for the 1892 Act. The wording has remained unchanged since then except for increases in the penalties.

15.37 Section 83 has been obsolete ever since the passage of the *Health Act 1911*. This Act contains comprehensive provisions about the sale of food. The present law is set out in Part VIII, comprehensively revised in 1985.[54] Section 246L makes it an offence to sell food which is unfit for consumption by man (or woman, presumably), adulterated or damaged, deteriorated or perished. Selling includes, inter alia, offering or exposing for sale.[55] Subsequent provisions set out offences relating to the preparation and packaging of such food,[56] and further provisions create offences of false packaging, labelling and advertising.[57] Health inspectors are given comprehensive enforcement powers, including powers of seizure.[58]

15.38 In the face of these provisions, section 83 is redundant and the Commission's provisional view is that it should be repealed. This would follow the example of South Australia and the ACT, although the provision remains on the statute book in the Northern Territory.[59] No other Australian jurisdiction has any equivalent.

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53 S 70.
54 By the *Health Amendment Act 1985* s 7.
55 S 3(1).
56 Ss 246M and 246N.
57 Ss 246P, 246Q and 246R.
58 Division 5 of Part VIII.
59 *Summary Offences Act 1923* (NT) s 65.

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, and have been fully dealt with in a research paper prepared for the Commission.[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]

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1 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 2.1 above.

3 See s 75.

4 S 77.

5 S 95. The problems surrounding the interpretation of this provision are considered in fn 43 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, shoed 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 shanghais[14] and ringing doorbells[15] to the annoyance of others. The rolling of casks,[16] the burning of cork,[17] the slacking of lime,[18] the laying of coal[19] 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 - so serious that in the

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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.

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. THE COMMISSION'S VIEW

16.6 Part VII needs to be dealt with as a whole, rather than section by section. When measured against the general criteria put forward in chapter 3,[33] the offences in Part VII are found wanting. They can be criticised on a number of grounds.

(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.[34] Most were adopted in Western Australia in 1849 with very little amendment and there has been virtually no change since then. It is little

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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 See paras 3.1-3.9 above.

34 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.

wonder, then, that 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.[35] There is also much duplication as between Part VII and other offences elsewhere in the *Police Act*.[36] The Commission's research paper[37] contains a full section by section analysis.

(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 research paper deals with Part VII section by section and shows how most of its provisions are duplicated in this way. 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.[38]

(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."**

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35 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.

36 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.

37 See fn 1 above.

38 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 I.

16.11 Though the section refers to by-laws or regulations lawfully made by any Municipality, Council of a Shire,[39] 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*,[40] 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 Health[41] have been abolished.[42] 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.[43]

16.12 Practically all areas of Western Australia are within the jurisdiction of municipalities.[44] Municipalities have powers to make by-laws under the *Local Government Act 1960*,[45] the *Health Act 1911*[46] and certain other Acts. Their by-law making powers cover almost all the provisions in Part VII, as the research paper shows. 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

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39 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.

40 S 9.

41 First set up under the *Public Health Act 1886* and later provided for under the *Health Act 1911* s 20.

42 By the *Acts Amendment and Repeal (Statutory Bodies) Act 1985* s 12.

43 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 as 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 no 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.

44 The only known examples 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 recent case 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.

45 Part VIII.

46 Ss 134, 158, 172, 199, 207 and 220.

operation. If a particular offence is needed, it would be better not to make it dependent on the absence of by-law provisions.[47]

(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 still to be found in the police legislation of the Northern Territory, Victoria and New South Wales.[48] 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,[49] 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 ACT. In South Australia, nearly all the Part VII provisions were repealed when the Act was redrafted in 1953.[50] In a thoroughgoing reform of the ACT *Police Offences Ordinance 1930* in 1983, a few provisions of the Part VII were removed to the *Crimes Act*[51] and the rest were repealed. Also, in New Zealand, most of the Part VII provisions were omitted from the *Summary Offences Act 1981*.[52]

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47 It is unlikely that nude bathing would be made an offence without providing certain designated areas where nude bathing could take place without any offence being committed. The most appropriate course of action would be to enact uniform by-laws under the provisions of the *Local Government Act*, if necessary amending the *Local Government Act* to allow the making of uniform by-laws on this matter.

48 *Summary Offences Act 1923* (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.

49 See paras 2.14 and 2.19 above.

50 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).

51 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.

52 The only survivors are the equivalents of s 96(7) (affixing placards) and s 96(8) (discharging firearms and fireworks).

(f) Conclusion

16.15 The provisions of Part VII are out of date. In nearly all instances, they have been superseded by other legislation or by by-laws. There are very few situations in which they can apply. Other jurisdictions have abolished them. In the Commission's view Western Australia should follow their example and repeal Part VII.

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 paper for the reasons stated in chapter 3 above.[2] The arrest powers in the *Police Act* have to be examined in the light of the comprehensive arrest powers in sections 564 and 569 of the *Criminal Code*.

17.2 The law gives the police the responsibility of detecting and preventing crime. It therefore recognises that police need powers of arrest which are greater than those given to ordinary citizens.[3] Thus the common law, though it gave ordinary citizens power to arrest in certain circumstances,[4] gave the police additional powers to arrest without warrant.[5] In addition, police had power to arrest under a warrant, which further extended their arrest powers as compared with those of ordinary citizens. But the law also recognised that the power of arrest must have its limits.[6] The need for law enforcement and the apprehension of offenders has to be balanced against the right of individuals to live their lives free from interference.

17.3 It is important to bear this in mind when considering what limits it is appropriate to place on police powers of arrest. It is not necessary to arrest a person in order to commence criminal proceedings: they can also be commenced by summons. In addition to being the only alternative in cases where there is no power to arrest, summons remains an alternative in cases where a power to arrest is available.

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1 The sections dealt with in this chapter are quoted in Appendix II.

2 See paras 3.31-3.32 above.

3 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.

4 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 arrester or is reasonably apprehended.

5 At common law police officers can arrest without warrant where they reasonably suspect treason or felony to have been committed, even if no offence has in fact been committed.

6 According to A V Dicey *Law of the Constitution* (10th ed 1959) 208, arrest is prima facie illegal and must be justified under some legal authority.

17.4 It has been suggested that police often favour arrest over summons,[7] 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 particulars[8] and to search the suspected person's premises.[9] 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 Investigation[10] 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 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."

17.5 Police regulations and orders commonly contain instructions as to the circumstances in which a person should be arrested rather than summoned.[11] Some Australian jurisdictions, however, have gone further than this and have incorporated in legislation dealing with powers of arrest a direction that proceedings should be commenced by summons rather than arrest unless arrest is necessary. The Commonwealth *Crimes Act 1914*,[12] for instance, provides that a constable may arrest a person without warrant where the constable has "reasonable ground to believe . . . that proceedings against the person by summons would not be effective."[13] The ACT

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7 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.

8 See paras 17.45-17.49 below.

9 See paras 18.5-18.7 below.

10 Report No 1 1975 para 28 (footnotes omitted).

11 Information about such regulations in the Commonwealth, South Australia and Victoria is set out in K L Milte & T A Weber *Police in Australia* (1977) 111-113.

12 S 8A.

13 S 55 of the *Police Offences Act 1935* (Tas) places the onus differently: 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

Crimes Act 1900,[14] after providing that any person may arrest a person in the act of committing, or immediately after having committed, an offence, gives a police officer power to arrest a person if the police officer believes on reasonable grounds that the person is committing or has committed the offence, but only if proceedings by way of summons would not achieve one or more of a number of listed purposes, as follows:

> "(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."[15]

In Western Australia, the *Justices Act 1902*,[16] though dealing only with arrest under warrant, makes it clear that a justice has a discretion to issue a summons instead of a warrant.

17.6 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 Bail[17] and by the Australian Law Reform Commission in its report on Criminal Investigation.[18] Very recently, the Western Australian Report of the Interim Inquiry into Aboriginal Deaths in Custody[19] recommended that the Government's legislative endorsement of the principle that imprisonment

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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).

14 S 352.

15 A broadly similar provision appears in s 25 of the *Police and Criminal Evidence Act 1984* (UK), and the New South Wales Law Reform Commission Discussion Paper on *Police Powers of Arrest and Detention* (DP 16 1987) 95-96 again suggests a similar formulation. 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.

16 S 58.

17 Project No 64 1979 paras 9.2-9.5.

18 Report No 1 1975 paras 22-29.

19 (1988) 60-62.

is the sentencing option of last resort[20] should be equally reflected in regard to the use of arrest.[21] 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 Custody[22] 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.

17.7 The Commission endorses the recommendations of these inquiries, and later in this chapter makes suggestions for incorporating the principle underlying them in reforms of the law of arrest.

2. MAJOR ARREST PROVISIONS

17.8 In Western Australia, the common law rules governing arrest[23] have been largely superseded by statutory provisions. There are many statutes which give the police (and sometimes private citizens) powers to arrest in particular circumstances,[24] but the most important provisions - those that deal with general powers of arrest - are found in the *Criminal Code*, the *Justices Act* and the *Police Act*.

(a) Criminal Code

17.9 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 he or she were found committing the offence, and offences for which arrest could be made without warrant. It was therefore necessary to know

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20 See Ministerial Statement by Attorney General, Western Australian *Parliamentary Debates* (1987) vol 267, 5209-5214. A number of the reforms have already been implemented by the *Criminal Law Amendment Act 1988*.

21 According to Lord du Parcq in *Christie v Leachinsky* [1947] AC 573, 600, arrest is the beginning of imprisonment.

22 (1988) para 6.2.

23 See para 17.2 above.

24 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.

into which category a particular offence fell. According to the Murray Report,[25] the provisions were full of illogicalities and led to confusion and uncertainty as to what powers were available in any given situation.

17.10 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."[26]

17.11 Another provision enacted in 1985, section 569, deals with the arrest of persons offering stolen property for sale. It provides -

> "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."

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25 354.

26 S 564(6), which deals with assisting a person believed to be a police officer to effect an arrest, has been omitted.

17.12 The powers of arrest in these two sections are of general application. They are not limited to offences created by the Code.

17.13 In his second reading speech, the Attorney General emphasised the importance of the new provisions.[27] 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.

(b) Justices Act 1902

17.14 Arrest under warrant is dealt with by sections 58 and 59 of the *Justices Act*. Section 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.

Section 59 gives a justice power to issue a warrant for arrest on complaint of a simple offence.

(c) Police Act

17.15 The *Police Act* has always contained a number of provisions on arrest - as a result of the fact that when it was enacted, in the days before the *Criminal Code*, it was seen as a statute dealing generally with criminal procedure as well as criminal law. At the present day, however, it is unnecessary for the *Police Act* to contain rules relating to arrest when the matter is

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27 Western Australian *Parliamentary Debates* (1985) vol 257, 3212-3213.

comprehensively dealt with by the *Criminal Code*. Some of the *Police Act* provisions dealing with specific offences are simply redundant. A few of the provisions on arrest are general in their terms, but they are inconsistent with the general principle adopted by the *Criminal Code*.

(i) Powers to arrest for any offence: sections 43(1) and 41(1)

17.16 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.[28] 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."[29]

17.17 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 him liable to apprehension, with or without warrant, or against whom a warrant has been issued, is harboured, secreted or concealed on board.[30]

17.18 These provisions allow the police to exercise a power of arrest for any offence. They therefore permit the police to arrest for offences which have been expressly declared by the *Criminal Code* to be non-arrestable.[31] To allow the powers in question to remain on the statute book would defeat the intention of Parliament. The arrest powers given by these provisions are wider than the arrest powers in some other Australian jurisdictions.[32] They are also wider than

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28 See paras 4.20-4.38 above.

29 It appears that being suspected of having committed or being about to commit an offence are themselves offences: see paras 4.25-4.26 above.

30 Resisting arrest and concealing suspected persons are offences, dealt with at paras 5.1-5.12 and 5.17-5.20 above.

31 See paras 17.10-17.13 above.

32 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 17.5 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 1978* (NT) s 123. The proposals in the New South Wales Law Reform Commission Discussion Paper on *Police Powers of Arrest and Detention* (DP 16 1987) (see fn 15 above) would however put New South Wales into the former group.

the powers of arrest given to the British police by the *Police and Criminal Evidence Act 1984*, a statute which considerably extended police powers.[33] In the view of the Commission it is unnecessary and undesirable for the police to have such a wide power of arrest.

17.19 The Commission suggests that the powers to arrest for non-arrestable offences in sections 43(1)[34] and 41(1)[35] should be repealed. As a result, the general power of arrest possessed by the police will be limited to arrestable offences.[36]

17.20 A more limited alternative would be to allow the police to retain the power given by section 43(1) to arrest for non-arrestable offences, but to provide that in such cases the police must proceed by summons rather than arrest unless at least one of a number of specified conditions were satisfied. A provision along these lines would embody reforms already adopted in some Australian jurisdictions and under consideration in others.[37] If this alternative is adopted, it would be preferable for the provision to be placed in the *Criminal Code*, alongside the other arrest provisions. There would presumably be no need to retain the separate provision under section 41(1) for arrest on board ship. The Commission seeks comment.

(ii) Powers to arrest for offences under the Police Act : sections 46 and 47

17.21 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.[38]

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33 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.

34 For the Commission's suggestions as to the other arrest powers in s 43(1), see para 17.27 below. For its suggestions as to the offences created by the section, see paras 4.27-4.38 above.

35 For the Commission's suggestions as to the entry, search and other powers in s 41(1), see paras 18.29-18.32 and 18.48 below. For its suggestions as to the offences created by the section see paras 5.1-5.12 and 5.17-5.20 above.

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.

37 See para 17.5 above.

38 Refusal by a constable to take the arrested person into custody is an offence: see paras 15.2-15.4 above.

17.22 The Commission suggests that sections 46 and 47 should be repealed. Section 46 is unnecessary in the light of section 50, under which the police have power to demand a person's name and address if they suspect that that person has committed an offence.[39] 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.[40] It is also out of date in continuing to refer to idle or disorderly persons. This reference was not removed when other such references were deleted in 1975.[41] These matters apart, sections 46 and 47 authorise arrest for non-arrestable offences. Most *Police Act* offences carry sentences of imprisonment and the police can therefore exercise powers of arrest under section 564 of the *Criminal Code*. The arguments against wider powers of arrest have already been dealt with.[42]

(iii) Power to arrest for any offence punishable in a summary manner: section 49

17.23 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. This provision, unlike sections 46 and 47, 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 because they do not carry a prison sentence. The Commission suggests that section 49 should be repealed.

3. OTHER ARREST PROVISIONS IN THE POLICE ACT

17.24 Other provisions in the *Police Act* confer powers of arrest, either for specific offences, or in special circumstances.

(a) Powers of arrest for specific offences

17.25 In a number of instances the *Police Act* confers power to arrest for specific arrestable offences. The Code provisions make it unnecessary for these powers to be retained.[43] In a few

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39 See paras 17.40-17.44 below.
40 See also paras 3.21-3.22 above.
41 By the *Police Act Amendment Act (No 2) 1975* s 31.
42 See paras 17.1-17.7 above.
43 Paras 17.26-17.32 below.

instances, there are powers to arrest for specific offences which do not carry a prison sentence, but these are all obsolete.[44]

(i) Section 42

17.26 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 unnecessary. In any case, the Commission suggests that the power given by section 42 to enter premises and order persons to leave, and the offence of refusing to leave, should be abolished.[45]

(ii) Section 43(1)

17.27 Apart from the more general arrest power dealt with above,[46] section 43(1) gives the police power to arrest for a number of specific offences, some which are offences under other provisions of the Act and some which have been held to be offences under section 43(1) itself.[47] All the offences in question are arrestable offences.[48] It would therefore be possible to arrest without warrant under section 564(2) and section 43(1) is unnecessary.

(iii) Section 44

17.28 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. The arrest power in section 44 is therefore unnecessary.

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44 Paras 17.33-17.34 below.
45 See paras 18.17-18.20 below.
46 Paras 17.16-17.20.
47 See paras 4.25-4.26 above.
48 By virtue of s 124, offences under s 43(1) are punishable by imprisonment.
49 See paras 6.3-6.4 above.

(iv) Section 70

17.29 Section 70 gives the police power to 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. It also gives power to 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 such circumstances an arrestable offence would have been committed,[50] and arrest may be made without warrant under section 564(4) of the Code. The arrest power in section 70 is therefore unnecessary. The Commission suggests that the entry and search powers in section 70 are unnecessary.[51]

(v) Section 76G(3)

17.30 Section 76G(3) is similar to the above provisions, except that it authorises arrest under a warrant. Section 76G(3) gives power under warrant to enter premises and arrest a person living on the earnings of prostitution. This is an arrestable offence,[52] and it would therefore 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*. The arrest power in section 76G(3) is therefore unnecessary.[53]

(vi) Section 49

17.31 Sections 49 and 82(3) are now rendered unnecessary by section 569 of the Code. Under section 49, any person to whom any property or liquor is offered to be sold, pawned or delivered may, if he has reasonable 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

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50 Under s 69, as to which see paras 13.6-13.17 above.

51 See paras 18.8-18.12, 18.16, 18.45-18.46 below.

52 Because it is deemed to be an offence against s 66, which is punishable by imprisonment: s 76G(1).

53 The Commission also suggests that the entry and search powers in s 76G(3) are unnecessary: see paras 18.8-18.12, 18.16 below. For the Commission's suggestions as to the offence of living on the earnings of prostitution, see paras 9.35-9.38, 9.43-9.44 above.

used for an unlawful purpose). The Commission therefore suggests that there is insufficient justification for retaining section 49.[54]

(vii) Section 82(3)

17.32 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. This simply duplicates section 569 of the Code and is unnecessary. In any case, the Commission suggests that section 82(3) should be repealed.[55]

(viii) Sections 96, 104, 108 and 110

17.33 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. The Commission suggests that these offences, like the other offences in Part VII, should be repealed.[56] The powers of arrest contained in these sections would in any case be unwarranted at the present day.

(ix) Section 122

17.34 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 suggests that this power should be abolished. The Commission also suggests that the entry and search powers in section 122 are unnecessary.[57]

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54 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.

55 See paras 13.49-13.52 above.

56 See ch 16.

57 See paras 18.8-18.12, 18.16, 18.23.

(b) Special cases

17.35 There are a few arrest powers in the *Police Act* which have some special value. Consideration could be given to putting them in the *Criminal Code* alongside the other arrest provisions.

(i) Section 43(2)

17.36 Section 43(2) (added to the *Police Act* in 1977[58]) 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.[59] 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 suggests that this provision should be retained.

(ii) Section 45

17.37 Section 45 contains two separate arrest powers. The first authorises a police officer to arrest without warrant any person who he 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 suggests that it is worth retaining.

17.38 The second provision in section 45 is made redundant by section 564 of the Code. It gives a police officer power to arrest a person who is reasonably believed to have committed any felony or misdemeanour. In virtually all cases felonies[60] and misdemeanours would be punishable by imprisonment and would therefore be arrestable offences.

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58 *Police Act Amendment Act 1977* s 2.

59 Which covers only acts wholly or partially committed in Western Australia: s 12.

60 This must be taken as a reference to crimes: *Criminal Code Act 1913* s 3(1).

(iii) Section 50

17.39 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.

4. POWER TO DEMAND NAME AND ADDRESS, AND ARREST: SECTION 50

17.40 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.[61]

17.41 In *Trobridge v Hardy*[62] 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 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 (eg 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."

17.42 Summing up the effect of the authorities, Wallace J in *Yarran v Czerkasow*[63] said that a police officer is not permitted to seek a person's name and address unless he or she suspects that the person has committed an offence or may be a witness to the commission of an offence.[64]

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61 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 he did not know. This limitation was removed by the *Acts Amendment (Betting and Gaming) Act 1982* s 4.

62 (1955) 94 CLR 147, 153-154.

63 [1982] WAR 239, 240.

64 Section 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.

17.43 Of the other Australian jurisdictions, only in Queensland, South Australia, Tasmania and the Northern Territory do the police have a similar power.[65] Except in Queensland, the power is much more carefully circumscribed. In South Australia, for example, the section 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,
>
> he may require that person to state his 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, he may require the person making the statement to produce evidence of the correctness of the name and address as stated by him.
>
> (3) If a person -
>
> (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 name or address,
>
> he shall be guilty of an offence and liable to a penalty not exceeding $1 000 or imprisonment for 3 months.[66]

17.44 The Commission seeks comment as to whether the power given by section 50, and the accompanying offence, should be retained. If it is to be retained, it suggests that the section should be redrafted to incorporate the safeguards found in the South Australian section and the case law.

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65 *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 1978* (NT) s 134.

66 S 74a(4) provides that persons who have been required to state their full name and address under subsection (1) may require the member of the police force to state his or her name and rank. Such a requirement would be equally desirable in any case where a police officer exercises the power of arrest.

5. POWER TO OBTAIN PARTICULARS OF IDENTITY: SECTION 50AA

17.45 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 will be destroyed only if the person so requests. Otherwise they are retained.

17.46 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.[67]

17.47 In most other Australian jurisdictions fingerprints and other particulars may be taken when a person is in lawful custody,[68] as in Western Australia, but in Victoria fingerprints may be taken only if the suspect gives informed consent or under a court order.[69] 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 an information, but the Act enacts a safeguard by providing that in each case the court must be satisfied of specified matters.[70]

17.48 The Commission's suggestions in this chapter, if implemented, will have the effect of reducing the number of cases in which proceedings are initiated by arrest rather than by summons. It is unsatisfactory in principle that all persons arrested should automatically have particulars such as fingerprints taken. The Commission seeks comment on whether there should be greater restrictions on the power to take fingerprints and other particulars.

17.49 In the Commission's view, there is no justification for retaining fingerprints and other particulars where the suspected person is not convicted. Many people will be unaware of their right to request that these particulars be destroyed. In other jurisdictions, fingerprints are

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67 Western Australian *Parliamentary Debates* (1974) vol 203, 364.

68 *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(1); *Police Administration Act 1978* (NT) s 146.

69 *Crimes Act 1958* (Vic) s 464K, inserted by the *Crimes (Fingerprinting) Act 1988* s 4.

70 S 464M.

automatically destroyed once a charge is withdrawn or dismissed.[71] The Commission suggests that section 50AA be amended accordingly.

[71] *Crimes Act 1958* (Vic) s 464R; *Vagrancy, Gaming, and Other Offences Act 1931* (Qld) s 43; *Summary Offences Act 1953* (SA) s 81(4f); *Police Administration Act 1978* (NT) s 147(2).

Chapter 18
POWERS OF ENTRY, SEARCH AND SEIZURE

1. INTRODUCTION

18.1 The *Police Act* contains provisions which give the police powers to enter premises and ships, in order to search, arrest suspected persons or for various other purposes; powers to search persons and vehicles; and powers to seize property.[1] The Commission deals with these powers in this paper for the reasons stated in Chapter 3 above.[2] These and other statutory provisions, such as those in the Code, considerably extend the powers of the police conferred by the common law.[3]

18.2 The law relating to entry, search and seizure has to balance two competing considerations, both of great importance: on the one hand, the need to give the police wide enough authority to ensure that criminals are caught, and on the other, the right of citizens to go about their business without unnecessary interference.[4] 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.[5]

2. POWERS TO ENTER PREMISES

18.3 A number of the 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*, add considerably to the powers to enter premises conferred by the common law.

18.4 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.[6] The law

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1 The sections dealt with in this chapter are quoted in Appendix II.

2 See paras 3.31-3.32 above.

3 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.

4 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.

5 See generally D Feldman *The Law Relating to Entry, Search and Seizure* (1986) 1-28.

6 *Mackay v Abrahams* [1916] VLR 681; *Great Central Railway Co v Bates* [1921] 3 KB 578; *Davis v Lisle* [1936] 2 KB 434.

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.[7] The law also gave police authority to enter private premises where there was an actual or threatened breach of the peace,[8] or to effect an arrest,[9] but the police did not have authority to search a person's premises following the arrest of that person elsewhere.[10]

(a) Entry for the purposes of search

(i) Without warrant: section 68

18.5 Under section 68, the police may inspect and search the premises and property[11] of any person taken into custody on a charge of felony.[12]

18.6 This is an important provision because it gives the police power to enter premises to search them without a warrant. No other statutory provision gives the police such a power: the general search power in the *Criminal Code*, section 711, is limited to cases where a search warrant has been issued,[13] as is the search power in the *Misuse of Drugs Act 1981*.[14]

18.7 In order to keep the search power in section 68 within appropriate bounds, it is limited to cases where a person has been charged with a serious offence. The Commission seeks comment as to whether the power should be further restricted or retained in its present form.

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7 *Entick v Carrington* (1765) 2 Wils KB 275: 95 ER 807.

8 *Thomas v Sawkins* [1935] 2 KB 249.

9 *Smith v Shirley* (1846) 3 CB 142: 136 ER 58.

10 *Jeffrey v Black* [1978] QB 490.

11 On s 68 in relation to search of property, see paras 18.40-18.44 below.

12 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*: *Criminal Code Act 1913* s 3(1).

13 Section 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. The Murray Report 146 recommends that this power should be extended to give the police power in certain circumstances to search the place where the person was found when arrested, but this proposed extension would still not be as wide as section 68, which allows the police to search the premises of the person whether arrested there or not.

14 S 14.

(ii) With warrant: sections 70, 76G(3) and 122

18.8 Three sections of the *Police Act* give the police power to enter and search premises under warrant in particular circumstances.

18.9 Under section 70, where there is reasonable cause to suspect that property stolen or unlawfully obtained is concealed or lodged in any place (or in any vehicle or package) a justice can issue a warrant authorising the police to enter the premises (with force if necessary) and search them.[15]

18.10 Under section 76G(3) if there is reason to suspect that a house is used by a female for purposes of prostitution, and any person residing in or frequenting the house is living on her earnings, a magistrate may issue a warrant authorising the police to enter and search the house.[16]

18.11 Under section 122 a justice may enter, or issue a warrant to "any constable or other person in like manner" to enter -

(1) any place kept or purporting to be kept for the reception, lodging or entertainment of travellers in which a person convicted of an offence against sections 65, 66 or 67 is or is suspected to be;[17]

(2) "a disorderly house, house of ill-fame, brothel or bawdy-house";

(3) a place where liquor is suspected of being illegally sold.[18]

18.12 Section 711 of the *Criminal Code* confers a general power to search premises under warrant,[19] if it appears to a justice that there are reasonable grounds for suspecting that there is any house, vessel, vehicle, aircraft or place -

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15 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 13.6-13.17 above. S 70 also provides for the seizure of the property suspected to be stolen: see para 18.48 below, and the arrest of persons found on the premises: see para 17.29 above.

16 The section also gives the constable power to arrest the person living on the earnings of prostitution: see para 17.30 above.

17 The section gives power to arrest the convicted person: see para 17.34 above.

18 The section gives power to seize the liquor: see para 18.48 below.

19 Similar provisions exist in most other Australian jurisdictions: *Crimes Act 1958* (Vic) s 465; *Criminal Code* (Qld) s 679; *Crimes Act 1900* (ACT) s 358B; *Police Administration Act 1978* (NT) s 117; in New South

(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,

a justice may issue a warrant directing police officers to search the premises and seize any such thing found there.[20] The more specific provisions in the *Police Act* are therefore unnecessary.

(b) Entry for the purposes of arrest

(i) Without warrant: section 44

18.13 Section 44 contains a provision allowing a member of the police force to enter certain premises without a warrant and make an arrest.[21] Police may enter any house licensed for the sale of fermented or spirituous liquors, or any licensed boarding, eating or lodging house, and without any warrant arrest any person found drunk, behaving in an indecent or disorderly manner, using profane, indecent or obscene language or threatening, abusive or insulting words or behaviour, with intent or calculated to provoke a breach of the peace.[22] He may also search the premises for offenders and otherwise perform his duty.

18.14 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 that section, it is lawful for the officer, for the purpose of effecting the arrest, to

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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.

20 The Murray Report 486 recommends amendments to s 711 to harmonise it with its recommendations as to s 236 (which are referred to in fn 13 above). The general powers conferred by s 711 would not be widened.

21 As to the scope of this power, see para 18.21 below. For the other entry power conferred by s 44, see para 18.33 below.

22 The section provides a penalty for these offences which applies unless a different penalty is prescribed by the *Police Act*: see paras 6.3-6.4 above.

enter upon any place where the person is or where the police officer suspects, on reasonable grounds, the person may be. The entry power in section 44 is therefore redundant.

18.15 Section 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. In *Letts v King*[23] the Full Court held that the section 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.

(ii) With warrant: sections 70, 76G(3) and 122

18.16 Sections 70, 76G(3) and 122, which confer powers to enter premises under a warrant for the purpose of search, also authorise arrest. The police are given power under section 70 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 section 76G(3) to arrest a person suspected of living on the earnings of prostitution, and under section 122 to arrest a person convicted of an offence against sections 65, 66 or 67 who is, or is suspected to be, in a place kept or purporting to be kept for the reception, lodging or entertainment of travellers or others. These provisions are also redundant in view of section 564(5) of the Code.[24]

(c) Entry for other purposes

(i) Section 42

18.17 Under section 42 the police may enter premises where any public table, board or ground is kept for playing various listed games,[25] whenever they think proper. Under the same section the police may enter places kept for theatrical or other public entertainments, exhibitions or shows, and remove common prostitutes, reputed thieves or other loose, idle or disorderly persons, or order them to leave. The section then provides that any person remaining after being ordered to leave commits an offence.

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23 [1988] WAR 76.

24 See para 18.14 above.

25 "Billiards, bagatelle, bowls, fives, rackets, quoits, skittles, or ninepins, or any game of the like kind."

18.18 Insofar as it confers power to enter premises where games are played, the games listed are not unlawful, and there seems 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*.[26] 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 *Police Act* categories, not because they have been guilty of any wrongdoing. The Commission suggests elsewhere in this paper that the label "common prostitute" should disappear.[27] The other references to idle and disorderly persons were removed in 1975[28] and this one ought to have been removed at the same time.

18.19 It may be suggested that the power conferred by section 42 is needed to enable the police to enter sports grounds and similar places where large groups of people are gathered, for the purpose of maintaining order. However it appears 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.[29]

18.20 In the Commission's view there are no sufficient reasons justifying the retention of the power of entry in section 42.[30] The offence in section 42 is also unnecessary, since conduct which would constitute an offence under section 42 would also constitute an offence under section 82B.[31]

(ii) Section 44

18.21 The provision in section 44 allowing 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

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26 S 25.

27 See para 9.18 above.

28 *Police Act Amendment Act (No 2) 1975* ss 31-32.

29 *Harris v Sheffield* United Football Club Ltd [1988] QB 77, which distinguished 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.

30 S 42 may be contrasted with s 73 of the *Summary Offences Act 1953* (SA), which was modernised in 1987. The power to enter is now limited to places of public entertainment, and the section only covers persons behaving in a disorderly or offensive manner, who may be ordered to leave or removed using reasonable force. Remaining when ordered to leave, or re-entry within 24 hours after having been ordered to leave or having been removed, is an offence. The Northern Territory equivalent, s 120 of the *Police Administration Act 1978*, has also been modernised somewhat.

31 For s 82B, and the Commission's suggestions concerning offences of unlawfully remaining on land or premises, see paras 8.1-8.22 above.

be limited to entry for the purposes of arrest. The drafting of the section is rather obscure. If it does give the police general powers of entry to such premises, then it is a historical anachronism and ought to be removed. In any case, the power is duplicated by provisions in the *Liquor Licensing Act 1988*.[32]

(iii) Sections 101 and 102

18.22 Sections 101 (butchers' shambles and slaughterhouses) and 102 (inspection of meat) also contain powers of entry and inspection. The Commission suggests that these sections be repealed.[33] The powers of entry and search contained in these sections seem anachronistic at the present day.

(iv) Section 122

18.23 Section 122 is largely concerned with entry for the purposes of search, seizure or arrest, but also gives a power to enter disorderly houses and the like. It is not clear why this power is given, and there seems no reason why the police should have such a power except for the purposes of search and seizure or arrest. The provision should be repealed, as it has been elsewhere.[34]

3. POWERS TO ENTER SHIPS

18.24 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,[35] when ships were the most efficient method of transporting both people and property.[36]

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32 S 155 allows the police 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*.

33 See ch 16.

34 The equivalent provisions have been repealed in the United Kingdom, South Australia, the ACT, the Northern Territory and New Zealand.

35 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.

36 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

(a) Section 40

18.25 Section 40 gives the police wide powers to enter ships. It provides that police officers and senior constables in charge of a police station are officers of customs within the meaning of the law relating to customs for the time being, and have power by virtue of their office to enter vessels for the purpose of searching and inspecting them, inspecting and observing the conduct of those employed on board or lading or unlading, taking measures to provide against fire and other accidents, preserving peace and good order on board, and preventing and detecting felonies and misdemeanours.

18.26 Insofar as it makes each police officer an officer of customs, section 40 has been inoperative since 1901, when the *Commonwealth Customs Act* was enacted.[37] That Act confers broad powers of entry, stoppage, search and seizure on Commonwealth customs officers.[38] Some Australian jurisdictions have an equivalent of section 40,[39] but none make police officers officers of customs.

18.27 It may be thought that the wide powers conferred by section 40 are unnecessary. If however it is thought advisable to retain these powers, then the Commission suggests that section 40 should be redrafted in modern form, perhaps following the example of section 357C of the *New South Wales Crimes Act 1900*, which provides as follows:

> "A member of the police force of or above the rank of sergeant or in charge of a police station or police vessel may at any time with as many members of the police force as he thinks necessary -
>
> (a) enter into any part of any vessel;
>
> (b) search and inspect the vessel;
>
> (c) take all necessary measures for preventing injury on the vessel to persons or damage to property by fire or otherwise; and

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the port thereof, and to prevent the escape of convicts therefrom by the facilitaties [sic] afforded by such shipping . . .".

37 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*.

38 Part XII Division 1.

39 *Summary Offences Act 1953* (SA) s 69; *Crimes Act 1900* (NSW) s 357C. 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.

(d) take all necessary measures for preserving peace and good order on the vessel or for preventing, detecting or investigating any offences that may be, or may have been, committed on the vessel."

18.28 The power given by section 40 is limited to officers of the police force or senior constables in charge of a police station. Apart from section 41(1), the powers in the *Police Act* are not limited in this way, and the Commission seeks comment as to whether this limitation is necessary. The Commission also seeks comment as to whether the entry and search powers in section 40 should be extended to aircraft. It should be noted that the New South Wales provision quoted above has not been extended in either respect.

(b) Section 41(1)

18.29 Section 41(1) provides that police officers and senior constables in charge of a police station, if they have reasonable cause to suspect that any offence has been or is about to be committed on board any ship, or that a person who has committed an offence rendering him liable to apprehension or against whom a warrant has been issued is harboured, secreted or concealed on board, may stop and detain the vessel, enter, search and inspect it and take measures for the prevention and detection of suspected offences or the apprehension of suspected persons, and arrest all persons suspected of being concerned in such offences, or liable to apprehension.[40] A number of other Australian jurisdictions have similar provisions.[41]

18.30 As to the power of entry for the purposes of search conferred by section 41(1), section 711 of the *Criminal Code* gives a general power to search all kinds of premises, including ships, but only where a search warrant has been issued.[42] The power given by section 41(1) may be exercised without a warrant, and the section therefore gives the police powers not conferred by other legislation. If, for example, a boat was suspected of being stolen, or if it was suspected that there was stolen property on board, the police could exercise the powers conferred by section 41(1) without the need to get a search warrant.

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40 As to the power of arrest, see paras 17.16-17.20 above. The section also provides that the police may take charge of all property suspected to be stolen, as to which see para 18.48 below; and creates offences of resisting or obstructing the police, dealt with at paras 5.1-5.12 above, and harbouring suspected persons, dealt with at paras 5.17-5.20 above.

41 *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.

42 S 711 is dealt with in more detail in para 18.12 above.

18.31 In so far as it gives the police power to enter ships for the purpose of arresting offenders, section 41(1) merely gives the police powers which are now conferred by section 564 of the *Criminal Code*, which deals generally with arrest. Section 564(5) provides that where it is lawful under section 564 for a police officer to arrest a person, 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 grounds, the person may be.

18.32 Assuming the power of entry for the purposes of search conferred by this section is to be retained, the Commission seeks comment as to whether it is necessary for this power to be exercisable only by police officers and senior constables in charge of a police station, when other entry powers are exercisable by any member of the police force; and whether the power should be exercisable in relation to aircraft as well as ships. The power to search under a warrant contained in section 711 of the Code also applies to aircraft.

(c) Section 44

18.33 The first part of section 44[43] gives the police power to enter ships for the purpose of making an arrest. It provides that a constable so ordered by a police officer, or any officer or constable when called upon by the master or any officer of a vessel, may enter the vessel and apprehend any person found drunk, behaving in an indecent or disorderly manner, using profane, indecent or obscene language or threatening, abusive or insulting words or behaviour, with intent or calculated to provoke a breach of the peace.[44] In so far as it deals with arrest, this part of section 44 merely gives to the police powers which are already conferred by section 564(5) of the *Criminal Code*,[45] and it can therefore be repealed.

18.34 Section 44 may also give powers to enter ships for other purposes.[46] If it does, it is unclear what purposes are included. There is no reason to retain section 44 merely because it might give additional powers to enter ships for purposes which are not defined.

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43 For the other powers conferred by s 44, see paras 18.13-18.16 and 18.21 above.

44 The section provides a penalty for these offences which applies unless a different penalty is prescribed by the *Police Act* : see paras 6.3-6.4 above.

45 See para 18.14 above.

46 See the discussion of the other power conferred by s 44 (which is in equivalent terms) at para 18.21 above.

(d) Section 41(2)

18.35 The three provisions dealt with above were all in the *Police Act* as originally drafted. Section 41(2) is a modern provision, added in 1978[47] to deal with offshore offences, such as drug trafficking and fisheries matters.[48] It allows the police, if they have reasonable cause to believe that a 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 would constitute an offence, to enter, take charge of or secure the vessel or otherwise take such steps as may be expedient for the purpose of preventing the voyage, and detain the vessel for as long as they have reasonable cause to suspect that the voyage may be undertaken.[49]

18.36 Section 41(2) is clearly a necessary provision and should be retained.[50]

4. POWERS TO SEARCH PERSONS, VEHICLES AND PROPERTY

18.37 At common law there was no power to stop and search a person unless an arrest was made.[51] Upon arrest there was a limited power to search the person arrested and also goods in that person's possession and control.[52] The *Police Act* contains provisions which add considerably to the common law powers.

(a) Section 49

18.38 Section 49 of the *Police Act* gives the police power to search persons without making an arrest. It provides that they may stop, search and detain[53] any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained.[54] The section also gives the police power to search vehicles. They may stop, search and detain any

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47 By the *Police Act Amendment Act 1978* s 11.

48 Western Australian *Parliamentary Debates* (1978) vol 218, 765.

49 Sub-s (3)-(6) of s 41 provide a procedure for applying to a magistrate for release of the vessel. S 41(7), which makes it an offence to resist or obstruct any member of the police force exercising powers under s 41(2), is dealt with at paras 5.1-5.12 above.

50 As should s 41(3)-(6).

51 G A Flick *Civil Liberties in Australia* (1981) 42.

52 Id 43.

53 On a literal reading of the section, it permits the detention of persons as well as vehicles and packages. In the context of persons, it appears simply to mean that they may be detained for as long as is necessary to search them.

54 Ie the offence set out in s 69 of the Act (as to which, see paras 13.6-13.17 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 13.9 above.

cart, carriage or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found.[55] Section 49 sandwiches these provisions in between provisions dealing with arrests.[56]

18.39 The Commission is of the view that the search powers conferred by section 49 should be retained, but that the provision should be redrafted in contemporary language and style, and separated from the other elements in section 49. An appropriate model would be the New South Wales provision,[57] which provides as follows -

> "A member of the police force may stop, search and detain -
>
> (a) any person whom he reasonably suspects of having or conveying any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence; or
>
> (b) any vehicle in which he reasonably suspects there is any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence."

(b) Section 68

18.40 Section 68 gives the police power to inspect and search the property (and also the premises[58]) of any person taken into custody on a charge of felony.[59]

18.41 Section 236 of the *Criminal Code* is a more general provision allowing the examination of accused persons in custody.[60] It empowers a police officer to search a person who is in lawful custody on a charge of committing any offence, using reasonable force if necessary.

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55 Some other Australian jurisdictions have equivalent provisions, eg *Crimes Act 1900* (NSW) s 357E; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) 24(b); *Summary Offences Act 1953* (SA) s 68. The equivalent provisions have been abolished in the Northern Territory, and are scheduled for repeal in the ACT.

56 See paras 17.23 and 17.31 above. S 49 also contains a provision dealing with seizure of property: see para 18.49 below.

57 *Crimes Act 1900* s 357E.

58 On s 68 in relation to search of premises, see para 18.5-18.7 above.

59 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*: *Criminal Code Act 1913* s 3(1).

60 There are similar provisions in most other Australian jurisdictions: *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.

18.42 The Murray Report[61] has recommended several amendments to section 236, including the addition of a power, after a lawful arrest, to search property in the possession of the person arrested.

18.43 Section 236 already covers much of the ground covered by the power to search property conferred by section 68. If the amendments recommended in the Murray Report are implemented section 68, in so far as it confers powers to search property, will cease to have any useful purpose.

18.44 Section 68 also provides that the justice by whom a person is convicted of an offence under section 65, 66 or 67 may order that the person be searched, and that his trunks, boxes, bundles, parcels or packages and any cart or other vehicle in his possession and use, or under his control, shall be inspected and searched. Any money found with or upon the offender is to be used to defray the expenses of detaining the offender in gaol. Section 68 is limited to offences under sections 65, 66 and 67 because all four sections were derived from the United Kingdom *Vagrancy Act 1824* and inserted in the *Police Act* without much amendment. 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. The prison system no longer depends on such means of finance. This provision should be repealed.

(c) Section 70

18.45 Section 70 is another provision giving power to search property. It provides that if information is given on oath to any justice that there is reasonable cause for suspecting that any thing stolen or unlawfully obtained is concealed in any vehicle or package, the justice may issue a search warrant to a police constable.[62]

18.46 Under section 711 of the *Criminal Code* a justice may issue a warrant to search any house, vessel, vehicle, aircraft or place in a number of circumstances, including where anything with respect to which any offence has been or is suspected, on reasonable grounds, to have been committed.[63] This provision makes section 70 unnecessary.

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61 144-148.

62 S 70 also provides for the issue of warrants to enter premises for the purpose of search or arrest: see paras 18.8-18.12, 18.16 above. On the relationship between s 70 and the offence in s 69, see para above.

63 For a fuller discussion of s 711, see para 18.12 above.

5. POWERS TO SEIZE PROPERTY

18.47 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.[64] The scope of this power was a contentious issue. More recent English authority appears to establish that police who are on premises pursuant to a search warrant may lawfully sieze goods not specified in the warrant if there are reasonable grounds for suspecting them to be stolen,[65] though it is not certain whether this will be followed in Australia.[66] Even where the *Police Act* without the authority of a warrant, the siezure of goods may be lawful in certain circumstances.[67]

18.48 Some of the *Police Act* provisions dealt with above give the police power to seize property. Under section 41(1) police, having entered a ship and searched it, may take charge of all property suspected to be stolen. Under section 68, 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, 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, where there is power to enter a place where liquor is suspected of being illegally sold, the liquor may be seized.

18.49 Powers to seize property are also given by two other provisions not so far dealt with. Under section 49, if any person to whom any property or liquor has been offered to be sold, pawned or delivered has reasonable cause to suspect the commission of an offence 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, that person may arrest the person concerned and deliver him into the custody of a constable, together with the property or liquor. Under section 123, where a person having charge of a horse, cart, carriage, boat, or other animal or thing is taken into custody, the police may take charge of the property and keep it as security for the payment of any penalty or sell it to satisfy the penalty and reasonable expenses.[68]

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64 *Elias v Pasmore* [1934] 2 KB 164.

65 *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299.

66 It is contrary to the view taken by the Victorian Full Court in *Levine v O'Keefe* [1930] VLR 70.

67 *Ghani v Jones* [1970] 1 QB 693.

68 Note also that s 83 gives power to seize adulterated or unwholesome articles of food. The Commission recommends in paras 15.35-15.38 above that s 83 is obsolete and should be repealed.

18.50 Section 236 of the *Criminal Code*[69] authorises the police to take the property of persons lawfully in custody, and section 711[70] authorises the seizure of the property being searched for under a search warrant. Amendments to sections 236 and 711 recommended in the Murray Report[71] will widen somewhat the powers to take property on arrest or search.

18.51 Provisions such as sections 68 and 123, which allow the seizure and sale of property to pay expenses, are outdated and should be repealed.[72] Furthermore, none of the seizure powers dealt with above are necessary in the light of sections 236 and 711 of the Code, which give adequate powers to seize property following arrest or search.

18.52 Section 41(2) is a more specific provision which gives the police power to detain ships in certain circumstances. The Commission has already recommended that it should be retained.[73]

6. CONCLUSION

18.53 Many of the *Police Act* provisions discussed in this chapter could be repealed without taking away any powers from the police, because of the overlap between the *Police Act* and provisions such as sections 236, 564(5) and 711 of the *Criminal Code*. A few *Police Act* provisions, such as section 42, do not seem justifiable. The provisions which the Commission canvasses for retention are the power in section 68 to enter premises without a warrant; sections 40, 41(1) and 41(2), dealing with powers to enter ships; and the power to search persons given by section 49.[74] If these provisions are to be retained, it may be preferable to insert them in the *Criminal Code* in appropriate places, so that all the major provisions dealing with powers of entry, search and seizure can be found in the one Act.

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69 See paras 18.41-18.43 above.
70 See para 18.12 above.
71 144-148, 486-487.
72 See para 18.44 above.
73 See paras 18.35-18.36 above.
74 And also s 68, unless the recommendation in the Murray Report to extend s 236 of the *Criminal Code* is implemented: see paras 18.40-18.44 above.

Chapter 19
QUESTIONS AT ISSUE

The Commission seeks comment on the issues raised in this Discussion Paper, and in particular on all or any of the following questions:-

CHAPTER 3 - THE COMMISSION'S APPROACH

Relationship between the Police Act and the Criminal Code

The *Criminal Code* sets out principles about liability for acts and omissions, the "mental element" of offences and the burden of proof. These principles also apply to offences in other legislation, unless they are excluded by or inconsistent with the wording of the offence. The *Police Act* offences are often inconsistent with these principles or leave no room for them to apply.

1. Now that the Commission is reviewing the offences in the *Police Act*, should the basic principles of criminal law which apply to them generally be the same as the *Criminal Code* provisions? In particular, should the offences now in the *Police Act* -

   (a) make criminal liability depend on a person's conduct, rather than on suspicion or status alone, such as being a "common prostitute" or a "reputed thief";
   (b) expressly state what the mental element of each offence is;
   (c) place the burden of proving every element of the offence on the Crown beyond reasonable doubt?

   Paragraphs 3.17-3.25

2. In many cases offences in the *Police Act* overlap or duplicate similar offences in the *Criminal Code*. Where this is so, should we repeal the *Police Act* offence and provide that in appropriate cases there may be a summary prosecution for the Code offence (as an alternative to trial on indictment) if the facts show that it is a less serious breach of the criminal law?

   Paragraphs 3.26-3.29

Repealing outdated provisions

Many offences now in the *Police Act* derive from very old English legislation, and pre-date the enactment of the *Criminal Code*. Many of these offences are drafted in terms which are inappropriate to modern conditions or inconsistent with the general principles of the criminal law referred to above. The Commission believes many of them ought to be repealed or amended.

Questions 3 to 79 ask whether you think particular offences should be repealed or amended.

CHAPTER 4 - PREVENTIVE OFFENCES

No lawful means of support

3. Should section 65(1) be repealed?

Paragraphs 4.4-4.9

Sleeping rough

4. Should section 66(9) be repealed?

Paragraphs 4.10-4.14

Consorting

5. Should sections 65(7) and 65(9) be repealed?

Paragraphs 4.15-4.19

Section 43(1) offences

6. Should it be an offence to be suspected of having committed an offence and not give a satisfactory account of yourself?

Paragraph 4.28

7. Should it be an offence to be suspected of being about to commit any offence and not give a satisfactory account of yourself?

Paragraphs 4.29-4.31

8. Should it be an offence to be suspected of having any "evil designs" and not give a satisfactory account of yourself?

Paragraphs 4.32-4.36

9. Should it be an offence to lie or loiter in any street, yard or other place and not give a satisfactory account of yourself? If not, should it be replaced by -

(a) an offence of loitering in a public place with intent to commit an offence; or

(b) an offence of failure to comply with a request by a police officer to cease loitering; or

(c) an offence of being found in a public place behaving in a manner from which it can reasonably be inferred that the person is preparing to commit a crime?

Paragraphs 4.37-4.38

CHAPTER 5 - INTERFERENCE WITH THE POLICE AND ALLIED OFFENCES

Interference with the police in the execution of their duty

10. Should the offences in sections 41(1), 41(7), 66(7), 67(3) and 90 be repealed, leaving section 20 as the only offence dealing with interference with the police in the execution of their duty?

Paragraphs 5.1-5.12

11. Should section 20 be confined to members of the police force, rather than being extended to public officers generally?

Paragraph 5.13

Escaping legal custody and assisting escape

12. Should the offences of escaping legal custody (section 67(1)) and assisting escape (section 67A) be retained?

13. Should the offence of harbouring, concealing, rescuing or attempting to rescue or assist suspected persons contained in section 41(1) be repealed?

Paragraphs 5.14-5.20

False reports

14. Should section 90A be retained?

Paragraphs 5.21-5.23

CHAPTER 6 - DISORDERLY CONDUCT AND RELATED OFFENCES

Disorderly conduct

15. Sections 54, 59 and 44 cover much of the same ground. If they are redrafted, should there be -

    (a) a single offence, but preserving the specific instances of disorderly conduct set out in paragraph 6.5; or

    (b) a single offence expressed in an all-embracing formula, as in New South Wales or the ACT?

Paragraphs 6.1-6.9, 6.13-6.17

16. Should the redrafted offence limit liability to behaviour which takes place in or near a public place or within the view or hearing of a person in a public place? If so, should "public place" include -

    (a) police stations,
    (b) ships, or

(c) licensed premises?

Paragraphs 6.10, 6.18

17. Should threatening, abusive or insulting words or behaviour be an offence if committed in a private place and not within the view or hearing of a person in a public place?

Paragraphs 6.10, 6.18

18. Should the court take account of circumstances such as the nature of the public place and of the audience in deciding whether conduct is disorderly?

Paragraphs 6.11-6.12, 6.19

Challenge to fight

19. Should section 64 be repealed?

Paragraphs 6.20-6.23

Exposing obscene pictures to the public

20. Should section 66(5) be repealed?

Paragraphs 6.24-6.26

Wilful and obscene exposure of the person

21. Should section 66(11) be redrafted so as to make it clear that women may also commit this offence? In view of the somewhat different effect on the observer of such behaviour when committed by men and by women, should its application to women be more limited?

Paragraphs 6.27-6.32

Regulation of houses of public resort

22. Should section 84(1) be

(a) repealed without being replaced; or

(b) replaced by a provision based on section 20 of the South Australian *Summary Offences Act 1953*?

23. Should section 84(2), which relates to allowing a child to remain on premises, be repealed?

Paragraphs 6.33-6.38

CHAPTER 7 - PUBLIC ASSEMBLIES

Public assemblies

24. Should section 52 be redrafted along the lines of section 59(2) of the South Australian *Summary Offences Act 1953*?

25. Should the provision allowing any member of the police force of or above the rank of sergeant to exercise the powers of the Commissioner under section 52 be restricted to higher-ranking officers?

Paragraphs 7.3-7.5, 7.15-7.17

26. Should section 54A be redrafted to clarify what is meant by the requirement that the disturbance be "needlessly provoked"?

Paragraphs 7.6-7.9, 7.18

27. Should the provisions of the *Public Meetings and Processions Act 1984* be integrated with the provisions of sections 52 and 54A?

Paragraphs 7.10-7.13, 7.19

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

Being unlawfully on land or premises

28. Should we replace the offences in sections 66(8), 66(13), 82A and 82B(1) by a general offence of entering, without lawful excuse, the premises of another without consent, or remaining there after being requested to leave?

Paragraphs 8.1-8.18

Right of landowner to demand particulars

29. Should the landowner's power to demand the name and address of entrants on enclosed land presently set out in section 82A(2) be abolished?

Paragraphs 8.19-8.21

Compensation for damage

30. In view of the general compensation provision now contained in the *Criminal Code*, should the right to seek compensation for damage done by a trespasser presently given by section 82A be abolished?

Paragraph 8.22

Hindering lawful activities

31. Should section 67(4) and section 82B(3) be repealed?

Paragraphs 8.23-8.28

CHAPTER 9 - PROSTITUTION

The Commission was not asked, and has not tried, to offer suggestions for the reform of the whole of the law relating to prostitution, which is not restricted to the *Police Act*. The discussion in the paper, and these questions, are based on the Commission's understanding of the present police policy, adopted by government, of containment and control of the practice of prostitution. Under this policy prostitution retains its general unlawful character. The Commission has sought only to clarify the existing law.

Soliciting and loitering for the purpose of prostitution

32. Should soliciting or loitering for the purpose of prostitution in a public place continue to be an offence in all circumstances, or should it be an offence only?

(a) in certain circumstances, for example where carried out near a dwelling, school, church or hospital; and/or

(b) in a manner that harasses or distresses the person solicited?

Paragraphs 9.6-9.8, 9.13-9.16

33. If soliciting or loitering for the purposes of prostitution is to remain an offence, should it be confined to "common prostitutes" or should it cover all prostitutes, male or female, and all prostitution, heterosexual or homosexual?

Paragraph 9.18

34. Should the maximum possible fine for this offence ($40) be increased?

Paragraphs 9.20-9.21

35. Should the offence be confined to persistent soliciting or loitering?

Paragraphs 9.23-9.24

Soliciting for immoral purposes

36. Should the offence of soliciting for immoral purposes be retained? If so, should it be limited to soliciting by males?

Paragraphs 9.9-9.12, 9.19

37. Should the offence be limited to soliciting for sexual, rather than immoral, purposes?

Paragraph 9.19

38. Should a conviction for the offence continue to be deemed to be a conviction under section 66?

Paragraphs 9.20, 9.22

39. Should the offence be confined to persistent soliciting?

Paragraphs 9.23-9.24

Soliciting by clients

40. Should it be an offence for a person seeking the services of a prostitute, that is a potential client, to solicit for the purposes of prostitution?

41. If such an offence is created, should it be confined to persistent soliciting?

Paragraphs 9.25-9.27

Riotous and indecent behaviour by common prostitutes

42. Should section 65(8) be repealed?

Paragraphs 9.28-9.30

Keeping premises for the purposes of prostitution

43. Should any amendment be made to section 76F? If so, how would you amend it?

Paragraphs 9.31-9.34, 9.42

Living on the earnings of prostitution

44. Should any amendment be made to section 76G(1)? If so, how would you amend it?

45. Section 76G(2) provides that a person who lives with, or is habitually in the company of, a prostitute is in certain circumstances deemed to be living on the earnings of prostitution. Should it be repealed?

Paragraphs 9.35-9.38, 9.43-9.44

CHAPTER 10 - GAMING AND DRUNKENNESS

Gaming

46. Should sections 84A to 84H be redrafted in contemporary form?

Paragraphs 10.7-10.12

Drunkenness

47. If drunkenness is decriminalised and sections 53 and 65(6) are repealed, should sections 43(1) and 44, and section 669 of the *Criminal Code* be amended also, as the Commission suggests in paragraph 10.17?

Paragraphs 10.13-10.18

CHAPTER 11 - DAMAGE TO PROPERTY

Wilful damage to property

48. Should section 80 be reformed by

(a) expressly specifying a mental element; and
(b) eliminating the defences in section 80(2)?

49. If so -

(a) should it be left to the prosecutor's discretion when it is appropriate to prosecute under section 80 and when it is appropriate to prosecute under section 453 of the *Criminal Code*; or

(b) should it be provided that where the amount of the injury does not exceed a stated sum, a prosecution on indictment under section 453 of the *Criminal Code* should not be possible?

Paragraphs 11.1-11.9

Damage to animals or plants in gardens

50. Should section 58A be retained in modified form as suggested in paragraph 11.12?

Paragraphs 11.10-11.12

Extinguishing wantonly any light set up for public convenience

51. Should the offence of extinguishing wantonly any light set up for public convenience in section 59 be repealed?

Paragraph 11.13

CHAPTER 12 - POSSESSION OF CRIME-RELATED PROPERTY

Weapons

52. Should section 65(4) be replaced by an offence limited to the possession of any article of disguise?

53. Should section 65(4a) be retained?

Paragraphs 12.5-12.11

Protective jackets and vests

54. Should section 65(4aa) be retained?

Paragraphs 12.12-12.14

Implements to facilitate unlawful use of motor vehicles

55. Should section 65(4b) be retained?

Paragraphs 12.15-12.17

Deleterious drugs

56. Should section 65(5) be repealed?

Paragraphs 12.18-12.21

Housebreaking implements and explosive substances

57. Should section 66(4) be

(a) repealed; or

(b) reformed as suggested in paragraph 12.26?

Paragraphs 12.22-12.26

CHAPTER 13 - OFFENCES AKIN TO STEALING

Being suspected of having or conveying stolen property

58. Should section 69 be repealed, or redrafted so as to provide that

(a) it is a good defence for the defendant to satisfy the court that he or she had no reasonable grounds for suspecting that the property was stolen or otherwise unlawfully obtained; and/or

(b) that there can be no conviction under the section if the evidence is sufficient to warrant a charge of stealing?

59. Should section 71 be repealed?

Paragraphs 13.6-13.20

Possession of gold, pearl or uncut diamond suspected of being stolen

60. Should sections 76A to 76E be repealed?

61. Should section 69 be redrafted to cover the problem of property found on a person's premises?

Paragraphs 13.21-13.36

Unlawfully taking or using animals

62. Should section 79A be retained? Should its retention be conditional on the repeal of section 428 of the *Criminal Code*?

Paragraphs 13.37-13.43

Removing boat or boat furniture

63. Should section 81 be retained?

Paragraphs 13.44-13.48

Destroying property with intent to steal, or retaining or disposing of property

64. Should section 82 be repealed?

Paragraphs 13.49-13.52

CHAPTER 14 - FRAUD AND DECEPTION

Valueless cheques

65. Should section 64A be

(a) expanded to cover the obtaining of any credit, benefit or advantage;
(b) repealed;
(c) retained in its present form?

Paragraphs 14.1-14.6

Imposition upon charitable institutions or private individuals

66. Should section 66(2) be repealed?

Paragraphs 14.7-14.11

Obtaining unemployment benefits without entitlement

67. Should sections 66(2a) and (2b) be repealed?

Paragraphs 14.12-14.15

Fortune telling

68. Should section 66(3) be repealed and replaced by a provision based on section 16 of the New Zealand *Summary Offences Act 1981*?

Paragraphs 14.16-14.23

Fraudulently manufacturing or selling adulterated metals or substances

69. Should section 66(12) be repealed?

Paragraphs 14.24-14.27

CHAPTER 15 - OTHER OFFENCES IN PARTS V AND VI

Wilful neglect of duty by police

70. Should the offence in section 47 be repealed?

Paragraph 15.2-15.4

Mad dogs

71. Should section 51 be repealed?

Paragraph 15.5-15.8

Negligent or furious driving

72. Should section 57 be repealed?

Paragraph 15.9-15.12

Restriction on games on certain days

73. Should the trading hours at present permitted by section 61 be altered?

Paragraph 15.13-15.21

Taking a dog into public gardens

74. Should section 63 be repealed?

Paragraphs 15.22-15.23

Begging

75. Should section 65(3) be repealed, or reformulated as suggested in paragraph 15.27?

Paragraphs 15.24-15.28

Wilful neglect

76. Should section 66(10) be repealed?

Paragraphs 15.29-15.31

Repeated offences

77. Should sections 66(1) and 67(2) be repealed?

Paragraphs 15.32-15.34

Persons selling adulterated or unwholesome articles of food

78. Should section 83 be repealed?

Paragraphs 15.35-15.38

CHAPTER 16 - OFFENCES IN PART VII

79. Should Part VII be repealed?

Paragraphs 16.1-16.15

CHAPTER 17 - ARREST AND RELATED POWERS

Questions 80 to 101 deal with police powers.

Major arrest provisions in the Police Act

80. Should the power to arrest for otherwise non-arrestable offences conferred by section 43(1) be -

(a) repealed;

(b) retained subject to the condition that the police should proceed by summons rather than arrest unless specified conditions are satisfied?

81. Should the power of arrest conferred by section 41(1) be repealed?

Paragraphs 17.1-17.20

82. Should the powers of arrest conferred by sections 46, 47 and 49 be repealed?

Paragraphs 17.21-17.23

Powers authorising arrest for specific offences

83. Should the powers to arrest for specific offences conferred by sections 42, 43(1), 44, 70, 76G(3), 49, 82(3), 96, 104, 108, 110 and 122 be repealed?

Paragraphs 17.24-17.34

Special cases

84. Should the powers of arrest conferred by section 43(2) and section 45 be retained? Should these powers be incorporated in the *Criminal Code* rather than the *Police Act*?

Paragraphs 17.35-17.39

Power to demand name and address

85. Should the power to demand name and address conferred by section 50, and the accompanying offence, be amended to incorporate the safeguards described in paragraphs 17.41-17.43?

Paragraphs 17.40-17.44

Power to obtain particulars of identity

86. Should the power to obtain fingerprints and other particulars of identity contained in section 50AA be subject to greater restrictions? If so, what restrictions?

87. Should fingerprints and other particulars of indentity be automatically destroyed once a charge is withdrawn or dismissed?

Paragraphs 17.45-17.49

CHAPTER 18 - POWERS OF SEARCH, ENTRY AND SEIZURE

Powers to enter premises for the purposes of search

88. Should the power to enter premises without warrant for the purpose of search conferred by section 68 be further restricted?

Paragraphs 18.5-18.7

89. Should the powers to enter premises with a warrant for the purposes of search conferred by sections 70, 76G(3) and 122 be repealed?

Paragraphs 18.8-18.12

Powers to enter premises for the purpose of arrest

90. Should the power to enter premises without warrant for the purposes of arrest conferred by section 44 be repealed?

Paragraphs 18.13-18.15

91. Should the powers to enter premises with a warrant for the purpose of arrest conferred by sections 70, 76G(3) and 122 be repealed?

Paragraph 18.16

Entry for other purposes

92. Should the powers of entry conferred by sections 42, 44, 101, 102 and 122 be repealed?

Paragraphs 18.17-18.23

Powers to enter ships

93. Should the power to enter ships conferred by section 40 be repealed, or should it be redrafted along the lines of section 357C of the New South Wales *Crimes Act 1900*?

Paragraphs 18.25-18.27

94. Should the power to enter ships conferred by section 41(1) be repealed?

Paragraphs 18.29-18.31

95. Assuming they are retained, should the powers in sections 40 and 41(1) continue to be limited to officers or senior constables in charge of a police station?

Paragraphs 18.28, 18.32

96. Should the power to enter ships conferred by section 44 be repealed?

Paragraphs 18.33-18.34

97. Should section 41(2) be retained? Should it remain in the *Police Act* or be incorporated in the *Criminal Code*?

Paragraphs 18.35-18.36

Powers to search persons, vehicles and packages

98. Should the search power in section 49 be retained, redrafted as suggested in paragraph 18.39?

Paragraphs 18.38-18.39

99. Should the search power in sections 68 and 70 be repealed?

Paragraphs 18.40-18.46

Powers to seize property

100. Should the powers to seize property conferred by sections 49, 68, 122 and 123 be repealed?

101. Should the power to detain ships conferred by section 41(2) be retained?

Paragraphs 18.47-18.52

OTHER ISSUES

102. Should the compensation and restitution provisions referred to in paragraph 3.33 be repealed?

103. Do any of the other provisions referred to in paragraph 3.33 need to be retained?

Paragraph 3.33

Appendix I

STATISTICS OF CHARGES BROUGHT UNDER THE POLICE ACT

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. 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 that year, or for any courts for subsequent years.

There were 7,134 charges under the *Police Act* out of a total of 75,576 charges for these two courts - roughly 9.5%. In other Courts of Petty Sessions the total number of charges was 83,228, ie 158,804 charges for the State as a whole. If the ratio of *Police Act* charges to total charges is constant, it can be assumed that there were 14,990 charges under the *Police Act* for the State as a whole.

In the Table, the figure in the left hand column is the actual number of charges for Perth and East Perth; the figure in the right hand column is the hypothetical figure for the State as a whole.

SECTION NO		NO OF CHARGES PERTH/ EAST PERTH	TOTAL FOR WA (ESTIMATED)
	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	19
16A	UNAUTHORIZED USE OF THE WORD "DETECTIVE"	1	2
18	HARBOURING CONSTABLES DURING THE HOURS OF DUTY	-	-
20	INTERFERENCE WITH POLICE	570	1198
	HINDERING POLICE 182 RESISTING ARREST 384 MISCELLANEOUS 4		
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	-	-
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	4
43	LOITERING	106	223
	S 43(1): EVIL DESIGNS 2 LOITERING 100 S 43(2) 4		
44	DISTURBING THE PEACE ON BOARD SHIPS, IN LICENSED HOUSES	3	6
	DISORDERLY 1 THREATENING WORDS 2		
47	WILFUL NEGLECT OF DUTY BY POLICE	-	-
50	NEGLECTING OR REFUSING TO GIVE NAME AND ADDRESS	389	817
51	MAD DOGS	-	-
52	PREVENTING OBSTRUCTIONS IN THE STREETS DURING PUBLIC PROCESSIONS	-	-

PART VI DIVISION 1

53	DRUNKARDS	2490	5232
54	DISORDERLY CONDUCT	1708	3589
	INSULTING WORDS 3 THREATENING WORDS 1 OBSCENE LANGUAGE 2 DRUNK 26 STREET DRINKING 1 URINATING 1 DISORDERLY 1674		
	IN 2 CASES OF INSULTING WORDS AND 13 CASES		
	OF "DISORDERLY" CHARGES WERE ALSO BROUGHT UNDER SECTION 59		
54A	DISORDERLY ASSEMBLY	3	6

57	NEGLIGENT OR FURIOUS DRIVING	1	2
58A	DAMAGE TO ANIMALS, PLANTS, IN GARDENS	5	11
	THESE ALL APPEAR TO HAVE BEEN CASES OF DAMAGE TO PROPERTY UNDER S 58A(c)		
59	OBSCENITY AND OTHER OFFENCES	232	487
	DISORDERLY 118 INSULTING WORDS OR BEHAVIOUR 93 OBSCENE LANGUAGE 4 THREATENING WORDS OR BEHAVIOUR 12 PROSTITUTION 5		
	IN ONE CASE OF "DISORDERLY" A CHARGE WAS ALSO BROUGHT UNDER SECTION 54		
61	RESTRICTION ON GAMES ON CERTAIN DAYS	-	-
63	TAKING DOG INTO PUBLIC GARDENS	-	-
64	CHALLENGE TO FIGHT	1	2
	DESCRIBED AS "DISORDERLY"		
64A	VALUELESS CHEQUES	59	124
	FALSE PRETENCES 2 FALSE REPRESENTATIONS 35 OBTAINED CREDIT 21 "OBTAINED POLICE" 1		
65(1)	NO VISIBLE LAWFUL MEANS OF SUPPORT	4	8
	IN 2 CASES CHARGES WERE ALSO BROUGHT UNDER S 66(1)		
65(3)	BEGGING	2	4
65(4)	POSSESSION OF WEAPONS	8	17
65(4a)	POSSESSION OF OFFENSIVE WEAPONS	83	174
	PARTICULAR WEAPONS MENTIONED INCLUDE KNIVES, A CROSSBOW AND "NUNCHUCKAS"		
65(4aa)	POSSESSION OF PROTECTIVE JACKETS AND VESTS	-	-
65(4b)	POSSESSION OF IMPLEMENTS TO FACILITATE UNLAWFUL USE OF MOTOR VEHICLES	1	2
65(5)	POSSESSION OF DELETERIOUS DRUGS	4	8
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	11
	BEGGING ALMS 1 FALSE REPRESENTATIONS 4		
66(2a)	WILFUL FALSE STATEMENTS TO OBTAIN UNEMPLOYMENT BENEFITS	-	-
66(2b)	CONTINUING TO RECEIVE UNEMPLOYMENT BENEFITS AFTER KNOWLEDGE THAT ENTITLEMENT HAS CEASED	-	-
66(3)	FORTUNE TELLING	1	2
66(4)	POSSESSION OF HOUSEBREAKING IMPLEMENTS AND EXPLOSIVE SUBSTANCES	16	34
66(5)	EXPOSING OBSCENE PICTURES TO THE PUBLIC	-	-
66(7)	VIOLENTLY RESISTING ARREST	-	-
66(8)	BEING FOUND IN OR UPON ANY PLACE, STABLE OR OUTHOUSE FOR ANY UNLAWFUL PURPOSE	45	95
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	134
66(12)	FRAUDULENTLY MANUFACTURING OR SELLING ADULTERATED METALS AND SUBSTANCES	-	-
66(13)	BEING IN OR UPON PREMISES WITHOUT LAWFUL EXCUSE	173	364
67(1)	BREAKING OR ESCAPING OUT OF LEGAL CUSTODY	100	210
67(2)	SECOND OFFENCE AGAINST S 66	-	-
67(3)	VIOLENTLY RESISTING ARREST	-	-
67(4)	OBSTRUCTING LICENCE HOLDERS	-	-
67A	AIDING AN ESCAPED PRISONER	7	15
69	BEING SUSPECTED OF HAVING OR CONVEYING STOLEN GOODS	98	206
71	HAVING POSSESSION OF STOLEN GOODS RECEIVED FROM ANOTHER	-	-

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	38
76G	OFFENCES CONNECTED WITH PROSTITUTION	7	15
	SOLICITING 2 LIVING ON EARNINGS 4 "PROSTITUTION" 1		
79A	UNLAWFULLY TAKING OR BRANDING ANIMALS	-	-
80	DAMAGE TO PROPERTY	698	1467
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	122
83	SELLING ADULTERATED OR UNWHOLESOME ARTICLES OF FOOD	-	-
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	2
87	COMMON GAMING HOUSES	63	132
89	WARRANTS TO ENTER COMMON GAMING HOUSES: NON-COMPLIANCE	-	-
89A	SLOT MACHINES	7	15
89B	USE OF METAL WASHERS IN SLOT MACHINES	-	-
89C	CHEATING AT PLAY	-	-

[THE OFFENCES IN SECTIONS 86 TO 89C WERE REMOVED FROM THE *POLICE ACT* BY THE *ACTS AMENDMENT AND REPEAL (GAMING) ACT 1987*.]

PART VI DIVISION 7

90	OBSTRUCTING POLICE		-	-
90A	FALSE REPORTS		88	185
	CREATE BELIEF	65		
	FALSE STATEMENT	22		
	HARASSING CALL	1		
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	4
	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	-	-
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	14990

Appendix II

PROVISIONS DEALING WITH ARREST, ENTRY, SEARCH, SEIZURE AND RELATED POWERS

Officers of Police Force, etc, may board vessels

40. 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 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 unlading 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.

Officers of Police Force, etc, to apprehend and seize stolen property on board ship

41. (1) 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 or being concerned in such offences, or liable to apprehension as aforesaid, and shall also take charge of all property suspected to be stolen; and if the master of any such ship or vessel, or any other person, shall resist or wilfully prevent or obstruct any officer or constable of the Police Force whilst stopping, detaining, entering, or endeavouring to stop, detain, or enter upon any such ship, boat or vessel, or whilst searching and inspecting the same as and for the purposes aforesaid, or 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.

(2) 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 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.

(3) An officer or constable of the Police Force who has detained any vessel pursuant to the provisions of subsection (2) of this section, or any person who is aggrieved by any exercise of the power conferred by that subsection, may apply to a stipendiary magistrate for an order in the matter, and that magistrate may thereupon -

(a) order the release of the vessel unconditionally;
(b) order the release of the vessel subject to such conditions as that magistrate may impose;
(c) order that the vessel be detained for a specific period;
(d) make an order as to the expenses incurred or to be incurred in relation to the seizure, detention or safe keeping of that vessel; and
(e) make such order as to costs,

as he may think fit and effect shall be given thereto.

(4) The terms of any conditions imposed on an order made pursuant to subsection (3) of this section may relate not only to the release of the vessel but also as to the use to which the vessel may be put within the period specified in the order, and the order may also be made subject to the requirement that a person enters into a recognisance with or without sureties conditioned upon the observance of the terms imposed in relation to the release and use of the vessel.

(5) An amount ordered in payment of expenses or costs under subsection (3) of this section may be recovered in the same manner as moneys ordered to be paid by Justices upon a conviction for a simple offence.

(6) The detention of any vessel, or the exercise of any other power conferred by subsection (2) of this section, shall not be taken to be unlawful only by reason that it subsequently appears or is found that the vessel was not to be used in the manner, or the circumstances were not such as, the member of the Police Force believed.

[Section 41(7) is set out at paragraph 5.4 above.]

Empowering police to visit houses where games carried on. Police may enter theatres, etc, and remove therefrom prostitutes and reputed thieves

42. Any officer or constable of the Police Force may enter into any house, room, premises, or place where any public table, board, or ground is kept for playing billiards, bagatelle, bowls, fives, rackets, quoits, skittles, or ninepins, or any game of the like kind, when and so often as

any such member shall think proper; and may enter into any house, room or place kept or used in the said State for any theatrical or any public entertainments, or exhibitions, or for any show of any kind whatsoever, whether admission thereto is obtained by payment of money or not, at any time when the same shall be open for the reception of persons resorting thereto and may remove from such house, room, or place any common prostitute, or reputed thief, or other loose, idle, or disorderly person who shall be found therein, and may order any such common prostitute, reputed thief, or disorderly person to leave the said house, room or place, and in case such person shall refuse to leave the same, may take such person into custody, and every such person remaining in such house, room, or place after having been so ordered to leave, shall on conviction be liable to a fine not exceeding one hundred dollars, or imprisonment for a term not exceeding one month.

Power of apprehending offenders

[Section 43(1) is set out at paragraph 4.21 above.]

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

[Section 44 is set out at paragraph 6.3 above.]

Any person against whom a warrant has been issued, and persons charged with recent offences may be apprehended without warrant

45. Any officer or constable of the Police Force may, without a warrant, take into custody any person whom he may have reasonable and probable cause for believing or suspecting to be a person for whose apprehension a warrant shall have been issued and any person who shall be charged by any other person with having committed, or whom he shall have reasonable and probable cause for believing has committed any felony or misdemeanour, punishable on information by the Supreme Court, or The District Court of Western Australia, in cases when by reason of the recent commission of the offence a warrant could not have been obtained for the arrest of the offender. And any warrant of arrest under this or any other Act may be executed by any police officer or constable on any Sunday, Good Friday, or Christmas Day.

Police may apprehend any offender whose name and residence are not known

46. Any officer or constable of the Police Force, and all persons whom he shall call to his assistance, may take into custody, without a warrant, any person who, within view of such officer or constable, shall offend in any manner against this Act, and whose name and residence shall be unknown to, and cannot readily be ascertained, by him.

Apprehension of known offenders

47. Any person whosoever, with or without a warrant, may apprehend any reputed common prostitute, thief, loose, idle or disorderly person, who, within view of such person apprehending,

shall offend against this Act, and shall forthwith deliver him to any constable or police officer of the place where he shall have been apprehended, to be taken and conveyed before a Justice, to be dealt with according to law, and any constable 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.

Power to police and persons aggrieved to apprehend certain offenders

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

Police may demand name and address, and apprehend

50. Any officer or constable of the Police Force may demand from and require of any individual his name and address, and may apprehend without warrant any such person who shall neglect or refuse to give his name and address or either of them when required so to do, or who furnishes information which that officer or constable has reasonable cause to believe to be false, and every such person so neglecting, or refusing, or who shall give a false name or address when applied to as aforesaid, shall upon conviction forfeit and pay any sum not exceeding $100, or at the discretion of the convicting Justice be committed to any gaol or lock-up there to be kept to hard labour for any term not exceeding three calendar months.

Particulars of identity

50AA. (1) Where any person is in lawful custody for any offence punishable on indictment or summary conviction, any officer or constable of the Police Force may take or cause to be taken all such particulars as he may think necessary or desirable for the identification of that person, including his photograph, measurements, fingerprints, and palmprints.

(2) Where the photographs, fingerprints, palmprints or other identification particulars of a person are taken under subsection (1) of this section and that person is found not to be guilty of any offence arising out of the circumstances leading to the taking of those particulars, the original negatives and all other copies available of the photograph, fingerprints, palmprints and

other particulars taken shall, if so requested by that person, be destroyed in his presence but not until the time for an appeal from the finding has expired or an appeal from the finding has been resolved in favour of the accused person.

Seizure of property and searching

68. Any constable or other person apprehending any person charged with an offence against section sixty-five, section sixty-six or section sixty-seven of this Act may seize any horse or other cattle, or any money, goods, or vehicle in the possession or use of the person so apprehended and charged, and may take and convey the same as well as such persons before a Justice or Justices, and the Justice or Justices by whom any person is convicted of an offence against section 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, and the expense of the keep of any horse or other cattle so seized, during the time such horse or cattle shall be detained; and if, upon such search, money sufficient for the purposes aforesaid be not found, such Justice or Justices may order that such horse, cattle, and so much as is necessary of such other effects then found shall be sold, and that the produce of such sale shall be paid and applied as aforesaid, and also that the surplus of such money or effects, after deducting the charges for such sale, shall be returned to the said offender. And when any person shall be taken into custody on a charge of felony, his premises and property may be inspected and searched by any officer or constable of the Police Force.

In case of information given that there is reasonable cause for suspecting that any goods have been unlawfully obtained and are concealed

70. 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.

Summary proceedings against persons connected with prostitution

76G. (3) 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 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.[1]

[Section 82(3) is set out at paragraph 13.49 above.]

Lodging houses, etc, may be searched

122. 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.

Horses, carriages, etc, of offenders may be detained

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 a 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.

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1 For a 76G(1) and (2) , see para 9.35 above.

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);

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1 No such routes ever appear to have been published.

(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.

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' shambles[2] 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.

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[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.

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.

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[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.

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.