



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 29**

**Special Constables**

**WORKING PAPER**

**JUNE 1974**

## INTRODUCTION

The Law Reform Commission has been asked to consider and report on the law relating to the appointment of special constables and the extent of their power.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 23 August 1974.

Copies of the paper are being sent to the -

Chief Justice & Judges of the Supreme Court  
Citizens Advice Bureau of W.A.  
Civil Defence and Emergency Service of W.A.  
Civil Liberties Association of W.A.  
Commissioner of Police of W.A.  
Commissioners of Police of other Australian States  
Department of Motor Vehicles  
Director General of Transport  
Fremantle Port Authority  
Judges of the District Court  
Law School of the University of W.A.  
Law Society of W.A.  
Magistrates' Institute  
Minister for Police  
Port Hedland Port Authority  
Royal Society for Prevention of Cruelty to Animals  
Solicitor General  
Under Secretary for Law  
W.A. Government Railways  
W.A. Police Union  
Firms employing special constables  
Law Reform Commissions and Committees with which this Commission is in  
correspondence

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

## TABLE OF CONTENTS

	Paragraphs
<b>TERMS OF REFERENCE</b>	1-2
<b>PRESENT LAW AND PRACTICE IN WESTERN AUSTRALIA</b>	3-22
Appointments under the Police Act	3-5
Appointments under other statutes	6
Powers, responsibilities & immunities of special constables	7-10
Control of special constables	11
Other persons involved in law enforcement	12-22
<i>Public officials with special powers</i>	14
<i>Regular constables performing special duties</i>	15-20
<i>Private security firms</i>	21-22
<b>SPECIAL CONSTABLES IN OTHER JURISDICTIONS</b>	23-26
<b>DISCUSSION OF SPECIAL CONSTABLES</b>	27-43
General	27-29
Categories of special constables	30-40
<i>Emergencies</i>	30-32
<i>Police of other States</i>	33
<i>Private security officers</i>	34-38
<i>Officers of public &amp; semi-public instrumentalities</i>	39
<i>Participants in social activities of police</i>	40
Powers of Commissioner of Police	41-43
<b>QUESTIONS FOR DISCUSSION</b>	44
 APPENDIX I	
 APPENDIX II	
 APPENDIX III	

## **TERMS OF REFERENCE**

1. The Commission has been asked to consider and report on the law relating to the appointment of special constables and the extent of their power.
2. This project arose out of the case of *De Vaney v. Moore* (unreported, Court of Petty Sessions, Perth, 1970). In the course of his judgement the magistrate expressed doubt about the validity of Mr. De Vaney's appointment as a special constable and about the purposes for which a special constable can be appointed. The relevant parts of the magistrate's judgement, and an outline of the circumstances of the case, are set out in Appendix I to this paper.

## **PRESENT LAW AND PRACTICE IN WESTERN AUSTRALIA**

### **Appointments under the Police Act**

3. Two methods of appointment are provided for in the *Police Act 1892* -
  - (a) Under s.34 a magistrate or two justices may appoint special constables when he or they consider that there are insufficient ordinary members of the police force in the area for the preservation of the peace, the protection of the inhabitants or their property or the apprehension of any offenders.
  - (b) Under s.35A the Commissioner of Police may appoint special constables. There is no express limitation on the circumstances in which he may exercise this power.

The relevant provisions of the *Police Act* are set out in Appendix II to this paper.

4. The Police Department has no record of a magistrate or justices having exercised the power under s.34 of the *Police Act* in recent times. The special constables used to control the riots in Kalgoorlie in January 1934 (140 in number) were appointed by the Commissioner of Police under s.35A of the *Police Act*.
5. There are at present twenty special constables appointed by the Commissioner of Police, categorised as follows -

(a) *Police of other States*

**Two** are members of the Northern Territory Police;

**One** is a member of the South Australian Police;

All three are stationed near the borders of Western Australia, and have been appointed special constables in connection with the pursuit of offenders across the border and to assist them in making enquiries in this State.

(b) *Private security officers*

**Five** are security officers of private organisations (one is employed by the W.A. Turf Club, one by the W.A. Trotting Association and one by Boans Ltd. Two are associated with two small firms specialising in security)

(c) *Officers of public or semi-public instrumentalities*

**Four** are officers of the narcotics squad of the Australian Customs and Excise Department, and have been appointed special constables to assist in the enforcement of the *Poisons Act* of this State.

**Four** are employed by the Perth City Council as parking inspectors in the Hay Street Mall, They have been appointed special constables to enable them to police the use of the Mall.

(d) *Participants in social activities of police*

**Three** are assistant supervisors of Police and Citizen's Youth Clubs;

**One** is a member of the Police Pipe Band.

All of them have been appointed special constables so that they can perform their duties in police uniform. In the case of the member of the pipe band the appointment also entitles him to a small allowance.

### **Appointments under other statutes**

6. (a) Under s.74(1) of the *Government Railways Act 1904*, the Railways Commission may, with the approval of the Governor, appoint special constables to act as such “within the limits of the Government Railways”.

There are at present -

**two** special constables appointed under this Act.

- (b) Under s.15 of the *Prevention of Cruelty to Animals Act 1920*, a magistrate may appoint any servant or agent of the Society as a special constable to act as such for the purposes of that Act.

There are at present –

**eight** special constables appointed under this Act (five in the metropolitan area, one at Albany, one at Bunbury and one at Port Hedland).

- (c) Under s.19(4) of the *Fremantle Port Authority Act 1902* and s.17(4) of the *Port Hedland Port Authority Act 1970*, the relevant Port Authority may appoint special constables to act as such within the limits of the port.

Neither Authority has any special constables at present. Until about ten years ago some employees of the Fremantle Port Authority were special constables, but since then their duties have been performed by the regular police. The Port Hedland Port Authority has informed the Commission that it may appoint its security officer a special constable if the Police Department undertakes to train him. The Commission understands that the Commissioner of Police is of the view that the training facilities available to the Police Department should not at present be used for this purpose.

## **Powers, responsibilities and immunities of special constables**

7. Special constables have the same powers, are entitled to the same privileges and benefits and are subject to the same duties, as ordinary constables. This applies not only to special constables appointed under the *Police Act* but also to those appointed under the *Government Railways Act* (see s.74) and any that may be appointed under the *Fremantle Port Authority Act* (see s.19(4)) and the *Port Hedland Port Authority Act* (see s.17(4)). However the powers, responsibilities and duties of special constables appointed under the *Prevention of Cruelty to Animals Act* are limited to the purposes of that Act (see s.15), and the following two paragraphs must be qualified in their case.

8. Amongst the most important powers thus possessed by a special constable are the powers to -

- (a) arrest without warrant any person found committing any offence, whether indictable or summary (*Police Act* s.49 (and see also ss.43 & 46); *Criminal Code* s.566(1));
- (b) in cases where an offence is such that an offender may be arrested without warrant generally (that is, in the case of most crimes and some misdemeanours), arrest without warrant any person whom he believes on reasonable grounds has committed such an offence (*Criminal Code* s.564(a));
- (c) stop and search any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained, and any vehicle in which there is reason to suspect that anything stolen or unlawfully obtained may be found (*Police Act* s.49);
- (d) require any person with whom he is unacquainted to give him his name and address and to arrest such person if he refuses to give the information (*Police Act* s.50).

9. In the absence of direct proof of corruption or malice no action lies against a constable (ordinary or special) in carrying the provisions of the *Police Act* into effect against persons

offending or suspected of offending against it (*Police Act* s.138, which incorporates section H of the second schedule of the *Interpretation Act*; see also *Trobridge v. Hardy* (1955) 94 C.L.R. 147 and *Luetich v. Walton* [1960] W.A.R. 109, where this provision is discussed).

10. An ordinary citizen's powers are much more limited, and he has no special immunity from court action. He has no power to stop and search any person or vehicle or require any person to give him his name and address. Although he has some powers of arresting on suspicion, these are more restricted than those of a constable. In particular, in cases where an offence is such that an offender may be arrested without warrant generally (see paragraph 8 (b) above), an ordinary citizen may arrest a person whom he believes on reasonable grounds has committed the offence only if the offence has in fact been committed, though not necessarily by the person he arrests (*Criminal Code* s.564(d)). However, the limitation that the offence must have been committed does not apply to the case where a citizen finds another person by night in such circumstances as to cause him to believe on reasonable grounds is committing the offence (*Criminal Code* s.564(e)). In other cases an ordinary citizen's power of arresting without warrant is generally confined to cases where he finds another person actually committing a specified offence; see for example Code s.237 (person joining in a breach of the peace); Code ss.438 and 464 and *Police Act* s.49 (owner of property on which offence committed may arrest offender) and Code s.564(c) (person found committing an offence for which an offender may be arrested without warrant generally) and Code s.567 (person committing an indictable offence by night).

In practice, however, a citizen's powers of arrest are very seldom exercised.

### **Control of special constables**

11. Under s.5 of the *Police Act* the Commissioner of Police is charged with "general control and management" of special constables appointed under that Act and under s.37 of that Act he may suspend or determine the services of any special constable so appointed.

It is not clear whether special constables appointed under the *Government Railways Act* and the *Prevention of Cruelty to Animals Act* are also under the Commissioner's control: the enactments are silent on the point. However, the question is clearer in respect to any special constables who may be appointed by the Fremantle Port Authority and the Port Hedland Port

Authority. The relevant enactments state that special constables under those Acts are not members of the police force but are servants of the port authority and under its direction and control (see the *Fremantle Port Authority Act* s.19(4) and the *Port Hedland Port Authority Act* s.17(5)).

### **Other persons involved in law enforcement**

12. Special constables are one category of persons possessing special powers who are not members of the Police Force acting in the course of their regular duties. Other categories are -

- (a) certain public officials;
- (b) off-duty regular constables performing police duties as employees of private persons or organisations;
- (c) certain persons employed in private security organisations.

13. It may help to place the question of special constables in context by first drawing attention to some important functions of these other categories.

#### *Public officials with special powers*

14. There are many examples. Fisheries inspectors may arrest without warrant anyone offending against the *Fisheries Act* (see s.40) and may search boats and premises for articles used in breach of that Act (s.41). Health surveyors have wide powers of entry onto private property (*Health Act*, s.349). Community Welfare Officers have powers of arrest and entry in a variety of situations (*Child Welfare Act*, ss.38, 109, 115, 132)

#### *Regular constables performing special duties*

15. A person who desires more police protection or assistance than the Police Department provides in the ordinary way can arrange for the hiring of off-duty constables through an officer designated by the Department for that purpose. The Commissioner of Police has issued a Routine Order prescribing the tasks that may be performed on special duties and the

minimum rate of pay therefore. This money is paid to the constable and is retained by him for his own use, less a commission which he pays to the officer who makes the arrangements.

This practice, which does not exist elsewhere in Australia, is of long standing in this State. It is widely utilised by private persons and organisations - for example in 1973 the number of such hirings was 5,625, The hours spent by members of the police force on special duties totalled 22,128, the most common occasions being sporting functions (6,603 hours), escorts (5,152 hours), dances and concerts (4,120 hours).

16. The practice of members of the police force performing special duties is open to criticism but, although the matter is not free from doubt, the Commission believes that it is not unlawful (see Appendix III). Accordingly, any change would need to be by legislative prohibition. Some of the arguments against certain categories of special constable (see paragraphs 34 and 35 below) probably apply here also. There is the possibility of conflict of duty as public officer and as private employee. There is also the possibility of blurred lines of command. It is not unusual for constables on special duties to be employed in the same location and on similar tasks as those on regular duties. The former might look to their employer for orders, while the latter would look to the police officer in charge. Such a situation could cause difficulty.

17. The practice of members of the police force performing special duties raises the fundamental question of the propriety of being able to purchase extra police protection. On the one hand, it could be argued that it is no more objectionable to purchase police protection than to purchase any other service. On the other hand, it could be argued that law enforcement should be directed to the greatest need, and that this should be assessed by the Police Department having regard only to the interests of the community as a whole.

18. The Commission understands that the W.A. Police Union at its conference in May 1974 decided to ask the Police Commissioner that the practice be stopped, one reason being the apparent doubt as to who, if anybody, would be responsible for paying compensation to a constable injured while on special duty.

19. One alternative to the present practice is for the Police Department itself to contract with those seeking extra police assistance, constables being detailed as part of their regular

duties. This would avoid the criticism in paragraph 16 above, but not that of the impropriety of purchasing police protection. Another alternative is to adopt a system similar to that in England. There, special constables are used as auxiliary police, their functions including traffic duty and control of peaceful crowds (see paragraph 25 below). But in the Commission's view the first step is to assess the real need for police services in these areas at all. The Commissioner of Police has informed the Commission that often the tasks performed on special duties are monotonous and require no special skill or powers and could be adequately performed by ordinary employees of those who contract for special duties (but see paragraph 21 below).

20. The Commission does no more at this stage than raise these matters in the most general terms and welcomes comment. It considers that an assessment of the law and practice relating to special constables has an important bearing on, and is in turn influenced by, the practice of "special duties".

#### *Private security firms*

21. Private security firms offer protection against robbery and vandalism. Under Western Australian law these firms do not as such possess special status and powers, though employees or principals may acquire police powers through appointment as special constables (see paragraph 5(b) above). For the most part, however, their employees merely have the status and powers of ordinary citizens (see paragraph 10 above). Some firms claim that they have rigorous selection and training programmes for their staff, but there is no legal obligation in this regard, the matter being left to private business judgement. If the practice of members of the police force engaging in "special duties" is prohibited or curtailed, the growth of security firms may accelerate. They have in fact increased markedly in numbers, especially in New South Wales. In turn this would probably create a demand for their statutory recognition and control. Comparable security firms are already subject to control in some American jurisdictions (see *Current Regulation of Private Police: Regulatory Agency Experience and Views Vol. III*; Rand Corporation (1972)).

22. Although as stated above, private security firms possess no special status or powers under Western Australian law, they have been given special powers under a Determination under Regulation 82 of the Commonwealth Air Navigation Regulations. Under this

Determination every person proposing to board an aircraft departing from certain airports must submit himself and his carry-on baggage to be searched by any person authorised by the operator of the airline. The operators at Perth airport have authorised a private security firm to perform this function. Other security firms have been authorised at airports in other States.

## **SPECIAL CONSTABLES IN OTHER JURISDICTIONS**

23. The following three paragraphs briefly summarise the law and practice in relation to special constables in other Australian jurisdictions, in England and in New Zealand.

### 24. **Australia**

- (a) New South Wales is the only Australian jurisdiction which uses special constables extensively. According to the New South Wales Law Reform Commission, there were about 3,000 special constables in September 1971 (when the Commission's working paper on special constables was issued). One hundred and sixty five were employed by the Police Department, 823 were members of the Police Force of other jurisdictions and 2,003 were employed as night-watchmen, inspectors and in similar capacities.
- (b) In Victoria and Queensland power to appoint special constables is confined to civil disturbance, and has not been exercised for many years.
- (c) In South Australia only specified employees of the Government Railways, R.S.P.C.A. inspectors, members of the police forces of other Australian jurisdictions and traffic inspectors are in practice appointed special constables.
- (d) In Tasmania, the Commission has been informed that a small number of large industrial firms each have as an employee a special constable appointed by the Commissioner of Police.
- (e) In the Australian Capital Territory and the Northern Territory only specified members of other police forces are appointed special constables.

## **25. England**

Special constables are in two broad categories. The first is that of auxiliary police. Under s.16 of the *Police Act 1964* the Chief Officer of Police of each district may appoint special constables. The police authorities encourage the use of this power for the purpose of providing auxiliaries to assist the regular police on special occasions, such as traffic duty at weekends and control of crowds on holidays. The other category is that of special police in the employ of the Transport Commission, harbour and canal authorities and similar bodies. Their appointment is provided for in enactments relating to those bodies.

## **26. New Zealand**

There, harbour boards are empowered to appoint employees as special constables within the limits of the board's area. Apart from this, the power to appoint special constables is limited to emergencies.

## **DISCUSSION OF SPECIAL CONSTABLES**

### **General**

27. The Commission considers that persons involved in law enforcement should be properly qualified and trained, they should be subject to strict legal control, they should be required to act within clear and definite lines of authority, and should possess no more powers than are necessary to fulfil their law enforcement functions.

28. It would be generally accepted that members of the Police Force, acting in the exercise of their regular duties, conform to the criteria set out in the previous paragraph. Whenever other persons are involved in the law enforcement process (particularly when profit is the primary objective), the question can be asked whether the grant to them of special powers is justifiable in principle, and, if it is, whether their control, qualifications and training are sufficient to eliminate the likelihood of abuse.

29. The relevant issues are -

- (a) Is it proper that persons and organisations should have available to them, as their own employees or under contract, persons invested with the status and powers of a constable? (cf. paragraph 17 above). This question arises in its most critical form about special constables privately employed or engaged, but can also be asked of those employed by public instrumentalities (e.g. Government Railways).
- (b) Is the likelihood of abuse arising from the conflict of loyalty between the duty as constable and the duty as employee or contractor such that the practice of appointing such special constables should be prohibited altogether?
- (c) Should special constables be replaced where appropriate by regular police? In considering this question it should be noted that, in the view of the Commissioner of Police, many of the tasks performed by special constables - as for example by those that had been employed by the Fremantle Port Authority (see paragraph 6(c) above) - were routine and required no special powers or training. If this is so it might be preferable to abolish the status of special constable altogether. Any residual powers required in any class of case could be specifically bestowed by legislation, as in the case of fisheries inspectors (see paragraph 14 above).
- (d) If special constables in some categories are necessary, is adequate provision made for their selection, training and control?

### **Categories of special constables**

#### *Emergencies*

30. The Commission is provisionally of the view that power to appoint special constables to deal with an emergency where insufficient regular constables are available should continue to exist, but that magistrates and justices should not retain *primary* responsibility for their appointment, no matter how justified the power may have been before the establishment of a regular police force (see 2 Radzinowicz: *A History of English Criminal Law*, 215-224 (1956)). The Commission is not aware of any case where magistrates or justices have ever exercised

this power in this State (see paragraph 4 above). The Commission thinks that primary responsibility for the appointment of special constables in emergencies should be with the Commissioner of Police, who should be able to delegate the power, either generally or in a particular case, to officers in charge of police districts (who are senior inspectors or above).

31. However, such factors as the large size of some police districts (the Northern District contains 219,000 square miles and the Eastern and Northern Coolgardie District contains 319,000 square miles) might make it desirable for magistrates and justices to retain power to appoint special constables in cases where there is no member of the police force available with power to appoint.

32. In any event, the Commission suggests it is desirable to ensure that special constables can be appointed not only in cases of civil disturbance, but also in cases of natural disaster. For example, it might be useful for there to be power to appoint civil defence workers as special constables to assist them in their general functions.

#### *Police of other States*

33. The justification for the appointment of members of the police force of other states as special constables is that it facilitates the pursuit of offenders across the border (see paragraph 5 (a) above). Western Australian police stationed near the border are correspondingly made special constables of adjoining jurisdictions. There would not appear to be any objection to such appointments, though, following the proposal of the New South Wales Law Reform Commission in paragraph 42 of its working paper on special constables, we suggest that the powers as special constable of this State should be exercisable only while on police duty here. It might also be desirable to give the Commissioner of Police express power to issue directions to them in their capacity as special constable.

#### *Private security officers*

34. The usual justification for appointing private security officers as special constables is that the prevention and detection of crime committed on private premises is facilitated by the presence of such persons on those premises, for example in the apprehension of shoplifters. But as against this there are the fundamental questions of possible conflict of loyalties and

abuse of power. In the case of *De Vaney v. Moore*, the magistrate held that Mr. De Vaney had demanded Mr. Moore's name and address not for any purpose connected with the *Police Act*, but for the purposes of his employer (see Appendix I).

35. Other possibilities of abuse may occur. The Commission has been informed that it is the rule of members of the Store Protection Association (Inc.) to charge every person caught shoplifting. However, firms who are not members of this Association may not have the same strict rule. T.C.M. Gibbens and Joyce Prince found that there was no uniform practice in this regard in London (see *Shoplifting* Ch. 15 (1962)). A special constable's duty to enforce the law could conflict with an employer's rule not to prosecute shoplifters except in special cases.

36. It appears significant that there are few special constables in this category, and the number is declining. One reason may be that the Commissioner of Police will not appoint a private security officer a special constable unless the officer has had experience in the regular police, preferably in this State. Another reason may be that some security officers prefer to hand offenders over to the Police to deal with, rather than to prosecute them themselves (the latter is an undertaking which the Commissioner insists on as a condition of appointing a security officer a special constable). Whatever the reason, the Commission feels that there may be no real necessity for such appointments.

37. An alternative to the appointment of security officers as special constables might be to enact legislation authorising employees of business organisations, designated for that purpose by the Commissioner of Police, to detain suspected shoplifters for a limited period pending the arrival of the regular police. Such a law might create difficulty in that a designated period may be longer than is necessary in city areas and not long enough in country areas. A more flexible formula would be to authorise a person's detention "for such time as may be reasonably necessary in order to give him into the custody of a police officer" (cf. s.237 of the *Criminal Code*). Some States of the United States have legislation which gives power along these lines to 'merchants' (see W.J. Markstrom 58 *Michigan Law Review* 429).

38. A drawback to the proposal outlined in the previous paragraph is that it would lead to a proliferation of persons possessing law enforcement powers greater than those of the ordinary citizen. In addition, untrained persons may behave in such a manner towards a detainee as to minimise the chance of a successful prosecution.

*Officers of public and semi-public instrumentalities*

39. Appointments are made under the *Police Act* (see paragraph 5(c) above) and under other statutes (see paragraph 6 above). The Commission thinks that it may be unnecessary to bestow on such officers the sweeping powers of a constable, and that consideration should be given instead to the enactment of legislation enumerating the specific powers required, as has been done in other similar cases (see paragraph 14 above). If this is impracticable, the Commissioner of Police should at least be given an active role in their appointment and supervision.

*Participants in social activities of police*

40. The reasons for appointing supervisors of youth clubs and members of the police band as special constables are given in paragraph 5(d) above, and are unconnected with any need to bestow police powers. The Commission suggests that, if it is desirable that such persons perform their duties in police uniform, the appropriate course would be to amend s.16 of the *Police Act*, which forbids the wearing of police uniform by persons other than members of the Police Force, to enable them to do so. An amendment to Part XVI of the Police Regulations would permit a member of the police band who is not a constable to receive an allowance.

**Powers of Commissioner of Police**

41. The Commission at this stage has no firm views as to whether the power to appoint special constables should be retained other than in emergencies. But if it is to be retained, the Commission considers that clarification and amendment of the existing law is required.

42. Section 35A of the *Police Act* gives the Commissioner of Police power to appoint special constables (see paragraph 3 above). Although the section does not expressly limit the circumstances under which the power of appointment can be exercised, it has been suggested that it may be limited to cases of emergency set out in s.34 (see the magistrate's comments in *De Vaney v. Moore* Appendix I). It is apparent that s.35A was not intended to be confined in this way. It was enacted in 1915 principally to deal with war-time conditions by enabling the appointment of special constables to perform escort and other police duties and to guard water

supplies and bridges (50 Parl. Deb. 1109-1114). It was also a ratifying measure, validating appointments which the Commissioner had already made for these purposes (ibid; at p.1114). The Commission considers that the legal position is not as clear as it might be, and that if the Police Commissioner's power to appoint special constables is to extend beyond civil disturbance or other emergency, s.35A should be redrafted accordingly.

43. The Commissioner of Police has general control over special constables appointed under the *Police Act* (see paragraph 11 above). The Commission suggests that to the extent that the power to appoint special constables is to be retained, this general power should be supplemented by detailed regulations covering -

- (a) Selection and training procedures. These must of course be adapted to each category of special constable.

If the practice of appointing private security officers as special constables is to continue, it would seem preferable to introduce proper selection and training procedures rather than rely on the availability of former policemen (see paragraph 36 above).

- (b) Adequate notification to the Commissioner of Police of the functions of each appointee, and of his ceasing to hold the position which gave rise to his appointment.

The Commission is of opinion that, if appointments under statutes other than the *Police Act* (see paragraph 6 above) are to continue, the Commissioner of Police should have a role in such appointments and should have the right to control the appointees. He should also train them. It does not seem desirable that persons with the powers of a constable should be entirely outside the Commissioner's responsibility.

## **QUESTIONS FOR DISCUSSION**

44. The Commission would welcome comment on any matter arising out of this paper, and in particular on the following -

- (a) Should the legal power to appoint special constables be retained?

- (b) If so, in what circumstances should it be able to be exercised? -
  - (i) in emergencies? If so, what kinds of emergency?
  - (ii) with regard to police of other States?
  - (iii) with regard to the carrying out of private security?
  - (iv) with regard to the discharge of their duties by officers of public or semi-public instrumentalities?
  - (v) with regard to any other situations? If so, what types?
- (c) Who should have the power of making such appointments? -
  - (i) The Commissioner of Police?
  - (ii) Magistrates or Justices?
  - (iii) Statutory authorities?
- (d) Should there be legal restrictions on who can be appointed a special constable and should there be legal requirements as to the training of special constables?
- (e) Should the Commissioner of Police, regardless of who else is permitted to participate in the decision as to the appointment of any category of special constables, have the ultimate power of command and control over them?
- (f) Should special constables have the same powers as regular constables, or should their powers be limited as to time and function?
- (g) Should the existing practice of off-duty regular police engaging in special duties be permitted to continue?

- (h) To what extent should provision be made for specific statutory powers to be granted to statutory officers?
  
- (i) If the power to appoint special constables is not to be retained, what degree of control should be exercised, and by whom, over peripheral official and unofficial law enforcement bodies?

## APPENDIX I

*De Vaney v. Moore* (Court of Petty Sessions, Beaufort Street, Perth. No. 1261 - 4/70)

1. Mr. De Vaney was a special constable employed by Charlie Carter Pty. Ltd., a company which operates a chain of supermarkets, and was acting as a parking attendant in the grounds of one of them. Mr. Moore had parked his car in those grounds, although he did not intend to shop there. On returning to his vehicle he was questioned by Mr. De Vaney who asked him for his name and address. Mr. Moore at first refused to give the information but later did so. Mr. De Vaney charged Mr. Moore with refusing to give his name and address, resisting Mr. De Vaney in the execution of his duty, escaping from legal custody, and aggravated assault.

2. In the course of his judgement the magistrate said -

“It was submitted by the defence that s.35A [of the *Police Act* ] does not empower the Commissioner of Police to invest employees of private organisations with the powers of police officers for the purposes of fulfilling their engagements with their employers. In developing this submission it was said that the section does not empower the Commissioner to endow the employee of a private organisation with the same powers as a police officer not merely to cause the peace to be kept and preserved and prevent all offences but to protect and promote his employer’s civil interests.

When the history of s.35A of the *Police Act* is examined there appears to be much to be said for this submission. Section 34 enables magistrates or justices to appoint special constables when any tumult riot or felony had taken place or was reasonably apprehended. Before s.35A was enacted it appears that the Commissioner of Police at that time without proper authority had appointed a number of special constables, for purposes connected with the first World War and perhaps for other purposes. One of the objects of the amending section was to ratify such appointments.

Section 35A which was introduced in 1915 does not expressly limit who may be appointed nor for what purpose although in the context it may be argued that such appointments should be limited to the circumstances set out in s.34. It appears that in England special constables may only be appointed in cases of emergency. It seems therefore somewhat odd if Parliament intended that in Western Australia the Commissioner should be empowered to appoint special constables merely to protect or promote an employer’s civil interests. This doubt is strengthened further by the fact that all Police officers including special constables undertake to serve Her Majesty. However, in view of the wording of s.35A I am not prepared to find that the appointment of the present complainant is invalid, and will content myself by saying that I do not think the matter is entirely free from doubt.”

3. The magistrate did not find it necessary to decide whether Mr. De Vaney’s appointment was valid. He held that since Mr. Moore had not committed an offence in parking his car in the grounds the purpose behind Mr. De Vaney’s request for Mr. Moore’s name and address could only have been in connection with a possible civil action against Mr. Moore. Since this was not a purpose for which the power conferred by s.50 of the *Police Act* could be used, the magistrate dismissed all charges on that ground except that of aggravated assault. That charge was reduced to common assault and dismissed for insufficient evidence.

## APPENDIX II

### POLICE ACT, 1892

#### PART III - AS TO THE APPOINTMENT AND REGULATION OF SPECIAL CONSTABLES

34. In all cases where it shall be made to appear to any Stipendiary Magistrate or any two or more Justices, upon the oath of any credible person, that any tumult, riot, or felony has taken place, or may be reasonably apprehended in any place in the said State, and any such Magistrate or Justices shall be of opinion that the ordinary constables or officers appointed for preserving the peace are not sufficient for the preservation thereof, and for the protection of the inhabitants, and the security of the property of such place, or where, without such oath or evidence as aforesaid, any such Magistrate or Justices shall be of opinion that the constables or officers aforesaid are not sufficient for the preservation, protection, or security as aforesaid, or for the apprehension of any offenders, it shall be lawful for any such Magistrate or Justices to appoint, by precept in writing under his or their hand or hands, so many as they may think fit of the persons (not legally exempt from serving the office of constable), residing in such place as aforesaid, to act as special constables for such time and in such manner as to the said Magistrate or Justices shall seem fit and necessary for the public peace, and for the protection of the inhabitants, and the security of property in such place; and any Justice of the Peace is hereby authorised to cause every person so appointed to subscribe the following engagement:-

I, A.B., engage and promise that I will well and truly serve Her Majesty The Queen in the office of special constable for the (*City, town, or district of*) without favour or affection, malice, or ill-will, and that I will to the best of my power cause the peace to be kept and preserved, and prevent all offences against the persons and properties of Her Majesty's subjects, and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law.

Provided always, that whenever it shall be deemed necessary to appoint such special constables as aforesaid, the notice of such appointments, and of the circumstances which have rendered such appointment necessary, shall be forthwith transmitted by the Magistrate or Justices making such appointment to the Minister.

35. All persons willing to act as special constables under the provisions of this Act, shall be capable of being appointed and acting, and may be appointed and act, as such special constables, notwithstanding they may not be resident in such place as aforesaid, or in the neighbourhood thereof; and any person appointed and acting as special constable under the provisions of this section, shall have all the same powers, and be entitled to and enjoy all the same privileges and benefits, and be subject to all the same duties and obligations, as any constable duly appointed under the other provisions of this Act.

35A. (1) The Commissioner of Police may appoint special constables.

(2) Any person appointed a special constable shall have all the same powers and be entitled to and enjoy all the same privileges and be subject to the same duties and obligations as any constable duly appointed under this Act.

(3) Any special constable may receive such payment for his services, and may be provided with such equipment and necessaries as may be allowed and provided to a special constable appointed under the provisions of this Act.

(4) All appointments of special constables made by the Commissioner of Police before the commencement of the *Police Act Amendment Act, 1915*, are hereby ratified and confirmed, and this section shall apply to such appointments as if it had been enacted by this Act.

36. If any person residing within any place in the said State, being appointed a special constable, shall refuse to subscribe the engagement aforesaid when thereunto required by the Magistrate or Justices so appointing him, he shall, on conviction thereof, before any two or more Justices, forfeit and pay any sum of money not exceeding forty dollars and if any person being appointed a special constable shall neglect or refuse to appear at the time and place for which he shall be summoned for the purpose of subscribing such engagement or having been appointed as special constable and called upon to serve, shall neglect or refuse to serve as such special constable or to obey such lawful orders and directions as may be given to him for the performance of the duties of his office every person so offending shall on conviction thereof before any two or more Justices, forfeit and pay for any such neglect or refusal any sum of money not exceeding forty dollars, unless such person shall prove, to the satisfaction of the said Justices, that he was prevented by sickness, or other such unavoidable cause as shall in the judgement of the said Justices be a sufficient cause.

37. The Commissioner of Police may suspend or determine the services of all or any of the said special constables, as to the Commissioner of Police shall seem meet, and notice of such suspension or determination shall be forthwith transmitted to the Minister, and to the Magistrate or Justice appointing them.

38. The Minister may, upon the recommendation of the Commissioner of Police, order from time to time such reasonable allowances for their trouble, loss of time, and expenses, to be paid to such special constables who shall have served or be then serving as he may deem proper; and he may further order the payment of such expenses as may have been incurred in providing arms, equipment, and necessaries for such special constables.

## APPENDIX III

### “SPECIAL DUTIES”

1. In Western Australia the practice of off-duty policemen performing special police duties for reward is well established. It has continued for a long time and with the consent of the Commissioner of Police. By this practice, some off-duty members of the police force offer themselves for employment by private persons to perform tasks in the nature of police duties required by that person. For this purpose a roster of available policemen is kept by a member of the police force. That member allocates the jobs to available policemen and in return is paid, as a commission, a percentage of the money paid to each policeman who performs those off-duty tasks.

2. The police force in this State, like those in England, is a creature of statute. It is regulated by the *Police Act 1892*. That Act establishes an organised force of policemen to maintain the peace. However, its members, although having numerous statutory duties, derive their status from the common law and not the statute establishing the force.

3. The *Police Act* expressly recognises that a policeman's powers are based on the common law. Section 7 provides (inter alia) that the Commissioner of Police may appoint constables and non-commissioned officers “who shall have all such powers and privileges, and be liable to all such duties and obligations as any constable duly appointed now or hereafter may have, or be liable to, either by the common law or by virtue of any statute law”. Furthermore, the High Court in *Enever v. R.* (1906) 3 C.L.R. 969 confirmed that the *Tasmanian Police Regulation Act 1898*, which for present purposes is identical with the Western Australian Act, in essence merely dealt with the appointment and disciplining of policemen, “leaving the nature of their powers and duties... to be governed by the common law as modified by the Statutes (if any) dealing with that subject” (p.979). That decision was followed by the Privy Council in *Attorney General for N.S.W. v. Perpetual Trustee Company Ltd.* (1955) 92 C.L.R. 113, 120.

4. There is no statutory provision in this State expressly prohibiting the practice of private employment of off-duty constables for police type duties. It is therefore necessary to consider whether the practice is sanctioned by the common law, which so far as it regulated the powers and duties of peace officers for the preservation of peace and the apprehension of offenders was introduced into Western Australia on settlement of the colony (*Enever v. R.* (supra) at p.977). There is no Australian or English decision touching directly on the matter.

5. As early as 1840 it was decided that a policeman could lawfully claim a reward offered for the detection of criminals even though it was done in the course of his duties (see *England v. Davidson* (1840) 11 Ad. & El. 856; *Smith v. Moore* (1845) 1 C.B. 438; *Neville v. Kelly* (1862) 12 C.B. (N.S.) 740; *Bent v. Wakefield and Barnsley Union Bank* (1878) 4 C.P.D. 1; *Gibbons v. Proctor* (1891) 64 L.T. 594; see also *Thatcher v. England* (1846) 3 C.B. 250).

6. The House of Lords in the case of *Glasbrook Brothers Ltd. v. Glamorgan County Council* [1925] A.C. 270 considered the matter of policemen working to perform police duties under an arrangement entered into by the police at the request of an individual. In that case the appellant, a collier, sought additional police protection from the respondent to overcome the problems associated with picketing by striking employees. The appellant requested that police be billeted on the site for the purpose of protecting it. The respondent refused on the

ground that it was able to protect the collieries adequately without installing police. At the insistence of the appellant the respondent brought in extra police for the “special duty” after the appellant had agreed to pay the respondent police authority for the extra protection. At the end of the strike the appellant refused to pay the bill sent to it by the respondent on the grounds that the payment was without consideration and the agreement to pay contrary to public policy. The House of Lords by a majority held that the agreement did not fail for want of consideration nor was it contrary to public policy. The House of Lords in an obiter dictum appeared to reject the suggestion that in taking payment for police services policemen were exacting money through their official office to which they were not entitled (pages 278, 285, & 287).

Referring to the provision in the English *Police Act* empowering the Chief Constable and, on the application of any person, the justices to appoint additional constables for the purposes of carrying out duties usually performed by regular police officers (cf. W.A. *Police Act*, ss.34, 35A, 38) the Lord Chancellor stated obiter:

“It is true that the provisions of this section are confined to the appointment of ‘additional’ constables; but it would seem somewhat absurd to require that, if in any case where constables are required for special duty there are members of the existing force who can be spared for the purpose, the service of those constables shall not be utilized but additional constables shall be appointed.” (p.279).

If it is lawful for persons appointed as special constables to receive remuneration from their employers for their work, it would seem also to be lawful for regular constables who are not required for normal duties to receive remuneration from the same source for doing what a special constable might otherwise have to be employed to do.

7. Although the decisions referred to above suggest that the practice is not unlawful at common law, they do not involve directly the matter now under review. It is therefore necessary to consider the historical developments of the police force so far as it relates to this matter.

8. The principal peace officer in England was the constable. At first his was an annual and unpaid office, but by the late 18th Century a number of police stations, each independent of the other and under the supervision of a magistrate, were established with paid constables. The salary then paid to constables was considered to be very low. However, it was only a small part of the inducement which a reasonably efficient policeman could expect to get when joining the office. It has been said that “if a police officer were indolent or unresourceful or perhaps unlucky, he might return home from duty having earned no more than his day’s wages.” (2 Radzinowicz *A History of English Criminal Law* p.255). Radzinowicz reports that police officers commonly demanding payments from owners for returning lost dogs or bringing back stray cattle, from local authorities for informing them of fires, and for calling to wake people early in the morning (p.255).

9. Police officers, after becoming established, actively sought special employment by those willing to pay for extra protection. They were employed by opera companies and by private individuals at public meetings, balls and similar occasions. One of the most sought after employers was the Bank of England. Senior police officers even sub-hired junior officers to perform the work they obtained.

10. There were three courses open to anyone who wanted to hire a police officer. The hirer could apply through the local authority, which acted as an intermediary. This course was usually adopted where the hiring was sought to detect some offence or recover property. If the local authority considered the offence serious enough, the local authority, rather than the individual, paid the police officer. Even so it was not uncommon for these officers also to receive gratuities from the hirer for a job well done. Secondly the hirer could apply to one of the police offices. In this case the magistrate selected the officer and usually fixed the terms of his employment but “there was nothing to prevent this private person from showing his gratitude for particularly valuable services by giving additional gratuities.” (2 Radzinowicz *A History of English Criminal Law* p.262). The third method was to by-pass all officialdom and “enter into a purely private agreement with a police officer” (Radzinowicz, (supra) p.262). He was then paid by the person who hired him and according to that person’s private disposition.

11. It has been said of the police officer “well into the nineteenth century, he was much more a member of a liberal profession, whose fortune and standing in life depended on the goodwill of his private clients” (2 Radzinowicz *A History of English Criminal Law* p.255). One magistrate is reported to have said in 1821 that while thieves were prowling about the metropolis “officers in abundance are loitering about police offices, waiting for hire. Protection is reserved for individuals who will pay individually for it.” (2 Radzinowicz, (supra) p.262).

12. The Home Office apparently had some doubts concerning the practice of police officers taking portions of fines and participating in forfeiture as reward for their services, and in 1811 sought the advice of the English Law Officers. The Law Officers advised that even though police officers had no strict right to any share of the forfeiture it was considered just that they should receive it. The Home Office apparently accepted the advice (Radzinowicz, (supra) p.248).

13. In 1831 the Home Office issued a Police Order requiring all persons who wanted to hire a police constable to apply to the Police Commissioner. A further Police Order in June 1837 said that only “sergeants and constables were to be employed at public meetings, balls, dinner parties and similar occasions. The employment of superior officers was forbidden except in special circumstances.” (Radzinowicz, (supra) p.259).

14. It would appear therefore that the practice of policemen, whether off-duty or not, being employed by private persons had gone on unchallenged for so long as to be part of the common law of England. Until the Police Order of 1831 it appears to have been positively encouraged by the authorities as a means of ensuring adequate remuneration for policemen; and indeed there appears to have been no attempt to prohibit the practice until 1920.

15. In 1920 the English police authorities took steps to prohibit all policemen earning extra money outside their normal salary (Police Regulations 1920, Reg.8; cf. *County Police Act 1839* (U.K.) (repealed), s.10; and *Police Act 1890* (U.K.) (repealed), s.23(3)). No member of any English police force is now permitted without the consent of the Chief Officer of Police to carry on any business or hold any other office of employment for hire or gain (Police Regulations 1971, Reg.11). Further, any payments made for the private hire of police constables must be paid to the police authority (*Police Act 1964* (U.K.), s.15; Police Regulations 1971, Reg. 41).

16. No similar provisions exist in this State, although s.9 of the W.A. *Police Act* gives the Commissioner power to make rules for the “control, management and discipline” of the police

force and for the purpose of “preventing neglect or abuse” of the force. The only enactment directly touching on the practice under review is Police Standing Order 601. That Order provides (inter alia) that any member of the police force who “directly or indirectly” receives “any reward, gift or gratuity” without the Commissioner’s sanction commits an offence against the *Police Act*. The Commissioner has sanctioned the practice under review and has fixed the minimum rate police officers are to be paid when performing such duties and has prohibited them from carrying out duties other than police duties on such occasions (Police Routine Order 1.8.67). In this respect the Routine Order to some extent follows the order made by the English Home Office in July 1831.

17. It is interesting to note that so far as payment for hiring the Police Band is concerned the Commissioner requires the “Hon. Treasurer of the Band to pay it into the Police Band Account for operational expenses” (Police Standing Order 1604 (3)). Similarly, fees paid for “escorting or guarding money or other property” must be paid “into Headquarters” (Police Standing Order 1716 (1)).

18. Section 10 of the *Police Act* provides that no person shall be eligible for appointment in the police force until he subscribes to an undertaking to (inter alia) “see and cause Her Majesty’s peace to be kept and preserved”. By Section 11 every person on subscribing in such manner is “thereupon bound to serve Her Majesty as a member of the Police Force at the current rate of pay for such member”. The New South Wales equivalent of both those sections were considered at some length by the Privy Council in *Attorney General for New South Wales v. Perpetual Trustee Company Ltd.* (1955) 92 C.L.R. 113 which decided that the “fundamental character of a constable’s office has not altered with the organisation of the police force and the imposition of various statutory duties”. Merely because s.11 binds a policeman “to serve Her Majesty as a member of the Police Force” he is not thereby prohibited from serving someone else. In any event a policeman performing duties connected with keeping the peace for a private person is not serving these persons “as a member of the police force” but rather as an individual. His authority is original, not delegated, and is exercised at his own discretion (see *Attorney General for New South Wales v. Perpetual Trustee Company Ltd.* (supra)).

19. There appears to be no other legislation in this State touching on the practice now under review. Members of the police force are expressly excluded from the provisions of the *Public Service Act* which prohibits public servants performing duties for reward outside of the service (see *Public Service Act* s.6). There is nothing in the Police Standing Orders other than those referred to which could be construed as prohibiting policemen from working outside normal duty hours.

20. It seems clear that the powers, rights and duties of a policeman are derived from the common law. Except as is otherwise provided in the *Police Act*, the organisation of policemen into a police force has not affected those powers rights and duties nor the nature of a policeman’s office. In the absence of any legislative enactment prohibiting the practice of off-duty policemen entering into private contracts of employment to perform duties connected with keeping the peace, it would appear that such practice is lawful.