

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES (SEARCH WARRANTS AND POWERS OF ARREST)  
AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Duncan Kerr MP  
Minister for Justice)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY  
THE SENATE TO THE BILL AS INTRODUCED



CRIMES (SEARCH WARRANTS AND POWERS OF ARREST)  
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OUTLINE

General Outline

The purpose of the Bill is to amend the Crimes Act 1914 to insert a new Part 1AA -Search Warrants and Powers of Arrest. The new part is based on the recommendations of the Review of Commonwealth Criminal Law. It provides specific powers and safeguards in relation to the investigation of the bulk of Commonwealth offences. The new part makes provision for obtaining and executing search warrants, including telephone warrants, stopping and searching conveyances, arrest and related matters such as personal searches, taking and destroying fingerprints, holding identification parades and other identification procedures.

The Bill replaces the existing provisions of the Crimes Act dealing with the issue of search warrants and powers of arrest and spells out details of the manner in which these powers may be exercised. Much of this detail is currently dealt with under common law, State and Territory law or in police instructions, general orders and practice and hence generally unavailable to the public. The Bill is designed to make public the powers of police and the rights of individuals in the important areas of police investigation with which it deals. The unavailability of the details is incompatible with modern concepts of open administration and access to justice.

Outline of new Part 1AA

Division 1 - Preliminary - This Division defines various terms used and sets out the relationship between Part 1AA and other laws of the Commonwealth and the Territories.

Division 2-Search Warrants - This Division sets out the requirements for the issue of search warrants, including telephone warrants, and the powers which are, or may be, conferred by such warrants. It provides specific powers in relation to seizure of property and the use of electronic and other equipment during the execution of a search warrant. Searches of persons may only be conducted where expressly authorised by the warrant and only frisk or ordinary searches may be authorised.

Division 3-Stopping and searching conveyances - This Division re-enacts the power for a constable to stop and search a vehicle without warrant in emergency situations. It replaces the existing emergency powers contained in sections 10A and 10B of the Crimes Act which are repealed by clause 5 of the Bill.

Division 4-Arrest and related matters - This Division provides for powers of arrest without warrant by police and citizens and additional conditions on the issue of warrants for arrest. It confers power subject to stringent safeguards to conduct searches of persons, including strip searches, upon or after arrest and regulates the conduct of identification parades, the taking and destruction of fingerprints and other identifying material.

Division 5 -General - This Division provides rules for the conduct of frisk and ordinary searches of persons, requires announcement before entry onto premises and creates offences in relation to the obtaining of search warrants. This Division also deals with the retention and return of seized items. Generally it provides that things seized can only be retained for as long as they are required for use in evidence. Things seized under the emergency powers contained in Division 3, may only be retained for 60 days pending institution of proceedings, unless forfeited or forfeitable or are the subject of a dispute as to ownership, but the period may be extended by court order. This follows similar provisions now contained in sections 10D and 10E of the Crimes Act which are repealed by clause 5 of the Bill. Legal professional privilege is expressly preserved.

### FINANCIAL IMPACT

The amendments are not expected to have any financial impact on Government expenditure. There may be some overall benefit accruing to the States and Territories, in the courts of which pursuant to the Judiciary Act 1903 or other Commonwealth laws, trials for Commonwealth offences are conducted, in terms of reduction of trial times by virtue of reduced contests over evidence.

## NOTES ON CLAUSES

### Clause 1 - Short Title

This clause is formal. It provides for the short title of the Bill and cites the Crimes Act 1914 as the "Principal Act".

### Clause 2 - Commencement

This clause provides that the Act will commence on Proclamation. However, the Act will commence by force of this provision, in the absence of a proclamation within 6 months of Royal Assent. A delay in commencement will be needed for training purposes.

### Clause 3 - Interpretation

This clause amends the definition of "constable" in section 3 of the Principal Act to include a member of a State or Territory "police service". This is necessary because not all jurisdictions describe their police as a "police force".

### Clause 4 - Insertion of new Part 1AA in Principal Act

This clause inserts the following sections after Part 1 of the Principal Act

#### PART 1AA- SEARCH WARRANTS AND POWERS OF ARREST

##### Division 1-Preliminary

#### Proposed section 3C - Interpretation

Subsection 3C(1) is the definition section. The principal words defined include:

'constable assisting' in relation to a warrant as not only a constable who is assisting in the execution of the warrant but also a person who is not a constable who has been authorised by the executing officer to assist. However, under subsection 3C(2) a person, who is not a constable as defined in paragraph 3C(1)(b), must not take part in searching, or arresting, a person. The person assisting could for example be a computer expert assisting the police to search for evidential material accessible through a computer.

'evidential material' as a thing relevant to any offence and includes information in an electronic form. Other provisions (such as subsection 3F(1)) provide how 'evidential material' may be seized, copied, examined and otherwise dealt with by the police.

'executing officer' is defined in a way which ensures that a particular constable is identified as being responsible for the execution of each search warrant.

'issuing officer' restricts the persons authorised to issue warrants to a magistrate or a justice of the peace or other person employed in a court (a person with some legal training) who have the power to issue a search warrant or arrest warrant under the law of the State or Territory. There has been judicial criticism of lay justices having the power to issue search warrants.

'offence' is defined as an offence against a law of the Commonwealth other than the Defence Force Discipline Act 1982. The definition also includes an offence against a law of a Territory, other than the Australian Capital Territory. Under section 3 of the Crimes Act 1914, 'Territory' does not include the Northern Territory.

'police station' includes a police station of a State or Territory and building occupied by the Australian Federal Police. The AFP often use State and Territory police stations to conduct their investigations in localities where there are no AFP buildings.

'premises' includes a place and a conveyance. Under section 3 of the Crimes Act 1914 'conveyance' includes an aircraft, vehicle, or vessel.

'seizable items' are dangerous items, such as weapons, which can be seized even though they are not evidential material.

'Frisk search', 'ordinary search' and 'strip search' of persons are also defined. These are dealt with under the appropriate proposed sections. The Bill does not confer any power to examine a person's body cavities.

### Proposed section 3D - Application of Part

This section provides that Part 1AA does not affect special provisions in other Commonwealth legislation such as the Customs Act 1901, Fisheries Management Act 1991 and various environmental laws which confer powers on inspectors and police, nor does it apply to the exercise, by a constable, of powers under the Defence Force Discipline Act 1982. Furthermore, the powers conferred by this Bill can be exercised by police to investigate offences under other Commonwealth Acts notwithstanding the existence of similar powers under those other Acts. It is proposed to examine the powers conferred by these

enactments as a matter of urgency to ensure their consistency with the provisions of the Bill.

The Part does not apply to offences against the laws of the Australian Capital Territory. It is understood that the ACT will be enacting its own legislation. The section also provides that Part 1AA is not intended to limit, or exclude, the operation of a law of any other Territory relating to the subject matter of the Bill. Under section 3 of the Crimes Act 1914 "Territory" does not include the Northern Territory.

## Division 2-Search Warrants

### Proposed section 3E - Issue of search warrants

Subsection 3E(1). A warrant to search premises can be issued if the issuing officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be, within the next 72 hours any evidential material at the premises. The 72 hour limit permits a warrant to be obtained in advance where intelligence suggests that evidential material is to be taken to premises. The same proviso is contained in the existing provision (section 10).

Subsection 3E(2). A warrant to search a person may be granted if the issuing officer is satisfied by information on oath that there are reasonable grounds for suspecting that the person has, or will within the next 72 hours have, any evidential material in his or her possession. Any such search must be limited to a frisk or ordinary search.

Subsection 3E(3) provides that if the constable applying for the warrant suspects that, in executing the warrant, it will be necessary to use firearms, the grounds for the suspicion must be stated in the information. This subsection is intended to alert the issuing officer to the possibility of violence. This is considered particularly desirable where it is proposed that tactical response units, special weapons squads and the like will be used.

Proposed subsection 3E(3B) requires an AFP member or special member to inform the issuing officer if he/she has applied for a warrant in relation to that particular person or premises previously and to state the outcome of those applications. This is designed to guard against forum shopping.

Subsection 3E(4) sets out the matters which must be specified in a warrant. These matters include: the offence to which the warrant relates, a description of the premises, or the name or description of the person to be searched, the kind of evidential material that is to be searched for, the name of the executing officer, the period for which the warrant remains in force (not longer than 7 days) and when the warrant may be executed. This last provision is intended to prevent the unnecessary execution of warrants on homes at night.

Subsection 3E(5) sets out the additional matters which the issuing officer is to specify in a warrant that relates to premises. These include non-discretionary matters such as the fact that the warrant authorises the seizure of things, other than the evidential material for which it is specifically issued, which are found and that relate to the warrant offence or another indictable offence where seizure is necessary to prevent concealment, loss or destruction or use of the thing in the commission of an offence. It also requires an express statement as to whether the warrant authorises a frisk or ordinary search of persons at, or near, the premises. This is designed to ensure the issuing officer considers the appropriateness of authorising the search of people. For example, where the premises are used by a large number of members of the public, it would usually not be appropriate.

Subsection 3E(6) concerns warrants that relate to the search of a person. In the same terms as subsection 3E(5), it requires the issuing officer to specify whether the warrant authorises the seizure of things other than the evidentiary material for which it is specifically issued. In addition to this, it requires the issuing officer to state whether a frisk or ordinary search is authorised. A 'frisk search' is a quick running of the hands over the garments whereas an 'ordinary search' may involve the removal of limited outer garments.

Subsection 3E(7) ensures that the 7 day limit on the duration of a warrant does not prevent the issue of further warrants for the same person or premises.

Subsection 3E(8) provides that if the application for a warrant is made by telephone the period in which it is believed that the evidential material will be on the premises or person is reduced from 72 to 48 hours and the duration of the warrant must be not more than 48 hours and not 7 days as for warrants obtained in person. If such a warrant is not executed within 48 hours a warrant must be applied for in person unless the police can satisfy the issuing officer of such circumstances of urgency as to authorise the issue of a further telephone warrant.

Subsection 3E(9) provides that an issuing officer in New South Wales or the Australian Capital Territory may issue a warrant for the search of premises or a person in the Jervis Bay Territory. This recognises the fact that there is no resident Magistrate in the Jervis Bay Territory.

Subsection 3E(10) provides that an issuing officer in a State or internal Territory may issue a warrant for premises or a person in that State or Territory or in an external Territory. The officer may also issue such warrants for execution in another State or internal Territory (including the Jervis Bay Territory) if he or she is satisfied that it is appropriate to do so. For example, in a major conspiracy investigation where warrants need to be simultaneously executed in a number of jurisdictions it would be undesirable for applications to be made in



each jurisdiction, particularly if officers with the necessary knowledge of the matter are located in one jurisdiction. This would also protect the security of the investigation.

### Proposed Section 3F - Authority of Search Warrant

These provisions are based on the recommendations of the Gibbs Review.

Subsection 3F(1) sets out the activities authorised by a warrant to search premises. A warrant authorises entry and search. It authorises seizure of seizable items and evidential material in relation to the warrant offence or any other indictable offence where this is necessary to preserve the evidence. The warrant also authorises the searching for and recording of fingerprints and other forensic samples found at the premises. If a warrant to search premises specifically authorises the frisk or ordinary search of a person at, or near, the premises - the executing officer or constable assisting is empowered to search such a person suspected of having evidential material or seizable items in his or her possession.

Subsection 3F(2) provides that a warrant to search a person is authority subject to the terms of the warrant to conduct a frisk or ordinary search of the person as well as the search of any conveyance used by the person in the last 24 hours for the kind of things specified in the warrant, to seize things found, record fingerprints found in the course of the search and to take forensic samples.

Subsection 3F(2) also authorises the seizure of other things found during the search believed on reasonable grounds to be connected with either the warrant offence or, subject to conditions, another indictable offence. The subsection also permits the seizure of weapons found during the search if that is necessary to prevent risk of injury to persons in the vicinity. The power to record fingerprints and samples under this section does not include the taking of fingerprints or samples from the body of a person but only from clothing or items found on the premises themselves, paragraph 3F(2)(b) only refers to taking them from things.

Subsections 3F(3) and (4) oblige those executing the warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed, and as to the type of personal search stipulated.

Subsection 3F(5) authorises the executing constable to make things seized under the warrant available to other agencies where it is necessary for the purposes of the investigation or prosecution of an offence to which the things relate. Police do not always have the expertise to properly analyse the things seized. In other cases police may seize items relevant to an offence appropriately dealt with by another agency (for example, Customs). This was not addressed by the Gibbs Review but has been inserted to remove any doubt about the authority and reflects current practice.

**Proposed Section 3G - Availability of assistance and use of force in executing a warrant**

This section restates the common law position that, in executing a warrant, the executing officer may obtain such assistance and use such force as is necessary and reasonable in the circumstances. Where the person assisting is not a constable, he or she may only be authorised to use force in relation to things (for example, a locksmith assisting the police to open a safe) and not persons.

**Proposed Section 3H - Details of warrant to be given to occupier etc.**

This section provides that if a warrant in relation to premises or a warrant in relation to a person is being executed, a copy of the warrant must be made available to the occupier of the premises or the person being searched as the case may be. In either case the person responsible for the execution of the warrant must identify himself or herself. Because it is not possible to predict whether any persons at or near warrant premises need to be searched, and a person being searched under a warrant in relation to premises need only be shown a copy of the warrant. In order to prevent forgery or other wrongful use of the warrant copy, subsection 3H(5) provides that the copy need not include the signature of the issuing officer or the seal of the Court. This provision has been included at the specific request of the ACT Chief Magistrate.

**Proposed Section 3J- Specific powers available to constables executing warrant**

Subsection 3J(1) permits the taking of photographs (including video tapes) of the premises or of things at the premises in certain circumstances.

Subsection 3J(2) allows for a limited interruption in the execution of a warrant. The constables executing the warrant, may if the warrant is still in force, complete its execution after ceasing and leaving the premises for not longer than one hour, or longer if the occupier consents in writing.

Subsection 3J(3) provides that where the execution of a warrant is stopped by order of a court which is later revoked, or reversed on appeal, its execution may be completed provided the warrant is still in force.

**Section 3K - Use of equipment to examine or process things**

Subsection 3K(1) empowers the executing officer or constable assisting to bring to the warrant premises any equipment reasonably necessary for the examination, or processing, of things found at the premises to determine whether they are liable to seizure.

Subsection 3K(2) provides that, if it is not practicable to examine or process things at the warrant premises, or if the occupier of the premises agrees in

writing, things at the premises may be moved to another place so that the examination or processing can be carried out. For example a substance believed to be narcotics may be taken to a laboratory for analysis - it would not be practicable to analyse it at most premises. Under Section 3ZS items found not to be evidence of an offence must, unless forfeited, be returned.

Subsection 3K(3) provides that when anything is taken from premises to be examined or processed the occupier must, if practicable, be informed of the address, time and place of the examination and be allowed to attend the examination. This is linked to subsections 3K(1) and (2) and applies where it is reasonably necessary to examine or process the things in order to determine whether they are things that may be seized under the warrant. The requirement is safeguarded by subsection 3M(3) which relates to compensation payable for damage to equipment during processing of information.

Subsection 3K(4) enables police to operate equipment already at the warrant premises to carry out the examination or processing to determine whether the thing is liable to seizure. This is especially useful for scanning audio or video recordings and the like if the executing officer or constable believes on reasonable grounds that the equipment is suitable and if the examination can be carried out without damage to the equipment or the thing.

#### Proposed Section 3L - Use of electronic equipment at premises

Subsection 3L(1) provides that the executing officer or the constable assisting (who under subsection 3C(1) may be a person who is not a constable but is authorised by the executing officer to assist, for example a computer expert) may operate equipment at the premises to see whether evidential material is accessible if he or she believes that the equipment may be operated without damaging it. The Bill has departed from the Gibbs Review by referring to evidential material which is accessible rather than stored, given that satellite and cable technology is such that now information may be obtained from the equipment which is not actually stored (for example, a computer terminal).

Subsection 3L(2) provides that, if evidential material is accessible, the executing officer or constable assisting may seize the equipment or any disk, tape or other associated device, or operate the equipment to obtain a print out and seize documents produced, or copy the records to another storage device and remove it from the premises.

Subsection 3L(3) is intended to encourage the seizure of print outs or duplicate discs wherever possible. It provides that a constable may seize equipment under subsection (2) only if it is not practicable to put the material into documentary form or copy them to a storage device or if possession by the occupier of the equipment could constitute an offence. Where original material is seized

Section 3N requires the police to provide a copy of the thing or information to the occupier unless its possession constitutes an offence.

Subsection 3L(4) provides that the executing officer or constable assisting may secure the equipment by locking it up or guarding it if he or she believes on reasonable grounds that the evidential material may be accessible by operating the equipment at the premises but expert assistance is needed to operate the equipment and the evidential material may be destroyed or otherwise interfered with if the equipment is not secured in the meantime. This is necessary to ensure that where the equipment is more sophisticated than expected and cannot be accessed or moved, then the opportunity to obtain expert assistance and to preserve evidential material is not lost. Material accessible on a computer can of course be removed with a swift keystroke from an operator. It is possible to pre-program the equipment to erase the evidence in this way. This was not included in the Gibbs Review provision, but is necessary for it to be effective.

Subsection 3L(5) requires the giving of notice to the occupier in cases where equipment may be secured for a period not exceeding 24 hours.

Subsection 3L(6) allows the equipment to be secured for either 24 hours or such lesser period when expert assistance is obtained to operate the equipment for the purposes of the Act.

Subsection 3L(7) allows the executing officer to apply to the issuing officer for an extension of the time needed for securing the equipment if he or she believes on reasonable grounds that the expert assistance will not be available within that period. The application must satisfy the criteria in subsection 3L(4). The occupier must be given notice under subsection 3L(8) and has a right to be heard in relation to the application. Subsection 3L(9) provides that the application for an extension must be made in the same manner as an application for the issue of a search warrant.

#### Proposed Section 3M- Compensation

This section provides that if damage is caused to equipment as a result of it being operated as mentioned in sections 3K or 3L and the damage resulted from insufficient care being exercised either in selecting the person to operate the equipment or by the person operating it, compensation is payable to the owner.

Compensation is payable out of a special appropriation by the Parliament not from the normal Australian Federal Police budget. In determining the amount of damages payable regard is to be had to whether the occupier had provided any warning or guidance to the operation of the equipment. This is to minimise compensation in cases where there has been a deliberate programming of software to destroy or cause damage if not accessed in a particular manner or

where the occupier failed to mitigate damage by providing warning or guidance. The inclusion of these provisions was recommended by the Gibbs Review.

#### Proposed Section 3N- Copies of seized things to be provided

Subsection 3N(1) requires a constable, on request, to give a copy of a thing or information seized that can be readily copied. This does not apply if no original material was seized under subsection 3L(2) or if possession of the thing seized could constitute an offence.

#### Proposed Section 3NA - Occupiers to be present at search of premises

Proposed section 3NA provides that occupiers or their representatives may choose to observe the searching of the premises providing they do not impede the conduct of the search in any way. This has been included to minimise, as far as possible, the potential for actual or alleged planting of material on the premises by the police.

For practical reasons, this right is not intended to have priority over the important safeguards and obligations of Part 1C of the Crimes Act 1914 when they apply to the person at the same time as section 3NA. If the person has been arrested and is being interviewed in relation to the alleged offence at the same time as the search, Part 1C should operate without being affected by the right to observe the search. Part 1C authorises the police to conduct interviews for a specified time period (usually a maximum of 4 hours) and contains safeguards concerning electronic recording and legal representation in relation to the interview. There are circumstances where there are good police operational reasons for the search to be conducted at the same time as the interview. For example, where the operation is being co-ordinated with searches of other premises at the same time and it eliminates the chance of collusion among co-offenders. In other cases, time may be of the essence in terms of proceeding to other stages of the investigation.

For similar reasons, the right to observe the search should not preclude the police from searching 2 or more areas of the premises at the same time. In those circumstances the person can move from area to area or elect to observe particular parts of the search. In some cases it will be necessary to search different parts of the building at once because of its size or where there is an opportunity for the destruction or concealment of evidentiary material.

#### Proposed Section 3NB - Receipts for things seized

Proposed section 3NB provides that receipts are to be issued to occupiers for things seized. Under this provision it will be possible for the items to be listed on the same receipt. It is not envisaged that police would be required to identify

absolutely every item individually where those items can be adequately identified by a class description.

### Proposed Section 3P- Warrants by telephone and other electronic means

This section enables the issue of a warrant by telephone, telex, facsimile or other electronic means in an urgent case or where delay could frustrate the execution of the warrant. Urgency can arise because of circumstances requiring immediate action or where the remoteness of the location of the search involves unacceptable delay . An application under this section must include all the information provided in an ordinary application but, if necessary, the application may be made before the information is sworn.

The issuing officer is required to inform the applicant of the terms of the warrant by the appropriate electronic means and the applicant must complete a form of warrant which sets out the substance of those terms. The applicant must, not later than the day after expiry of the warrant, or the day after the warrant was executed, whichever is the earlier, give or transmit to the issuing officer the completed form of warrant and if the information had not been sworn, the sworn information.

In any court proceedings concerning the exercise of a power under the warrant, if the warrant signed by the issuing officer is not produced, the court is to assume, unless the contrary is proved, that the power was not duly authorised.

This provision is particularly necessary in remote areas or where for some reason a court employed justice of the peace, authorised officer or magistrate is not readily available. It avoids the need to rely on lay justices of the peace as an alternative. A lay justice of the peace cannot issue a search warrant under Part 1AA.

### Proposed Section 3Q - Restrictions on personal searches

Search warrants cannot authorise either a strip search or a search of a person's body cavities. Strip searches in a post arrest situation are dealt with in proposed sections 3ZF and 3ZG. Body cavity searches in relation to narcotics offences are dealt with in the Customs Act 1901.

### Division 3 - Stopping and searching conveyances

#### Proposed Section 3R - Searches without warrant in emergency situations

Sections 3R and 3S re-enact the substance of existing sections 10A and 10B of the Crimes Act 1914 which empower police to conduct a search of a conveyance in an emergency.

Section 3R applies where a constable suspects on reasonable grounds that a thing relevant to an indictable offence against any Commonwealth or Territory law, (excluding Australian Capital Territory law) is in an aircraft, vessel or vehicle. The constable must also suspect that it is necessary to seize the thing to prevent concealment, loss or destruction and that it is necessary to act without the authority of a search warrant because the circumstances are so serious and urgent. Under such circumstances a constable may stop, detain and search the conveyance, and seize the thing.

If in the course of the search the constable finds another thing relevant to any offence against the Commonwealth or Territory law the constable may seize it to prevent its concealment, loss or destruction because the circumstances are so serious and urgent.

Subsection 3R(4) provides that the constable must exercise his or her powers subject to section 3S which provides various safeguards.

#### Proposed Section 3S - How a constable exercises power under section 3R

When a constable exercises powers under section 3R he or she may use such assistance as is necessary, must search the conveyance in a public place or place to which the public have ready access and must not detain the conveyance for longer than is necessary.

While the constable may use necessary and reasonable force to open a part of the conveyance or any container he or she must not cause damage unless the person in charge of the conveyance has been given a reasonable opportunity to open that part or container. There is an exception to this requirement, where the person in charge of the conveyance has fled and therefore cannot be given an opportunity to open the container, the constable may open it.

### Division 4 - Arrest and related matters

#### Proposed Section 3T - Requirement to furnish name etc.

This section empowers a constable to ask the name and/or address of a person where these are not known to the constable and he or she believes that the

person may be able to assist inquires in relation to an indictable offence that the constable has reason to believe has been or may have been committed. It varies from the provision recommended by the Gibbs Review by not applying to offences that the constable has reason to believe are likely to be committed.

Subsection 3T(2) creates, subject to certain conditions precedent, an offence of failing to provide or falsifying the information requested. The maximum penalty is 5 penalty units (this is \$500). The conditions are that the constable informs the person of the reason for the request and compliance by the constable with proposed subsection 3T(3).

Subsection 3T(3) requires that when requested the constable must inform the person of his or her own name and/or place of duty, and if in plain clothes, identification. There is a penalty of 5 penalty units (this is \$500) if the constable does not comply with the request. These safeguards were recommended by the Australian Law Reform Commission and the Gibbs Review.

#### Proposed Section 3U - Power of arrest without warrant by constables

This section replaces the existing powers of arrest without warrant conferred on constables which are contained in sections 8 and 8A of the Crimes Act 1914 and are repealed by clause 5 of this Bill. The new provision details the circumstances where a person may be arrested without warrant. These relate to varying specified situations where proceeding by summons would not be effective.

Subsection 3U(1) provides that a constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds firstly that the person has committed or is committing the offence and secondly that proceedings by summons against the person would not achieve one or more of a number of specific purposes. Those purposes are, ensuring the person's appearance in court, preventing a repetition or continuation of the offence or the commission of another offence, preventing the concealment, loss or destruction of evidence, preventing interference with witnesses, preventing the fabrication of evidence or preserving the safety or welfare of the person. These purposes were recommended by the Gibbs Review.

Subsection 3U(2) requires the constable in charge of the investigation who ceases to believe that a person arrested but not charged either committed the offence or that custody is necessary to achieve a purpose referred to in subsection (1) to release the person.

Subsection 3U(3) provides that a constable may, without warrant, arrest a person who he or she believes on reasonable grounds has escaped from lawful custody. It is inappropriate that the restriction relating to proceedings by



summons should apply in these circumstances. This reflects the view of the Gibbs Review.

### Proposed Section 3V - Arrest of prisoner unlawfully at large

This section is in the same terms as the existing section 48B of the Crimes Act which is repealed by clause 5 of this Bill. The section provides that a constable may, without warrant, arrest a person who the constable believes on reasonable grounds to be a prisoner 'unlawfully at large.' This is intended to cover persons who leave some place of detention with permission and who fail to return as required or who is released in error, for example a case of mistaken identity. The arresting constable must, as soon as practicable, take the person before a Magistrate. If the Magistrate is satisfied that the person is unlawfully at large he or she may issue a warrant authorising that person to be conveyed to prison (or other place of detention) to undergo the term of imprisonment or other detention that the person is required by law to undergo.

In this section 'prisoner unlawfully at large' includes a person who is at large and the subject of a detention order made under Part 1B of the Crimes Act 1914 consequent on being found by a court to be unfit to be tried, being acquitted of an offence on grounds of mental illness or being found to be suffering from a mental illness or intellectual disability.

### Proposed section 3W - Power of arrest without warrant of a person on bail

This section empowers a constable to arrest without warrant a person who has contravened, or is about to contravene, a condition of bail.

Subsection 3W(1) provides that this power is exercisable even though the bail condition was imposed in a State or Territory other than the one in which the person is arrested. Persons charged with offences against Commonwealth laws are dealt with in State Courts under State bail procedures applied by Section 68 of the Judiciary Act 1903. Subsection 3W(1) is necessary because there is no existing mechanism for arrest without warrant of a person bailed in another jurisdiction. For serious Commonwealth offences it is not unusual for a condition of bail to be that a person not go to an airport or other place of departure from Australia. If such a person is found at an international airport in another State it is essential that police have power to prevent the person leaving Australia. It is also important the police are able to prevent any interference with witnesses and similar conduct which may amount to a breach of bail conditions.

Subsection 3W(2) provides that a person arrested under subsection (1) must be taken before a Magistrate as soon as practicable. Under subsection 3W(3) a person arrested in the State or Territory in which the bail condition was imposed is to be dealt with under the relevant applied State or Territory law.

Subsections 3W(4) and (5) provide that if a person is brought before a magistrate in a State or Territory other than the one in which the bail condition was imposed, the Court can release the person without effecting the original bail order or remand the person on bail or in custody pending arrangements under the Service and Execution of Process Act 1992 for the obtaining of a warrant authorising the transfer of the person to the State or Territory in which the bail condition was imposed.

#### Proposed Section 3X - Power of arrest without warrant by other persons

This section replaces the existing power of arrest without warrant for breaches of the peace by any person under section 8 of the Crimes Act 1914 referred to as 'citizen's arrest', which is repealed by clause 5.

Subsection 3X(1) provides that a person who is not a constable may, without warrant, arrest another person if he or she believes on reasonable grounds that the other person is committing or has committed an indictable offence and that proceedings by summons against the other person would not achieve one or more of the purposes referred to in subsection 3U(1). This is a more restricted power than exists at present where there is no requirement to be satisfied that a summons would be ineffective before a citizen can arrest.

Subsection 3X(2) provides that a citizen who arrests another person under subsection (1) must, as soon as practicable after the arrest, arrange for the person, and any property found on that person, to be delivered into the custody of a constable. This may involve either taking the person to police or calling police. This requirement is new and reflects the views of the Gibbs Review and the current law in the ACT.

#### Proposed Section 3Y - Warrants for arrest

This provision does not confer a power to issue warrants of arrest, these powers are still conferred by the State and Territory laws applied by the Judiciary Act 1903. These provisions merely specify additional procedures which must be complied with before a warrant of arrest can be issued for a Commonwealth offence. These procedures were recommended by the Gibbs Review. This section provides that an issuing officer must not issue a warrant for the arrest of a person unless the information is on oath and generally the informant has given the officer an affidavit setting out the reasons why the warrant is sought including the reasons why it is believed that the person committed the offence and why it is claimed that proceedings by summons would not be appropriate. The requirement for the affidavit contained in paragraph 3Y(1)(b) does not apply where the warrant is required to make an extradition request of any foreign country.

Any further information requested by the issuing officer concerning the reasons for which the warrant is sought must also be provided and the issuing officer must be satisfied that there are reasonable grounds for the issue of the warrant. The issuing officer must write on the affidavit which of the reasons specified in the affidavit and any other reasons he has relied on to justify the issue of the warrant.

#### Proposed Section 3Z - Power to enter premises to arrest offender

Subsection 3Z(1) provides that if a constable has power under a warrant to arrest a person and the constable believes on reasonable grounds that the person is on any premises he or she may enter the premises using reasonable force at any time, subject to the conditions in subsection 3Z(3) being met, for the purpose of searching for, and arresting, the person.

Subsection 3Z(2) provides that if a constable has power under proposed section 3U to arrest a person without warrant for an indictable offence and the constable believes on reasonable grounds that the person is on any premises he or she may enter the premises using reasonable force at any time, again subject to subsection 3Z(3) for the purpose of searching for, and arresting, the person. At common law a constable has power to enter premises to effect an arrest with or without the authority of a warrant. These provisions restrict that power in relation to arrest without warrant to indictable offences.

Subsection 3Z(3) states the general rule that entry to domestic premises to effect arrest should not be conducted at night. It precludes a constable entering a dwelling house (as defined) to arrest a person between 9 pm and 6 am on the following day unless the constable believes on reasonable grounds that it would not be practicable to arrest the person either at the dwelling house or elsewhere, at another time or believes on reasonable grounds that it is necessary to prevent the concealment, loss or destruction of evidence.

Subsection 3Z(4) provides that "dwelling house" includes a vehicle, a vessel or an aircraft or a room in a hotel, motel, boarding house or club in which people ordinarily retire for the night.

#### Proposed Section 3ZA - Use of force in making arrest

Subsection 3ZA(1) restates the common law principle that, in making an arrest, a person must not use more force, or subject the arrested person to greater indignity, than is necessary and reasonable to make the arrest or prevent the escape of the arrested person after the arrest.

Subsection 3ZA(2) provides that when arresting a person a constable must not do anything likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that is necessary to protect

life or prevent serious injury to another person, including the constable. If the person is attempting to escape by fleeing, the constable must not, as a general rule, act in a way likely to cause serious injury or death unless the person has been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner. This provision restates the common law with some of the restrictions applicable in the Code States (Queensland, Western Australia, Tasmania) superimposed in the manner recommended by the Gibbs Review.

#### Proposed Section 3ZB - Persons to be informed of grounds of arrest

The section provides that a citizen, or constable, who arrests a person must inform the person, at the time of arrest, of the offence for which that person is being arrested. This does not require a technical statement of the terms of the offence but merely of its substance. This requirement does not apply if the arrested person should, in the circumstances, know the substance of the offence or if the arrested person's actions make it impracticable, for example vigorous resistance to the arrest. This requirement exists at common law.

#### Proposed Section 3ZC - Power to conduct a frisk search of an arrested person

This section restates the common law power of a constable upon or after arrest, to conduct a frisk search (quick running of the hands over the person's outer garments) and seize any 'seizable items' being anything that would present a danger to a person or that could be used to assist a person to escape. The constable must suspect on reasonable grounds that it is prudent to ascertain if the arrested person is carrying any seizable item.

'Frisk search' and 'seizable item' are defined in subsection 3C(1) and pursuant to section 3ZO must, if practicable, be conducted by a person of the same sex.

#### Proposed Section 3ZD - Power to conduct an ordinary search of an arrested person

This section provides that if a constable upon or after arrest suspects that the arrested person is carrying any evidentiary material in relation to an offence or a seizable item he or she may conduct an 'ordinary search'. This is a power exercisable as an incident of arrest at common law.

'Ordinary search' is defined in subsection 3C(1) and means a search of a person, or of articles in the person's possession, that may include requiring the removal of specified outer clothing, gloves, shoes and hat and an examination of those items. Where practicable, such a search must be conducted by a person of the same sex as the person to be searched- section 3ZO.

### Proposed Section 3ZE - Power to conduct search of arrested person's premises

This section provides that a constable who arrests a person at premises for an offence, or who is present at such an arrest, may seize things in plain view at those premises which the constable believes to be evidential material of that, or another offence, or a seizable item. While a thing must be in plain view before it can be seized this does not prevent its movement or manipulation to determine whether it is evidential material or a seizable item. This power is more limited than that available in the United Kingdom under the Police and Criminal Evidence Act 1984 in that it precludes a full search of the premises. Police would need to obtain a warrant, at least by telephone, before that could be done.

### Proposed Section 3ZF - Power to conduct an ordinary search or a strip search

In line with the recommendations of the Gibbs Review, subsection 3ZF(1) provides that if a person who has been arrested for an offence is brought to a police station, a constable may, if an ordinary search has not already been conducted at the time of arrest, conduct an ordinary search, or subject to the stipulated conditions, a strip search.

'Strip search' is defined in subsection 3C(1) and means a search of a person, or of articles in the person's possession and may include requiring the removal of all the person's clothes and an examination of the person's body and of the garments. However, this provision does not confer power to take any body samples or search body cavities but only to examine the body surface for things such as bruises, scratches and identifying marks.

Section 3Q makes it clear that nothing in this Part can authorise a search of a person's body cavities. The law relating to such searches will be addressed in a separate amendment which is being developed by the Standing Committee of Attorneys-General. In the meantime section 3ZV provides that Part 1AA is not intended to limit or exclude the operation of another law of the Commonwealth (for example, section 219ZF of the Customs Act 1901), a law of a Territory or a law of a State or Territory applied by the Judiciary Act 1903.

Subsection 3ZF(2) provides that a strip search may be conducted if a constable suspects that the person is in possession of evidential material or a seizable item or that a visual inspection of the person's body will provide evidence of the person's involvement in an offence. Before the search may be conducted the constable must also suspect that it is necessary to conduct a strip search to recover that item, or discover that evidence, and must obtain the approval of a police officer of the rank of superintendent or higher.

Subsection 3ZF(3) provides that a strip search may also be conducted if the arrested person consents in writing but this is subject to paragraphs 3ZG(1)(e) and (f) which provide that a child under 10 must not be strip searched and that,

except where the person is arrested and charged, a court order is required where the child is a least 10 but not 18 or the person is incapable of managing his or her affairs. In other cases the remaining provisions must be complied with.

Subsection 3ZF(4) provides that the strip search may be conducted in the presence of a medical practitioner who may assist in the search.

Subsections 3ZF(5) and (6) provide that the approval from the senior police officer to conduct a strip search may be obtained by telephone or by electronic means and the officer who gives, or refuses, such approval must make a record of the decision and the reasons for it.

Subsections 3ZF(7) and (8) provide that such force as is necessary and reasonable in the circumstances may be used to conduct a strip search and any items of the kind referred to in subsection 3ZF(2) found may be seized.

#### Proposed Section 3ZG - Rules for conduct of strip search

Subsection 3ZG(1) sets out the procedure to be followed whenever a strip search is conducted as an incident of arrest. A strip search must be conducted in private by a constable of the same sex as the person being searched and must not involve a search of the person's body cavities. Except in the case of a medical practitioner or a parent, guardian or personal representative (where the person being searched has no objection), a strip search must not be conducted in the presence, or view, of a member of the opposite sex nor in the presence of a person whose presence is not necessary for the purposes of the search.

It also provides that a child under 10 must not be strip searched and that, except where the person is arrested and charged, a court order is required where the child is a least 10 but not 18 or the person is incapable of managing his or her affairs. This is designed to protect the interests of young people and those who are so incapable. Parental consent alone may not always be an adequate safeguard. Additionally, in most jurisdictions a child under 10 is not criminally responsible for an offence. The proposed Model Criminal Code (Chapter 2) recommends that 10 should be the national age of criminal responsibility.

The rights of children and incapable persons are adequately protected by a requirement that a strip search must only be conducted in the presence of a parent or guardian or personal representative if their presence is acceptable to the person. Furthermore, a strip search must not involve the removal of more garments, or involve more visual inspection, than is reasonable and necessary for the purposes of the search.

Subsection 3ZG(2) requires the court to have regard to the seriousness of the offence, the age or disability of the person, and such other matters as it thinks fit

when determining whether a young person or an incapable person should be the subject of a strip search.

Subsection 3ZG(3) provides that a strip search may only be conducted in the presence of a medical practitioner of the opposite sex to the person being searched if a medical practitioner of the same sex is not available within a reasonable time. Subsection 3ZG(4) allows a parent, guardian or personal representative of a different sex to be present where the person being searched has no objection.

Subsection 3ZG(5) provides that if any garments are seized the person must be given adequate clothing.

Proposed Section 3ZH- Taking fingerprints, recordings, samples of handwriting or photographs

The provisions of State and Territory law relating to identification material vary considerably and it is considered desirable to have uniform provisions applicable to the investigation of Commonwealth offences.

Subsection 3ZH(1) defines 'identification material' for the purposes of this section and proposed sections 3ZI and 3ZJ as prints of hands, fingers, feet or toes, voice recordings, handwriting samples or photographs (including video recordings) but excluding tape recordings of a person's responses or confessions made during the investigation of Commonwealth offences under sections 23U and 23V in Part 1C of the Crimes Act 1914.

Subsection 3ZH(2) provides that a constable must not take identification material from a person who is in lawful custody for an offence except in accordance with this section. A constable cannot require a person not in custody to submit to the taking of identification material but a person who is 18 or over and is not incapable can consent to its taking. This latter provision would permit a person to supply such material on a voluntary basis, for example, to eliminate himself or herself as a suspect in a police inquiry, or to afford evidence that the person is a victim of crime, for example, assault.

Subsection 3ZH(3) provides that if a person is in lawful custody in respect of an offence, a constable of the rank of sergeant or higher or who is for the time being in charge of a police station may take identification material from the person if;

- the person consents in writing (except where the person is a suspect who has not been arrested and charged and is between the ages of 10 and 18 or who is incapable, in which case subsection 3ZH(6) applies); or

- . the constable believes on reasonable grounds that it is necessary to do so in order to establish the identity of the person, or to identify the person as the person who committed the offence, or to provide evidence of the offence; or
- . the constable suspects on reasonable grounds that the person has committed another offence and the material is to be taken for the purpose of identifying the person as committing, or to provide evidence of, the other offence.

Subsection 3ZH(4) provides that a constable may use reasonable force in the taking of identification material.

Subsection 3ZH(5) has the effect of prohibiting the taking of identification material children under the age of 10 but this prohibition is qualified by subsection 3ZH(9). In most jurisdictions children that age cannot be suspects because the age of criminal responsibility is 10. It is necessary to permit the taking of identification material from young children who are not suspects where they may have been the victim of the crime, for example in a child abduction it might be necessary to establish through the use of fingerprints that the child was at a particular place at some time. This is provided for in subsection 3ZH(9).

Subsection 3ZH(6) provides that identification material cannot be taken from a suspect who is at least 10 but under 18 or who is incapable and who has not been arrested and charged unless there is a court order authorising the taking. This is designed to protect the interests of young people and those who are incapable. Parental consent alone may not always be an adequate safeguard. Subsection 3ZH(7) requires the court to have regard to the seriousness of the offence, the age or disability of the person, and such other matters as it thinks fit when determining whether a young or incapable person should have identification material taken from them.

The rights of children and incapable persons are adequately protected by a requirement in subsection 3ZH(8) that the taking of identification material must only be conducted in the presence of a parent or guardian or personal representative if their presence is acceptable to the person.

Subsection 3ZH(9) provides that in the case of children under the age of 10, or incapable people who are not suspects (victims), the question of whether the identification material should be taken would always be determined by a court. In those cases they will, in most instances, not be able to provide meaningful input and should have the protection of the court in all circumstances.

Subsection 3ZH(10) provides that identification material may not be taken from a child who is at least 10 but under 18 and who is capable of managing his or



her affairs and is not a suspect (a victim) unless both that person and the parent, guardian or personal representative agree. If there is no agreement then a court must determine whether the material should be taken. This provides for input from the child or the incapable person and the protection of the court where agreement cannot be reached. In some circumstances the child or incapable person's interests may not be adequately protected by the parent, guardian or personal representative, (for example, where there has been abuse of the child).

Subsection 3ZH(12) deals with adults who are capable of managing their own affairs and who are not suspects. Identification material may be taken from them if the person consents in writing.

#### Proposed Section 3ZI- Destruction of identification material

This section is intended to prevent the indefinite retention of identification material relating to persons who have not been convicted of an offence.

Unless criminal proceedings have been instituted within 12 months, subsection 3ZI(1) requires the destruction of identification material unless there is an order to the contrary by a magistrate made under subsection 3ZI(3).

Where proceedings have commenced and resulted in either a finding of guilt but no conviction is recorded under section 19B of the Crimes Act 1914 or an acquittal which is no longer the subject of an appeal and no retrial has been ordered, subsection 3ZI(2) requires that any identification material must also be destroyed unless an investigation into, or proceedings for, another offence to which the identification material is relevant is pending.

Under subsection 3ZI(3) a magistrate can authorise police to retain identification material which would otherwise need to be destroyed if he or she is satisfied that retention is justified by the existence of circumstances which render application of the general rule inappropriate. It is not intended that the threshold of 'special' circumstances be particularly difficult to cross. There will be many serious offences against Commonwealth law where investigations will be protracted through no fault of police. Nor is it intended that material be destroyed because it was taken in relation to one offence which is not being proceeded with or of which the person was acquitted if charges are pending in relation to a related offence or another offence.

#### Proposed Section 3ZJ - Offence of refusing to allow identification material to be taken

This section provides that if a person is convicted of an offence, the judge or magistrate presiding at the proceedings may order either that the person attend a police station, or that a constable go to the person if in detention, to allow the person's fingerprints or a photograph to be taken. It is an offence for a person ,

without reasonable excuse, to fail or refuse to allow those fingerprints or a photograph to be taken. The maximum penalty for an offence under this section is 12 months imprisonment. This provision was recommended by the Gibbs Review to cover situations where police would be entitled to retain fingerprints had they been taken during the investigation. This would permit the taking of fingerprints and photographs in cases where a person is convicted after proceedings instituted by summons and avoids a temptation to proceed by way of arrest. This is necessary for the identification of the person in the event that he or she commits another offence at some other time. Identification is necessary for investigative purposes and to ensure that the person is appropriately sentenced for any subsequent offence, (that is, prior convictions are appropriately taken into account).

### Proposed Section 3ZK - Identification parades

An identification parade is the preferred method of identification in relation to offences. A parade must be held if the suspect requests it and it is reasonable or may be held if he or she consents.

In some circumstances, even though a suspect requests an identification parade, it may not be reasonable to conduct one. For example, other evidence of identity such as fingerprints or forensic samples may establish identity beyond reasonable doubt. Another example would be where the witness has a close relationship with the suspect identified by him or her. In these circumstances the holding of an identification parade would not be reasonable. Likewise it may not be reasonable to require an identification parade in the case of minor offences.

Subsection 3ZK(3) provides that an identification parade must not be held unless the suspect is informed that:

he or she can refuse to take part in the parade; and

if he or she, without reasonable excuse, refuses to participate, evidence of that refusal and of other identification of the suspect by a witness may be given in subsequent proceedings, and

a legal representative or other person may be present while the person is deciding whether to take part in the parade and during the parade if arrangements can be made for that presence within reasonable time.

Identification parade procedures in proposed subsection 3ZK(3)(c) ensure that a suspect, (whether the person is an adult, child or incapable person) is entitled to have a legal representative (or other person) present while he or she is deciding whether to take part in an identification parade if this can be done in a reasonable time. This is designed to ensure that the suspect is aware of the

consequences of not participating in the parade as set down in proposed subsection 3ZK(7).

Subsection 3ZK(4) provides that the giving of this information must be either videotaped or audiotaped. Subsection 3ZK(5) requires an identification parade to be arranged and conducted fairly so as not to prejudice the suspect.

Subsection 3ZK(6) provides a number of rules for the conduct of an identification parade. At present these rules are generally set out in police standing orders but the most significant are set out in the Bill as recommended by the Gibbs Review. These rules are to apply without limiting the intent of subsection 3ZK(5) and include that:

- . the parade consists of at least 9 persons;
- . they resemble the suspect in age, height and general appearance;
- . where practicable, no constable who has participated in the investigation may take part in arranging, or conducting, the identification parade;
- . the suspect can select where he or she stands in the parade and may change places after each viewing by a witness;
- . witnesses view the parade separately and not communicate with each other;
- . the parade be videotaped, or, if this is not practicable, photographed in colour and all reasonable steps are taken to record everything said and done at the parade;
- . copies of the videotape or photograph and record be given to the suspect;
- . the suspect may have a legal representative or other person of his or her choice present.

Subsection 3ZK(7) provides that certain questions are to be decided according to common law in relation to whether evidence of a suspect's refusal to participate in a parade is admissible, what inferences may be drawn if the refusal is admissible and whether evidence of alternative methods of identification is admissible after such refusal.

Subsection 3ZK(8) provides that if a witness under the supervision of a constable is to attempt to identify a suspect otherwise than during an identification parade, the constable must ensure that the attempted identification is done in a manner that is fair to the suspect.

### Proposed Section 3ZKA - Identification Parades for Children and Incapable Persons

This section sets out procedures for identification parades for children under 18 years and incapable persons. These provisions ensure that no suspect under 10 years can participate in an identification parade and that a suspect who is an incapable person must not either, unless there is a court order.

In relation to children who are at least 10 but under 18, it provides for protection in the two circumstances where attendance at an identification parade becomes an issue.

First, where the person is asked to agree to a request that they participate in the parade. Proposed subsection 3ZKA(3) provides that a child suspect who is at least 10 but under 18 cannot agree to participate in an identification parade unless there is also agreement from the parent or guardian (if that person is acceptable to the child) or personal representative. If there is no agreement then a court must determine whether the person should participate in the parade. This provides for input from the child and the protection of the court where agreement cannot be reached. In some circumstances the child's interests may not be adequately protected by the parent, guardian or personal representative, (for example, where there has been abuse of the child).

Secondly, where the person proposes on his or her own initiative to request the police to hold an identification parade (which under proposed subsection 3ZK(2)(b) the police must hold), in the case of a child suspect the request may only be made if there is also agreement from the parent, guardian (if that person is acceptable to the child) or personal representative. If there is no agreement then a court must determine whether the person should participate in the parade. This is also provided for by proposed subsection 3ZKA(1). This also provides for input from the child and the protection of the court where agreement cannot be reached.

### Proposed Section 3ZL- Identification by means of photographs

Subsection 3ZL(1) prevents the use of photographs if a suspect is in custody, or is otherwise available to take part in an identification parade, unless the suspect has refused to take part in a parade, or the holding of a parade would either be unfair or unreasonable. This reinforces the position of identification parades as the preferred mode of identification.

Subsection 3ZL(2) sets out a number of other procedural requirements for the use of photographs to ascertain the identity of a suspect who is in custody or is otherwise available if an identification parade is not to be held for the reasons set out in subsection 3ZL(1). These requirements include the number and nature of photographs or pictures to be used, the keeping and provision of copies of

records and allowing inspection of photographs and pictures by the suspect or his or her legal representative. It also provides that the suspect or his or her legal representative is informed in writing that a copy of the record identifying each photograph shown to witnesses is available.

If practicable the photograph or picture of the suspect included in the series should have been taken or made after the suspect was arrested or considered as a suspect. An investigating constable who shows photographs or pictures to a witness for the purpose of ascertaining, or obtaining evidence of, the identity of a suspect must not act unfairly towards the suspect or suggest that a particular photograph or picture is that of the suspect.

Subsection 3ZL(3) provides that if a photograph or picture of a suspected person, taken, or made, after arrest or after the person became a suspect, is shown to a witness and proceedings in relation to an offence are brought before a jury and the photograph or picture is admitted into evidence, the jury must be informed of the time when the photograph was taken. This provision is intended to overcome the possible prejudice to an accused person which might arise from the jury concluding that, because police were in possession of a photograph of the accused, the accused was previously known to police.

Subsection 3ZL(4) provides that if a suspect is in custody an investigating constable must not use a composite (identikit) picture or a picture of a similar kind for the purpose of assisting the witness to describe that suspect.

Subsection 3ZL(5) provides that if a witness has been shown a composite picture and subsequently a suspect is taken into custody for the offence, the constable should ask the witness to attend an identification parade involving the suspect and make the necessary arrangements if the witness is willing to attend.

Subsection 3ZL(6) provides that if after a witness has been shown a composite picture a person is subsequently charged with the offence, the constable must, upon request, provide the person charged, or his or her legal representative, with particulars of the picture and any comments by the witness concerning the picture.

Subsection 3ZL(7) provides that if a suspect is in custody and an investigating constable wishes to investigate the possibility that another person committed the offence, subsection 3ZL(4) does not prevent a constable showing a witness a composite picture for the purpose of assisting a witness to describe a person other than the suspect.

Proposed Section 3ZM - Identification procedures where there is more than one suspect

This section deals with the situation where police wish to use photographs or to conduct an identification parade to ascertain either which of several suspects committed an offence or to establish the identities of several suspects who may have jointly committed an offence. In both cases the section requires that a separate identification process be undertaken for each suspect. This would prevent more than one suspect being placed in one identification parade or a photograph of more than one suspect being placed among a particular series of photographs being shown to a witness.

Proposed Section 3ZN - Descriptions

Subsection 3ZN(1) requires a description of a suspect given to a constable to be recorded and retained until any proceedings are completed.

Subsection 3ZN(2) provides that subject to subsection (3) a constable must, on request, provide a person charged with an offence with the name of every person who is known to claim to have seen a person who is suspected of being involved in the offence.

Subsection 3ZN(2A) introduces a requirement that the constable must notify the person charged in writing that a copy of the record of a description of a person who is suspected of being involved in the commission of the offence is available for collection.

Subsection 3ZN(3) provides that if the constable suspects on reasonable grounds that providing the name of a person could place the person in danger or expose the person to harassment or unreasonable interference, any description of the suspect may be provided without identifying the person who provided the description.

Division 5 - General

Proposed Section 3ZO - Rules for conduct of ordinary and frisk searches

Both ordinary and frisk searches must also, if practicable, be conducted by a person of the same sex as the person being searched.

Proposed Section 3ZP - Announcement before entry

This requirement was not addressed by the Gibbs Review but is based on the recommendations of Judge Staunton following the Brennan inquiry and the inquiry into the Gundy case by the Royal Commission into Aboriginal Deaths in

Custody. Section 3ZP provides that before any person enters premises under a search warrant or for the purposes of arresting a person, the constable must announce that he or she is authorised to enter and give any person at the premises an opportunity to allow entry to the premises unless there are reasonable grounds to believe that immediate entry to the premises is required to ensure the safety of a person or that the effective execution of the search warrant or the arrest is not frustrated.

#### Proposed Section 37Q - Offence for making false statements in warrants

This section creates an offence of knowingly making a false or misleading statement in an application for a warrant under this Part. The maximum penalty for an offence under this section is imprisonment for 2 years.

#### Proposed Section 37R - Offences relating to telephone warrants

This section creates offences arising from the preparation, and execution, of a form of warrant obtained by telephone or other electronic means under section 3P. It is an offence for a person to name a person in a form of warrant as the issuing officer unless that officer issued the warrant, or to knowingly state in a warrant something materially different from that authorised by the issuing officer. It is also an offence to purport to execute an unauthorised or false form of warrant or to give an issuing officer a form of warrant that is not the form that the person purported to execute. Offences under this section are punishable by imprisonment for up to 2 years. These offences are intended to prevent abuses of telephone search warrants by police and were recommended by the Gibbs Review.

#### Proposed Section 37S - Retention of things which are seized

Subsection 37S(1) provides that subject to a contrary order of the court, where things are seized under this Part they must be returned if the reason for their seizure ceases to exist or it is decided that the seized items are not to be used in evidence. Additionally, if a constable seizes a thing in an emergency situation under proposed section 3R, the constable must return it when the reason for its seizure no longer exists or it is decided that it is not to be used in evidence or 60 days have elapsed since seizure, whichever occurs first. This reflects the fact that seizure in these circumstances is not judicially sanctioned and follows section 10D of the Crimes Act 1914 which is to be repealed.

The exceptions to this are where the thing is forfeitable (for example, drugs), there is a dispute as to the ownership of the thing, or proceedings in respect of which it may afford evidence have been instituted or its retention is specifically authorised by law or a court order.

Subsection 3ZS(2) provides that, subject to certain exceptions, where goods have been seized by way of emergency search, they must be returned after 60 days. The exceptions are, in addition to those set out in subsection 3ZS(1), are that relevant proceedings have been instituted and are not concluded, a court has ordered to the contrary pursuant to section 3ZT or there are other lawful grounds to retain, destroy or dispose of the things.

Proposed Section 3ZT- Court of summary jurisdiction may permit a thing to be retained

Before the end of 60 days after emergency seizure under section 3R or before the end of a period previously specified in an order of a court, if proceedings in which the thing may be evidence have not commenced, the constable may apply for an order to retain the item for a further period. The police are required to notify each person the constable believes has an interest in an application for an extension of the 60 day period during which the police may retain seized items. The constable is required to take reasonable steps to discover who has an interest in the retention of the thing.

The court may order retention if it is satisfied that it is necessary for an investigation or prosecution.

Proposed Section 3ZU - Law relating to legal professional privilege not affected

This section puts it beyond doubt that this Part does not in any way affect the law relating to legal professional privilege. Under that law at present, documents which are subject to legal professional privilege cannot be seized. Guidelines have been established between legal professional bodies and the Australian Federal Police for the execution of search warrants on solicitors' and Law Society premises which prevent police from inspecting documents for which privilege is claimed until the validity of the claim has been determined.

Proposed Section 3ZV - Laws relating to taking forensic samples not affected

This section provides that nothing in the Bill is intended to limit, or exclude, another law of the Commonwealth or of a Territory, or a law of a State or Territory applied by section 68 of the Judiciary Act 1903 relating to the taking of forensic samples. This ensures that despite some references in the Bill to the taking of forensic samples (excluding taking of identification material as defined in proposed section 3ZH) police investigating Commonwealth offences will be able to avail themselves of any other relevant laws (for example, section 219ZF of the Customs Act 1901). The Gibbs Review made recommendations concerning the taking of body samples, but it was decided to defer implementing that aspect of the Review at this stage pending agreement at the Standing Committee of Attorneys-General on agreed uniform procedures in all jurisdictions.



### Clause 5 - Repeals

This clause repeals the existing sections of the Crimes Act 1914 relating to arrest, search warrants for general offences and search warrants in cases of suspected espionage. Section 48B dealing with the arrest without warrant of persons unlawfully at large is repealed and replaced by proposed section 3V. Sections 10A and 10B dealing with searches without warrant in emergency situations are also repealed and are re-enacted as sections 3R and 3S. The Gibbs Review recommended the repeal of section 82 on the basis that there is only justification for a single search warrant procedure in the Crimes Act 1914.

### Clause 6 - Amendments of other Acts

This clause amends the Acts set out in the Schedule to the Bill. The Schedule to the Commonwealth Places (Application of Laws) Act 1970 and paragraph 5(4)(a) of the Crimes at Sea Act 1979 are amended to substitute a reference to proposed Part IAA (other than section 3X) for references to sections 8A and 10 of the Crimes Act 1914 which are repealed by Clause 5 of this Bill.

Under the former two Acts, where arrangements exist with the States, section 8A (arrest without warrant by a constable) and section 10 (search warrants) do not apply to matters arising under those two Acts. This is only of practical relevance to the Commonwealth Places (Application of Laws) Act 1970 as there are no arrangements under the Crimes at Sea Act 1979. The proposed amendments will preserve this situation for the new arrest and search warrant powers contained in the Bill.

The clause also amends an drafting error in a previous amendment to those Acts by removing an unnecessary reference to section 16BA of the Crimes Act 1914 in each Act. Section 16BA falls within "the provisions of Divisions 1 to 9 (inclusive)..... of the Crimes Act 1914" which are already excluded from application by the relevant provision in each Act. Furthermore, the clause also amends the definition of "external search" contained in section 4 of the Customs Act 1901 to enable items in the possession of a person, such as baggage, to be searched. This will make the definition of "external search" in the Customs Act more consistent with the definition of 'ordinary search' under proposed subsection 3C(1) of this Bill.











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