

1981

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

CRIMINAL INVESTIGATION BILL 1981

EXPLANATORY MEMORANDUM

(CIRCULATED BY AUTHORITY OF THE ATTORNEY-GENERAL)

OUTLINE

The purpose of the Bill is to codify and clarify the rights and duties of citizens and the Australian Federal Police, when involved in the process of criminal investigation of offences against laws of the Commonwealth and the Australian Capital Territory.

The Bill regulates all stages of criminal investigation from the initial questioning of persons believed capable of furnishing information to the trial of a person charged with an offence. Thus, the Bill regulates the rights, not only of persons suspected of committing offences, but also those of persons called upon to answer questions or otherwise assist the police in their inquiries.

In addition to provisions regulating police powers concerning search and seizure, arrest, interviewing, recording of confessions and various other types of investigative action, the Bill provides for rights of persons in custody such as the right to have access to a lawyer or interpreter and to communicate with relatives or friends. Special provisions are included to deal with interviewing of Aborigines and Torres Strait Islanders, persons not fluent in the English language, physically handicapped persons and children.

Division 3 of Part IV of the Bill regulates the granting of police bail to persons charged with offences.

Part VII of the Bill provides for the keeping of police records and the right of access of persons to their criminal history records.

Part VIII of the Bill lays down the matters to be considered by a court in the trial of an offence when deciding whether to admit evidence obtained in contravention of the legislation.

NOTES ON CLAUSES

CRIMINAL INVESTIGATION BILL 1981

Clause 1: This is formal.

Clause 2: This clause provides that the Act shall come into operation on a date to be fixed by Proclamation.

Clause 3: This clause contains interpretation provisions and other preliminary matters. The definitions of "Aboriginal" and "Torres Strait Islander" are similar to those used in the Racial Discrimination Act 1975. The definitions of "Commissioner", "Police Officer" and "Police Station" take account of the passage of the Australian Federal Police Act 1979.

Clause 4: This clause defines when a person is, for the purposes of the Act, to be regarded as being in "lawful custody". The scheme of the Act is that, in a criminal investigation, the various duties placed by the Act on a police officer operate from when a person comes into "custody". Rights are only given to the police when a person is in lawful custody, for example, under clause 34.

Sub-clause (2) covers a situation where

- (a) a person is already in custody for some reason or imprisoned for an offence and a police officer investigating another offence believes, or has given the person reasonable grounds to believe, that the police officer believes, that the person has probably committed the other offence; or

- (b) a person is in the company of a police officer in a police vehicle or on police premises in connection with the investigation of a particular offence and the police officer would not, or the person has reasonable grounds to believe the police officer would not, let that person leave if the person wished to do so.

In these cases the person is to have the same rights as other persons taken into custody under the Act. The purpose of sub-clause (3) is to ensure that the provisions of the Act in relation to persons held in custody do not apply to a person concerned in a minor traffic offence. The purpose of sub-clause (4) is to ensure that a person in any form of custody has all the rights conferred by the Act on a person in custody, whether the custody is lawful or unlawful. The effect of sub-clause (5) is that a person arrested by a police officer is not, for the purposes of the Act, in lawful custody where the police officer does not charge him with an offence as soon as practicable after he is arrested. The sub-clause similarly restricts police powers where a person, refused police bail, is not provided with facilities to appeal against such a refusal or is not otherwise brought before a court to face the charges brought against him as soon as it is practicable.

Clause 5: This clause makes the Act binding on the Crown in right of the Commonwealth.

Clause 6: Sub-clause (1) of this clause excludes the operation of Commonwealth and Territory laws, including common law, to the extent that they are inconsistent with the Act. Sub-clause (2) makes similar provision in relation to State laws applied to Federal offenders by virtue of the Judiciary Act 1903 and other Commonwealth legislation. Sub-clause (3) saves the operation of the provisions of any Commonwealth, State or Territorial law that protect the rights of the individual.

Clause 7: This clause deals with the application of the Act to police officers. While the Act is primarily designed to regulate criminal investigations conducted by officers of the Australian Federal Police in relation to offences against Commonwealth and Australian Capital Territory laws, sub-clause (1) intends that it should be the duty of an Australian Federal Police Officer to comply with the provisions of the Act when investigating offences against State law in the circumstances contemplated by the Australian Federal Police Act 1979. Sub-clause (2) makes it clear that a contravention of the Act by a police officer is not punishable as an offence against the Act unless a penalty is expressly provided in respect of the contravention. Contraventions of sub-clauses 17(3), 38(10), 64(2) and (3), 65(4), 66(1) and (2) and clause 68 of the Act by police officers are punishable as offences. The reference to Police Officers of a State or the Northern Territory in sub-clause 7(2) is explained by the fact that, for the purposes of Part IV (which does not include clauses in respect of which a penalty is provided), references to Police Officers include references to Police Officers of a State or the Northern Territory: see sub-clause 40(2). Sub-clause (3) is inserted to ensure that sub-clause (2) does not prevent a police officer from being dealt with for a disciplinary offence in respect of a contravention of the Act. Similarly, sub-clause (2) is not to be taken to prevent a contravention of the Act by a police officer constituting grounds for the exclusion of evidence under any provisions of the Act relating to the exclusion of evidence or constituting grounds for the institution of civil proceedings.

Clause 8: This clause provides for the making of arrangements with the States and Territories with respect to the performance by State and Territory Magistrates of functions under the Act.

Clause 9: This clause lays down strict criteria to be applied by a Magistrate when considering whether to grant a warrant for a person's arrest for a Commonwealth or Australian Capital Territory offence . Thus, sub-clause (1) restricts a Magistrate's power to issue a warrant to those cases where an information laid on oath is supported by an affidavit and he is satisfied that there are reasonable grounds for issuing the warrant. Sub-clause (2) requires a Magistrate to record on the affidavit furnished to him the reasons on which he has relied in issuing the warrant.

Clause 10: This clause sets out the circumstances in which Commonwealth, State and Northern Territory Police Officers may arrest persons without warrant for Commonwealth and Australian Capital Territory offences. The effect of sub-clause (2) is that a police officer may only arrest a person without warrant if he believes on reasonable grounds that -

- . the person has committed or is committing an offence;
- . the arrest of the person is necessary for the purpose of ensuring that the person appears before a court, of preventing a continuation or repetition of the offence or the commission of a further offence, of preventing the concealment, loss or destruction of evidence or for the purpose of preserving the safety and welfare of the person; and
- . proceedings by way of summons would not be effective for one or more of those purposes.

Sub-clause (3) requires a police officer to release a person arrested without warrant where his arrest is no longer necessary for the purpose of ensuring his appearance in court

or for the other purposes mentioned above. Sub-clause (4) allows arrest of persons escaping or who have escaped from lawful custody. Sub-clause (5) provides that the regulations may prescribe offences to which the section will not apply; thus, in respect of those offences, persons may not be arrested without warrant.

Clause 11: This clause empowers an Australian Federal Police Officer to arrest a person without warrant in the Australian Capital Territory where the officer reasonably believes the person has committed an offence against State or Northern Territory law. There must be, in the Australian Capital Territory an offence corresponding to that committed in the State or in the Northern Territory that is punishable by more than 6 months imprisonment and the arrest must be necessary for one or more of the purposes mentioned in sub-clause 10(2)(b) and there must be grounds for believing that proceedings by summons would be ineffective.

Clause 12: This clause sets out the circumstances in which a member of the public may arrest another person without warrant. Apart from the requirement that the person must believe on reasonable grounds that the other person is committing or has just committed the offence, the grounds required to make the arrest lawful are the same as those applicable to arrests by police officers. Sub-clause (3) requires that persons arrested under the section are to be taken forthwith to a Magistrate or delivered into the custody of a police officer. Sub-clause (4) is necessary to ensure that this section does not affect powers of arrest without warrant for offences given to persons, who are not police officers, under Commonwealth and Australian Capital Territory laws.

Clause 13: The effect of this clause is to authorize a police officer, who has a warrant for a person's arrest, to enter premises, by force if necessary, at any time of the day or night for the purpose of arresting the person and may search for the person if the officer believes that the person is on the premises. Similarly, an officer may enter premises to search for and arrest a person without warrant if he has reasonable grounds for believing that the person has committed a serious offence, i.e. one punishable by more than six months' imprisonment. The effect of sub-clause (3) is that an officer is not authorized to enter premises to arrest a person between the hours of 9 in the evening and 6 in the following morning, if it would be practicable to arrest the person at any other time.

Clause 14: In essence, this clause prohibits a police officer or other person from using, in the course of an arrest, more force, or subjecting the person arrested to greater indignity, than is necessary to make the arrest or to prevent the person arrested from escaping. Sub-clause (2) specifically prohibits the use of force likely to cause the death of a person or to inflict grievous bodily harm unless this is necessary to protect life or to prevent serious injury to a person; and, where the person to be arrested is fleeing, unless he is called upon to surrender (if practicable) and the police officer believes on reasonable grounds that the person cannot be apprehended in any other manner.

Clause 15: This clause requires a person arresting another person to inform the other person of the offence for which he is arrested unless, because of the circumstances in which the arrest occurs, the person ought to know of the offence for which he is arrested or if the person arrested makes it impracticable because of his own actions for the person effecting the arrest to inform him of the offence for which he is arrested.

Clause 16: This clause provides that a person in custody in respect of an offence and suspected of another offence, shall, for the purposes of Part III of the Act, be deemed to be in custody in respect of both offences.

Clause 17: Sub-clause (1) empowers a police officer to request that a person furnish to the officer his name and address where the officer believes the person may be able to assist him in his inquiries in connection with an offence. Sub-clause (2) makes it an offence to fail to comply with such a request and sub-clause (3) makes it an offence for an officer not to respond with his name and the address of his place of duty when requested to do so by a person whose name and address he has requested.

Clause 18: This clause, which embodies the first of the rules known as the Judges' Rules, as applied in Australia, provides that, subject to the Act, a police officer investigating an offence may ask questions of a person who may be able to assist the officer in his investigation. Sub-clause (2), however, affirms a person's right not to answer questions asked by a police officer except where a failure to answer a question would constitute a contravention of the Act (for example, sub-clause 17(2)) or of other Commonwealth, State or Territory legislation.

Clause 19: Sub-clause (1) requires that, where a person is in custody, a police officer shall not ask him any questions or ask him to do anything for a purpose connected with the investigation of an offence unless the officer has told him his name and rank. Sub-clause (2) provides for the first of the cautions required under the Act to be administered by police officers to suspects intended to be questioned. Where a person is being interviewed by a police officer in connection with an offence, the police officer shall not, after the person commenced to be in custody in respect of the offence,

ask him any questions or ask him to do anything for the purpose of investigating that offence or cause or permit another police officer to do so unless a police officer has warned the person or caused him to be warned in a language in which the person is reasonably fluent that

- he is not obliged to answer any questions or to do that thing asked of him; and
- anything he does say may be used in evidence; and
- he may consult with a lawyer or communicate with a relative or friend.

This represents in substantial effect the third of the Judges' Rules as applied in Australia. Sub-clause (3) provides that it is unnecessary to give the caution referred to in sub-clause (2) if the person has already been cautioned for the purposes of clause 20. Sub-clause (4) provides that sub-clause (2) does not apply in relation to asking the person to participate in an identification parade or when asking a person to do something where the officer is authorized to do so by a prescribed law of the Commonwealth or of the Australian Capital Territory. It is contemplated that laws of the nature of the Motor Traffic (Alcohol and Drugs) Ordinance 1977 of the Australian Capital Territory will be prescribed under this provision. This Ordinance empowers a police officer to require a person to submit to certain tests which must, to be effective, be carried out within a limited period after the road accident in question.

Clause 20: This clause adopts substantially the second of the Judges' Rules as applied in Australia. Where a police officer decides to charge a person with an offence, to seek the issue of a summons against a person for an offence or to

recommend that a person be charged or a summons sought, the officer shall not, after so deciding, ask the person any questions or ask the person to do anything or cause or permit another officer to do so, unless a police officer cautions the person -

- . that he is not obliged to answer any questions asked of him by a police officer;
- . that anything he does say may be used in evidence;
- . that he may communicate with a lawyer, and have the assistance of a lawyer while he is being questioned; and
- . that he may communicate with a relative or friend.

The caution is to be administered in writing in a language in which the person is reasonably fluent and by reading the document to the person in the language in which it is written unless it is impracticable for the document to be read to him. Sub-clause (3) provides in effect that the restrictions imposed by sub-clause (1) do not apply to a police officer when requesting a person to participate in an identification parade, when doing anything for the purpose of arresting a person or when taking necessary custodial measures.

Clause 21: This clause sets out the requirements to be followed by a police officer to whom a request for access to a lawyer is made by a person in custody in respect of an offence. Sub-clause (1) provides, that, for the purposes of the section, "investigative action" in relation to a person in custody in respect of an offence means investigative action taken in the presence of the person and includes asking the

person questions or further questions for the purpose of investigating the offence. Sub-clause (2) requires that, where a person in custody indicates to a police officer that he wishes to consult a lawyer the officer shall forthwith cause reasonable facilities to be provided to enable the person to communicate with a lawyer and to arrange for the lawyer to be present and shall not, until the person has had a reasonable opportunity to communicate with a lawyer, take any investigative action in relation to the person. The effect of sub-clause (3) is to allow a police officer to take investigative action after the person has arranged for a lawyer to be present but before the lawyer arrives in certain circumstances. These are -

- . where a reasonable period has been allowed for the lawyer's arrival;
- . where a police officer has reasonable grounds for believing the action must be taken without delay to avoid danger of the death of, or serious injury to, any person or serious damage to property; or
- . where a prescribed law of the Commonwealth or the Australian Capital Territory authorises that action. (It is intended that laws of the nature discussed in the comment on sub-clause 19(4) will be prescribed).

When a lawyer attends a person in custody, sub-clause (4) prohibits a police officer from taking investigative action until the lawyer has had a reasonable opportunity to consult with the person. That sub-clause also provides that the lawyer is entitled to be present while any investigative action is taken by the police officer and to give such advice to the person as he seeks but the lawyer is not otherwise to

interfere with the police investigation. Reasonable facilities must be made available to enable the lawyer to consult with the person in private. Sub-clause (5) extends the provisions of the clause to the situation where a person not in custody seeks a lawyer after being cautioned under sub-section 19(2).

Clause 22: Sub-clause (2) of this clause requires the Minister to keep in relation to each prescribed place (as defined by sub-clause (1)), being a place at which there are likely to be persons in custody, a list of lawyers and local firms willing to assist persons in custody at or in the vicinity of that particular place. Sub-clause (3) requires the Minister to consult with local law societies or associations in the making of the lists. The effect of sub-clause (4) is that, where a person is in custody at or in the vicinity of a place in relation to which a list is kept and, seeks, but is unable, to communicate with a lawyer or wishes to consult with a lawyer but does not know of a lawyer whom he could consult, the police officer shall give the person a copy of a list of lawyers relating to that place. Sub-clause (5) defines the expression "legal firm" and sub-clause (6) makes it clear that the expression "person in custody in respect of an offence" does not include a person on remand or imprisoned for the offence but does include a person who is to be, or is being, interviewed by a police officer in connection with the investigation of the offence and who has been cautioned in accordance with sub-section 19(2).

Clause 23: The effect of sub-clause (1) is that a police officer is to cause reasonable facilities to be provided to enable a person in custody in respect of an offence to communicate with a relative or friend where the person indicates to the police officer that he wishes to do so. Sub-clause (2) excuses a police officer from complying with sub-clause (1) where this is necessary to prevent the escape of an accomplice of the person or the concealment, loss,

destruction or fabrication of evidence or intimidation of a witness. Sub-clause (3) extends the provisions of the clause to the situation where a person not in custody wishes to communicate with a relative or friend after being cautioned under sub-section 19(2) but excludes persons who are on remand or imprisoned in respect of the offence.

Clause 24: This clause provides for a procedure under which friends, relatives or lawyers may obtain information concerning the whereabouts of persons held in custody or of persons who, while not in custody, have been in the company of the police for more than 1 hour for the purpose of the investigation of offences they are suspected of having committed.

The effect of sub-clauses (1) and (2) is that, where a person is in custody at a place in respect of an offence, the officer in charge of investigating the offence shall ensure that an officer appointed as officer-in-charge of records of the regional office designated for the purpose is informed that the person is in custody at that place. Sub-clause (2) also requires the officer-in-charge of records to be informed whether the person consents to particulars of his whereabouts being supplied to all or any of the persons mentioned in sub-clause (3). Sub-clause (3) requires that the officer-in-charge of records at a regional office shall, on application by a relative, friend or lawyer representing a person, inform the applicant whether the person is in custody and, if so, provide such information as is reasonably available concerning his whereabouts. Sub-clause (4) also requires the whereabouts of a person to be notified to the appropriate regional office when the person, while not in custody, is in the company of a police officer for the purpose of the investigation of the offence for more than 1 hour and the officer suspects that the person committed the offence. Sub-clause (5) ensures that a person is to be regarded, for

the purposes of sub-clause (4), as being in the company of a police officer when he is, at the request of that officer, waiting at a place or in the company of another officer. Sub-clause (6) provides that information is not to be furnished under sub-clause (3) unless the person concerned has consented to it being furnished and the provision also permits an officer to refuse to furnish information where this is necessary to prevent the escape of an accomplice of the person concerned or the concealment, loss, destruction or fabrication of evidence of, or relating to, the offence. The officer is enabled to make reasonable inquiries to determine whether the applicant for the information is a person entitled to make the application and is not an accomplice in the offence or a person seeking the information on behalf of an accomplice.

Clause 25: This clause deals with the treatment of persons in custody. Sub-clauses (1) and (2) require that such persons shall be treated with humanity and with respect for human dignity and prohibit cruel, inhuman or degrading treatment. Sub-clause (3) requires that police officers take all reasonable steps with a view to the provision of medical treatment to a person in custody when necessary or requested. Sub-clause (4) provides that the cost is to be borne by that person when he requests the treatment. Sub-clause (5) requires all reasonable steps to be taken to ensure the provision to persons in custody of reasonable refreshments and access to toilet facilities. Similarly, under sub-clause (6) such a person is to be provided with facilities to wash and shower and to be permitted to obtain a change of clothes before being brought to court. Sub-clause (7) provides that action taken for the purposes of section 34 or any necessary custodial measures do not contravene sub-clauses (1) or (2).

Clause 26: This clause provides for special obligations of police in relation to Aborigines and Torres Strait Islanders interviewed in connection with the investigation of certain offences.

The effect of sub-clauses (1) and (2) is to require a police officer to notify a specified organization providing legal assistance for Aborigines and Torres Strait Islanders when he has an Aboriginal or Torres Strait Islander in custody in respect of an offence and the Aboriginal or Torres Strait Islander does not object to the organization being notified. Notification need not be given under that sub-clause where the Aboriginal or Torres Strait Islander has already arranged for a lawyer to assist him. The effect of sub-clause (3) is that unless a prisoner's friend is present or the person has waived his right to the presence of a prisoner's friend, a police officer is not to interview a person or ask him to do anything in connection with the investigation of an offence, where the police officer believes that the person is an Aboriginal or a Torres Strait Islander and the person is in custody in respect of an offence punishable by more than six months' imprisonment or an offence against the person or property or, not being in custody, is suspected of having committed such an offence.

Sub-clause (4) provides an excuse for compliance with sub-clause (3) if the police officer has reasonable grounds for believing that having regard to the person's level of education and understanding, he is not at a disadvantage in respect of the investigation, in comparison with members of the Australian community generally.

Sub-clause (5) provides that where -

- . the police officer has reasonable grounds for believing that it is necessary to interview the person or ask or cause the person to do a

particular thing without delay in order to avoid danger of the death of, or serious injury to, any person or serious damage to property; or

. the police officer is authorised to ask or cause the person to do a particular thing by a provision of a prescribed law of the Commonwealth or the Australian Capital Territory (It is intended that laws of the nature discussed in the comment on sub-clause 19(4) will be prescribed.),

sub-section (3) does not prevent the officer from interviewing the person or asking or causing the person to do that thing, as the case may be.

Sub-clause (6) places on the prosecution the burden of proof in any proceedings that an Aboriginal or Torres Strait Islander has waived his right, under sub-clause (3), to the presence of a friend or objected to a notification being given under sub-clause (1). In either case, a court must be satisfied that the person waived the right or made the objection with full knowledge and understanding of what he was doing. The burden of proof that an Aboriginal or Torres Strait Islander had made his own arrangements to obtain a lawyer lies, under sub-clause (7), on the prosecution. Further where a police officer has not complied with sub-clause (3), the burden of proof, that the officer had reasonable grounds for believing as provided in sub-clause (4), lies under sub-clause (8) on the prosecution. Sub-clause (9) sets out the classes of persons who may be called upon under sub-clause (3) as prisoners' friends. The effect of sub-clause (10) is that the special measures provided for in clause 26 do not constitute acts of racial discrimination within the prohibitions of the Racial Discrimination Act 1975.

Clause 27: This clause requires the Minister to cause to be kept in relation to each place where there are likely to be persons in custody a list of persons suitable and willing to assist Aborigines and Torres Strait Islanders as prisoners' friends for the purposes of clause 26 or as interpreters for the purposes of clause 28. The Minister, in compiling the list of prisoners' friends, is required to consult with prescribed organisations provided legal assistance to Aborigines and Torres Strait Islanders. Sub-clause (5) provides that the list of interpreters established under sub-clause (4) should specify next to each person's name the language or languages that person is able to understand and converse in.

Clause 28: Under this clause a police officer is not to ask a person in custody any questions in connection with the investigation of an offence where he believes the person is unable by reason of inadequate knowledge of the English language, or any physical disability, to communicate with reasonable fluency in English unless -

- . he does so in some language or by some means in which he and the person are able to communicate;
- . an interpreter is present; or
- . it is necessary to do so without delay to avoid danger of the death of, or serious injury to, any person or serious damage to property.

Clause 29: This clause provides for special duties to be exercised by police when taking investigative action in relation to child suspects. Sub-clause (1) requires a police officer to notify the parent or guardian of a person under 16 years of age as soon as the officer realises that he has such a person in custody. The effect of sub-clause (2) is that a police officer is not to interview a person he believes to be

less than 16 years of age or ask such a person to do anything, in connection with the investigation of an offence where the child is in custody, or not being in custody is suspected of having committed an offence punishable by more than six months' imprisonment or an offence against the person or property, unless -

- . a person being a parent, relative, friend, lawyer or welfare officer acceptable to the child is present; or
- . where such a person has not been able to attend within a reasonable time after being requested to be present, another person (who may be a police officer) who has not been involved in the investigation, is present.

Sub-clause (3) ensures that sub-clause (2) neither confers on an accomplice of a child a right to be present during an investigation nor requires a police officer to permit the presence of a parent or relative believed to be an accomplice of the child.

Under sub-clause (4) -

- . a police officer may interview the child or request the child to do a thing where he believes it is necessary to do so without delay in order to avoid danger of the death of, or serious injury to, any person or serious damage to property; or
- . the police officer can ask or cause the child to do a particular thing if he is authorised to request the child to do that thing by a prescribed law of the Commonwealth or the

Australian Capital Territory (It is intended that laws of the nature discussed in the comment on sub-clause 19(4) will be prescribed under this provision).

Clause 30: This clause provides that the duties imposed on a police officer by clauses 26, 28 and 29 in relation to a person are in addition to any duties imposed on him in relation to such a person by the other provisions of the Act.

Clause 31: This clause deals with the admissibility of, and weight to be attached to, confessions. Sub-clause (1) provides that a confession made to a police officer is not admissible in evidence in proceedings against its maker for an offence unless it was made voluntarily. Sub-clause (2) deems a confession obtained in certain circumstances not to be made voluntarily.

Clause 32: This clause lays down procedures for the recording and witnessing of records of interview. The effect of sub-clauses (1)-(4) is that evidence of a confession made by the defendant in the presence of a police officer can only be adduced on the trial of an indictable offence if -

- (a) the interview during the course of which the confession was made was contemporaneously tape recorded by a multiple tape sound recorder, unless the special circumstances outlined in paragraph (2)(b) apply when a single tape sound recorder may be used;
- (b) the interview was recorded in writing contemporaneously or as soon as practicable thereafter, the record was acknowledged in the prescribed manner by the accused and a copy of the record given to him; or

- (c) the interview was recorded in writing contemporaneously or as soon as practicable thereafter and was read back to the accused (and a copy given to him) and the accused was afforded an opportunity to deny or comment on the record, the whole process being recorded on a multiple tape sound recorder or conducted before an independent witness.

Where sound recordings are made, sub-clause (5) provides that the police officer in charge of making the recordings shall hand one of the recordings to the accused advising him that the other will be retained by the police and may be used in evidence. The officer will also advise the accused to make arrangements for safe custody of the tape, and if requested afford the accused an opportunity of making these arrangements, so that the accused's tape will be available for comparison with the recording held by the police. Under sub-clause (6) the police on request will provide facilities to enable the accused or his lawyer to listen to their tape. Sub-clause (7) provides that the play-back procedure set out in sub-clause (4) will still be complied with if it is commenced but cannot be completed because of the accused's own actions. Sub-clause (8) provides that the burden of proving compliance with the section rests on the prosecution. By virtue of sub-clause (9) the prosecution is not prevented from leading evidence of an admission by the accused by anything the accused may have said when that admission was read back to him under the sub-clause (4) procedure. Under sub-clause (10) a court may still admit evidence to which the section applies notwithstanding that there is insufficient evidence of compliance with the section if the court is satisfied that, in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice. Under sub-clause (11), where evidence is given before a jury in accordance with sub-clause (10), the Judge shall, if he

considers the interests of justice so require, inform the jury of the non-compliance or insufficient evidence of compliance and give the jury an appropriate warning. Sub-clause (12) defines what is meant by a multiple sound-recording apparatus. Sub-clause (13) provides that "interview" includes a reference to any occasion on which anything is said by the accused in the presence of a police officer. Sub-clause (14) sets out a list of persons who may be an "appropriate witness".

Clause 33: This clause defines a number of terms used in Division 6 of Part III.

Clause 34: This clause contains the police power to fingerprint suspects or take like action. Sub-clause (1) limits the taking of hand, finger, feet and toe prints, voice recordings, photographs of a person in lawful custody in respect of an offence or samples of the person's handwriting. It requires that this power must be exercised by a sergeant or higher rank or a person in charge of a Police Station and further requires that this police officer must believe on reasonable grounds that it is necessary to do so for the purpose of establishing who the person is or of identifying the person as the person who committed the offence or of providing evidence of, or relating to, the offence. Alternatively the officer may believe on reasonable grounds that the person has committed another offence and the prints etc are taken for the purpose of identifying the person as the person who committed the other offence or of providing evidence of, or relating to, the other offence. The officer may also take the prints etc with the consent in writing of the person to do so. Sub-clause (2) prevents an officer taking or causing to be taken such prints, recordings, photographs or samples of a person who is in custody or at a police station or of any other person except where such procedures are authorised by the Act. Sub-clauses (3), (4) and (5) provide for applications to be made to a Magistrate (defined in

sub-clause (7) not to include a justice) by a police officer of the rank referred to in sub-section (1) for the taking of prints, recordings, photographs or samples of persons in custody or against whom proceedings have been instituted by summons. An application to a Magistrate may be made by telephone where it is impracticable for it to be made in person. Sub-clause (6) allows an officer, acting in accordance with sub-section (1) or with a Magistrate's approval, to use such reasonable force as may be necessary.

Clause 35: This clause regulates the use by police of photographs in identifying suspects. The effect of sub-clause (1) is that a police officer is not to show photographs to a witness for the purpose of identifying an offender unless the suspect has refused to take part in an identification parade or the holding of a parade would be unfair to the suspect or impracticable. Sub-clause (2) requires a police officer who shows photographs to a witness to do so with fairness to the suspect, to keep records of the photographs shown and, upon application by the suspect, provide a copy of that record and allow the suspect to inspect the photographs shown to a witness. Sub-clause (3) prohibits the use of 'identikit' pictures where a suspect is held. Where a suspect comes into custody after an 'identikit' picture has been shown to a witness, sub-clause (4) requires the police officer (unless it is impracticable) to cause the witness to attend an identification parade. Sub-clause (5) requires a police officer to provide, upon application being made by a person charged with an offence, particulars of any 'identikit' picture shown to a witness before the charge was laid together with any comments made by the witness concerning the picture. Sub-clause (6) provides that, in cases where more than one suspect is involved but all suspects are not in custody, sub-sections (1) and (3) do not prevent a police officer from taking action under those provisions for the purpose of identifying the suspect or suspects not in custody.

Clause 36: This clause regulates the holding of identification parades. Sub-clause (1) provides that an identification parade shall not be held unless the suspect has agreed to the holding of the parade and has been informed both in writing in a language in which he is reasonably fluent and, if practicable, orally

- . that he does not have to take part in the parade;
- . that if he does not, evidence may be given in proceedings for the offence being investigated of any identification of him by a witness from photographs or otherwise than as a result of an identification parade;
- . that, if he does take part in the parade, evidence may be given of any identification made by the witness, of any doubts experienced by the witness during or immediately after the parade and of any unfairness in conducting of the parade; and
- . that he may have a lawyer or other person present during the parade if his presence can be obtained within a reasonable time.

Sub-clause (2) requires a police officer to obtain a written acknowledgement of a caution administered under sub-clause (1). The effect of sub-clause (3) is that where it is necessary for a court to determine whether a caution was given in accordance with sub-clause (1) and the written acknowledgement referred to in sub-clause (2) is not produced, the court shall assume, unless the contrary is proved, that the person was not so cautioned. Sub-clause (4) requires a police officer holding an identification parade to ensure that the parade is conducted so as not to unfairly prejudice the

suspect. Sub-clause (5) requires that a parade be photographed or video-taped. Sub-clause (6) imposes on the police officer conducting a parade the duty to cause to be recorded particulars of what happens during the parade and, where they consent, details of each of the persons included in the parade. Sub-clause (7) provides that a suspect involved in an identification parade is entitled, upon request, to be provided with a copy of any photograph taken in pursuance of sub-clause (5) and a copy of a record made under sub-clause (6) and with facilities to view any video-tape made under sub-clause (5).

Clause 37: This clause provides for the searching of persons immediately after arrest. Sub-clause (1) empowers a police officer, after taking a person into lawful custody, to search the person, his clothing and any property in his immediate control if the officer believes on reasonable grounds it is necessary to do so for the purpose of finding whether the person has on him a weapon or other article capable of being used to inflict bodily injury or to assist him to escape or for the purpose of preventing the concealment, loss or destruction of evidence. Sub-clause (2) provides that sub-section (1) does not authorize an officer to require a person to remove any clothing he may be wearing. Under sub-clause (3) an officer may seize any article referred to in sub-section (1) or any thing he believes to be connected with the commission of an offence that is found as a result of a search conducted under sub-section (1). Sub-clause (4) ensures that this section does not affect existing powers to search persons, clothing worn by them and property under their control upon being admitted as inmates of gaols, lock-ups or like places after being charged with offences.

Clause 38: This clause provides for the medical examination of persons in lawful custody in respect of an offence. Sub-clause (1) empowers a police officer to arrange for a

medical practitioner to examine a person in lawful custody in respect of an offence if, and only if, the officer believes on reasonable grounds that it is likely to provide evidence relating to the offence and the person has consented or a Magistrate has approved the examination. Sub-clause (2) makes the same provision in relation to the taking of specimens from such a person. Sub-clauses (3), (4) and (5) provide for the making of applications to Magistrates and for their hearing. Sub-clauses (6) and (7) require a police officer to give a person in custody the opportunity of having his own medical practitioner present during an examination or specimen-taking unless the officer believes on reasonable grounds that delaying until that medical practitioner can be present means that evidence of, or relating to, the offence may be lost or destroyed or may otherwise disappear. Sub-clause (8) allows a police officer to use such reasonable force as necessary to take the person to the medical practitioner. Sub-clause (9) provides for the destruction, in specified circumstances, of reports of examinations and of analyses of specimens after 12 months. Sub-clause (10) makes it an offence to make copies of such reports after the time they are required under sub-section (9) to be destroyed. Sub-clause (11) provides for the furnishing to persons examined, or to persons from whom specimens have been taken, of copies of the reports of such examinations or analyses of such specimens. Sub-clause (12) protects from liability medical practitioners acting under the section and persons assisting them. Sub-clause (13) ensures that nothing in the section prevents a medical practitioner examining a person in custody at the person's request or for the purpose of treating him for illness or injury, affects the powers of a court to exclude evidence obtained through unreasonable force or inhuman treatment, or affects the operation of a prescribed Commonwealth or Australian Capital Territory law relating to medical examinations or the taking of specimens from persons.

(It is intended that laws of nature discussed in the comment on sub-clause 19(4) will be prescribed under this provision). Sub-clause (12) defines "Magistrate" and "specimen" for the purposes of the clause.

Clause 39: This clause provides that matters mentioned in Division 6 of Part III are not intended to be exhaustive of the forms of investigative action which may be taken by police officers.

Clause 40: Sub-clause (1) provides that, for the purposes of Part IV, which deals with the rights of persons charged with offences, a person shall not be taken to have been charged by a police officer with an offence unless or until particulars of the charge have been entered in a police station charge book and a person shall be taken to have been summoned at the time of issue of the summons against him. Sub-clause (2) provides that where a person charged by a Commonwealth police officer is handed over into the custody of a State or Territory police officer before a decision as to police bail is taken, the provisions of Part IV, dealing with bail and other matters, continue to apply to him; for that purpose, references to a Police Officer in the Part shall be read as including a reference to a State or Territory Police Officer.

Clause 41: This clause provides that a person is to be charged by a police officer as soon as practicable after he is arrested for an offence.

Clause 42: This clause ensures that nothing in this Part of the Act shall be taken to prevent the release of a person in lawful custody at any time without being charged with an offence.

Clause 43: This clause provides that a person is to be cautioned as to his rights by a police officer immediately after he has been charged with an offence. This clause substantially embodies the fifth rule of the Judges' Rules, as applied in Australia.

Clause 44: This clause embodies in substantial effect the seventh rule of the Judges' Rules, as applied in Australia. Sub-clause (1) prohibits a police officer from questioning a person charged with or summoned in respect of an offence other than for the purpose of clearing up ambiguities in answers to questions asked before he was charged, in statements made by the person or where it is necessary for the purpose of dealing with an emergency. Sub-clause (2) provides that where fresh evidence becomes available a police officer may ask the person whether he wishes to make a statement in regard to this material but cannot ask the person any further questions other than questions to clear up ambiguities in any statement he makes. Sub-clause (3) requires a police officer to caution a person charged with an offence immediately before he asks the person any questions relating to the offence. Sub-clause (4), which substantially embodies the sixth rule of the Judges' Rules, requires that, where a person charged with an offence voluntarily makes a statement to a police officer in relation to the offence, the officer shall caution the person before the person makes the statement, or if this is not practicable, as soon as possible after he commences to make it.

Clause 45: This clause substantially embodies the eighth rule of the Judges' Rules, as applied in Australia. Sub-clause (1) requires that, where 2 or more persons have been charged with the same offence and one of those persons furnishes to a police officer a written statement in relation to the offence, the police officer is to furnish each of the other persons charged with a copy of the statement but he is not to read the statement or invite them to reply to the statement. Sub-clause (2) provides an exception to this to cover situations where a

person to whom a statement referred to in sub-clause (1) is furnished cannot for any reason read the statement. Sub-clause (3) requires that where a person voluntarily makes a reply to a statement given to him under sub-clause (1), the police officer is to caution the person before he makes the reply or, if it is not practicable to do this, as soon as practicable after he commences to make the reply.

Clause 46: This clause deals with police bail. Sub-clause (1) states the general principle that where a police officer charges a person with an offence he shall, if it is possible to do so forthwith after the person is charged, bring or cause the person to be brought before a Magistrate forthwith to be dealt with according to law. Sub-clause (2) requires that where a police officer charges a person with an offence but is unable to take the person forthwith before a court, the officer shall

- . inform the person that he may apply for bail, he may communicate with a lawyer in connection with the making of an application for bail and that he may communicate with any other person in connection with the provision of bail and, if the person requests, the officer shall provide reasonable facilities to enable him to communicate with a lawyer or other person,
- . furnish to the person particulars of matters relevant to the granting of bail and of the conditions subject to which bail may be granted; and
- . if he is authorized to grant bail (i.e. is a sergeant or of higher rank or officer-in-charge of a police station - sub-clause (3)), determine

whether bail should be granted or, if he is not so authorized, bring the person before an officer who is so authorized.

Sub-clause (4) provides that the authorized police officer may cut short the procedure if he decides, before completing this procedure, to grant bail subject only to the condition in paragraph 49(a).

Clause 47: Sub-clause (1) requires an officer called on to consider whether to grant bail to decide forthwith whether to grant or refuse bail, having regard to the information before him and to sub-sections (2) and (3), after affording the person or his lawyer and any police officer concerned opportunities to make submissions to him concerning any of the criteria for bail detailed in sub-section 48(1) that are relevant to the particular case. The effect of sub-clause (2) is that, if the authorized police officer decides to grant bail, the bail must be granted subject to the condition that the person concerned undertake in writing to appear before a specified court at a specified time or at such other time and place as is notified. However, in addition, the bail may be made subject to such of the other conditions specified in section 49 as the officer considers appropriate. Sub-clause (3) provides that bail is not to be granted subject to a condition in paragraph 49(b) - (f) unless the condition is necessary for the purpose of securing

- . the person's attendance at court;

- . the protection from bodily injury of the person charged or of other persons connected with the charge; or

- . the prevention of the person charged from interfering with evidence, intimidating witnesses or hindering inquiries into the charge.

Under sub-clause (4) before imposing a particular condition specified in clause 49, other than that specified in paragraph 49(a), the police officer must conclude that fulfilment of conditions specified earlier in clause 49 than the particular condition will not achieve the purposes referred to above, and is required to record why he decided that the preceding conditions would not secure those purposes. Under sub-clause (5) if an authorized Police Officer refuses to grant bail he must record his reasons for so deciding.

Clause 48: This clause sets out the criteria to which a police officer is to have exclusive regard when considering whether to grant bail.

Clause 49: This clause sets out the conditions that a police officer may impose when granting bail. Apart from the condition specified in paragraph (a) (to the effect that a person undertake to appear before a specified court at a particular place, date and time), which must be imposed as a condition on all bail granted, conditions are ranked in the order that they are to be considered by a police officer in deciding what conditions to impose on bail.

Clause 50: This clause provides for the notification of a bail decision and of a right to review. Sub-clause (1) requires that, as soon as a police officer refuses bail he shall inform the person charged of the decision and also inform him that -

- . he is entitled to be furnished with a copy of the reasons recorded under sub-clause 47(5);
- . he is entitled to request an officer to provide facilities for him to apply to a Magistrate for bail; and

- . he is entitled to communicate with and have the assistance of a lawyer in connection with such an application.

Under sub-clause (2) where bail is granted subject to a condition or conditions (other than that in paragraph 49(a)) the person is to be informed forthwith and also informed that he can request a copy of the reasons recorded under sub-clause 47(4) and, if the person remains in custody because he is unable or unwilling to arrange for compliance with that condition or conditions, that he is entitled to request facilities to apply to a Magistrate for bail and communicate with, and have the assistance of, a lawyer in connection with such an application. Sub-clause (3) requires a police officer to provide, upon request by such person in custody who has been granted bail, facilities to enable him to communicate with a lawyer and shall provide the person with a copy of the reasons recorded under sub-section 47(5) in relation to the decision to grant him bail.

Clause 51: By sub-clause (1) of this clause, where a police officer refuses bail or grants it subject to unacceptable conditions, the person is required to be brought before a court to be dealt with according to law as soon as practicable. A person waiting in custody to be so brought before a court is entitled under sub-clause (2) to request a police officer for facilities to make an application for bail and, in such event, the police officer is required, as soon as practicable after the request is made, to bring him before a Judge or Magistrate in person or arrange for him to make application to a Judge or Magistrate by telephone for bail. By virtue of sub-clause (3), a person is not to be brought before a Judge in person and an application is not to be made to a Judge by telephone for bail, if it is practicable for the person to make the application in person to a Magistrate or by telephone to a Magistrate.

Clause 52: This clause deals with bail applications where a person is charged with several offences.

Clause 53: Where bail is granted subject to the condition that a sum be deposited, this clause permits the required sum to be deposited by cash, cheque or other prescribed means.

Clause 54: Under sub-clause (1) of this clause, where an authorized police officer believes that a person released on bail is absconding or has failed, or is about to fail, to comply with a bail undertaking, the officer may revoke the bail and the person may then be arrested. By sub-clause (2), where a sum has been deposited by way of cheque and the cheque is dishonoured, an authorized police officer may revoke the bail.

Clause 55: This clause makes a wilful failure to comply with a bail undertaking an offence punishable by the same penalty as that relating to the original offence, or where the bail relates to more than one offence, to the most or more serious offence, subject to a maximum of a fine of \$1,000 or imprisonment for 6 months. Sub-clause (4) provides that the regulations may make provision for the enforcement of undertakings given in accordance with conditions referred to in paragraphs 49(d), (e) and (f).

Clause 56: This clause defines the term "a thing connected with the offence" and provides an extended definition of "offence" for the purposes of Part V.

Clause 57: This clause sets out an exhaustive list of the circumstances in which searches of a person or searches on premises and seizure of items may be conducted. Sub-clause (1) sets out the circumstances in which a police officer may search the person of, clothing worn by, or property in the

immediate control of a person, and may seize things connected with an offence found in the course of the search. Sub-clause (2) sets out the circumstances in which a police officer may enter upon land, upon or into premises or a vessel or vehicle and may search for, and seize, things connected with an offence that he finds in those places.

Clause 58: This clause deals with procedures for obtaining search warrants. Sub-clause (1) provides for the issue of a warrant by a Magistrate authorizing the search of a person where information on oath has been provided to the Magistrate that there are reasonable grounds for suspecting that a thing connected with an offence may be concealed on that person, in his clothing or in any property in the immediate control of the person. Sub-clause (2) makes similar provision for issue of a warrant to search premises, vessels, vehicles or land. Sub-clause (3) requires that a Magistrate shall not issue such a warrant unless any further information he requires has been furnished to him concerning the grounds on which the issue of the warrant is being sought and the Magistrate is satisfied that there are reasonable grounds for issuing the warrant. Sub-clause (4) requires a warrant issued under either sub-clause (1) or sub-clause (2) to state the purpose for which the search is authorized, a description of the kind of the things authorized to be seized, the date upon which the warrant ceases to have effect and, in the case of a warrant issued under sub-clause (2), at what times entry is authorized. By virtue of sub-clause (4) a warrant ceases to have effect one month after the date of issue or sooner, if it so states. Sub-clause (5) allows a police officer who, in the course of searching for things specified in a warrant, finds another thing he believes on reasonable grounds to be connected with the offence for which the warrant is issued or another offence and that it is necessary to seize that thing to prevent its concealment, loss or destruction or continued use in regard to an offence, or another offence, to seize that

thing. Sub-clause (6) provides that a police officer acting in accordance with a warrant may remove or require a person to remove any clothing. However, sub-clause (7) provides that a female may only be searched by a female.

Clause 59: This clause permits a police officer, in circumstances of urgency where he considers it necessary to do so, to make an application for a search warrant to a Magistrate by telephone. However, under sub-clause (2) before proceeding to make the application the officer must prepare an information but may make the application before the information is sworn. Sub-clauses (3) and (4) provide for the procedure before the Magistrate. Where such an application is made and granted, a form of warrant completed by the police officer, if it is in accordance with the terms of the warrant made out and signed by the Magistrate after the telephone application, is authority by virtue of sub-clause (7) for the search, entry or seizure authorized by the warrant so signed. The police officer is required to forward promptly to the Magistrate the form of warrant prepared by him and the required information duly sworn (sub-clauses (5) and (6)). Under sub-clause (8) if the warrant signed by the Magistrate is not produced in proceedings before a court, the court shall assume, unless the contrary intention is proved, that the search, entry or seizure was not authorized by such a warrant.

Clause 60: This clause provides for searches in emergencies. Sub-clause (1) authorizes a police officer to make searches of a person or land, premises, vessels or vehicles on or in which he believes that a thing connected with an offence may be situated if he believes that it is necessary to do so in order to prevent concealment, loss or destruction of any thing connected with an offence and the search or entry was made in circumstances of such seriousness and urgency as to require and justify immediate search and entry without an order of the court or a warrant. Sub-clause

(2) authorizes a police officer believing that a person is carrying an offensive weapon (defined in sub-clause (4)) or anything connected with a serious offence to stop the person and seize any thing found on the person. Under sub-clause (3), a police officer has similar powers in respect of a vessel or vehicle.

Clause 61: This clause provides a procedure under which a police officer can obtain the consent of a person to a search or entry.

Clause 62: The effect of this clause is that provisions of any other law of the Commonwealth or the Australian Capital Territory in force at the commencement of the Act authorizing search, seizure and entry by a police officer upon land, premises, vehicles or vessels for purposes not expressly stated are to be construed as authorizing the police officer to act only for the purposes of the law in which the provision is included.

Clause 63: This clause forbids a police officer to induce a person or cause another person to induce a person to commit an offence. However, by virtue of sub-clause (2), a police officer is exempt if he has reasonable grounds for believing that the person would, without the inducement, have been ready and willing to commit an offence of the kind committed. Sub-clause (3) makes it clear that the section does not make lawful anything that would otherwise be unlawful.

Clause 64: This clause places an obligation on the Commissioner to ensure the accuracy and security of records of the Australian Federal Police Force, prohibits a police officer, except in the performance of his duties, making copies of records or communicating official information to

others and prohibits other persons from seeking to obtain from a police officer information that he is forbidden to communicate. Sub-clause (4) defines "police officer" for the purposes of the section.

Clause 65: Under this clause a procedure is provided by which a person may apply to obtain information concerning himself contained in the records of the Australian Federal Police. Sub-clause (2) provides the means by which an application can be made and sub-clauses (3) and (5) provide that the information requested (defined in sub-clause (6)) is to be contained in a certificate furnished to the applicant within 21 days and any fingerprints taken for the purposes of the application returned to the applicant.

Clause 66: This clause prohibits an employer requiring an employee to produce a certificate issued to the employee under clause 65. Sub-clause (2) provides that any other person may not require a person who has made an application for employment to produce, for the purposes of the application, the certificate or communicate the contents of the certificate. The provision is expressed to bind the Crown.

Clause 67: Sub-clause (1) and (2) require the destruction of prints, recordings etc, made under section 34 after certain periods of time or in certain circumstances. Under sub-clause (3) an application may be made to a Magistrate to extend those periods of time.

Clause 68: This clause forbids a police officer making a copy of any prints, recordings, photographs or samples after the time the Commissioner is required under section 67 to destroy them.

Clause 69: The effect of this clause is that, if in proceedings in a court in respect of an offence, an objection

is made and established that evidence was obtained in contravention of any provision of the Act, the court may not admit the evidence unless it is satisfied that admission of the evidence would substantially benefit the public interest in the administration of criminal justice without unduly prejudicing the rights and freedoms of the person. While by sub-clause (3) it is made clear that this provision is in addition to, and not in substitution for, any other law or rule under which a court may refuse to admit evidence, sub-clause (4) states in effect that a court will not in this regard apply the Judges' Rules because the substance of these rules is incorporated in the preceding provisions of the Act.

Clause 70: This is the general authority for the making of regulations to carry out, or give effect to, the Act.

