

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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

**SUPPLEMENTARY EXPLANATORY MEMORANDUM**

Amendments to be Moved on Behalf of the Government

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



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GOVERNMENT AMENDMENTS

General Outline

These amendments have been prepared in response to suggestions raised at the hearing of the Senate Standing Committee on Legal and Constitutional Affairs and accords with the recommendations of the Government members of that Committee.

The primary purpose of the amendments is to increase safeguards available to persons and their property when subject to search warrants and procedures ancillary to arrest. In the case of property it is intended that proper notice be given to occupiers that their equipment is to be moved elsewhere for examination. Subject to practical considerations, occupiers would be allowed to be present at searches provided they do not impede the search and there is a requirement to issue receipts to occupiers where things are seized, (this is currently left to police procedures). Furthermore, the police would be required to take reasonable steps to discover who has an interest in seized property and notify them of any application made to retain the property beyond the initial seizure period of 60 days.

The amendments provide that written notices must be given to persons to ensure they are aware they may retain copies of records of photographic identification procedure and of descriptions. Further, those who are requested to attend an identification parade would be entitled to have a lawyer present when deciding whether to participate or not .

Children and incapable persons are to be given added protection under the sections relating to strip searches, the taking of identification material and identification parades. It is now required that presence of a parent or guardian must be acceptable to the child. Furthermore, a child or incapable person who is not a suspect and the parent, guardian or representative must agree to the taking of identification material from the child or incapable person or that person's participation in an identification parade. If agreement cannot be reached, then a decision on these matters must be made by a court. These provisions have been inserted to ensure, as far as is possible, that children and incapable persons are not overborne by persons who may not be acting in their best interests.

FINANCIAL IMPACT

The amendments are not expected to have any financial impact on Government expenditure.

## NOTES ON CLAUSES

### Amendment (1)

This amendment to proposed section 3K(3) makes it clear 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. Previously this provision was to only apply to 'electronically stored information'.

### Amendment (2)

This amendment proposes that new sections 3NA and 3NB be inserted.

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 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.

#### Amendment (3)

Proposed paragraph 3ZG(f)(ii) is amended to ensure the rights of the child and incapable persons are adequately protected and provides 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. Previously it provided that the search be conducted in the presence of a parent or guardian or a personal representative but only dealt with the question of acceptability in relation to the personal representative.

#### Amendment (4)

This amends proposed sub-section 3ZH(8) to provide for the same changes contained in Amendment (3) where identification material is being taken from a person under 18 years or an incapable person.

Proposed new sub-section 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.

It also includes new sub-section 3ZH(10) which 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).

#### Amendment (5)

This provides for a cross reference between the identification parade provision, proposed section 3ZK, and proposed section 3ZKA which provides for special protection in relation to children under 18 and incapable persons.

### Amendment (6)

This provides that the identification parade procedures in proposed sub-section 3ZK(3)(c) should be extended to 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. Currently this provision only provides that the legal representative may be present during the identification parade. This is designed to ensure that the suspect is aware of the consequences of not participating in the parade as set down in proposed sub-section 3ZK(7).

### Amendment (7)

Procedures for identification parades for children under 18 years and incapable persons are set out in the new proposed section 3ZKA. 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.

#### Amendment (8)

This amends proposed section 3ZL(2)(g) to ensure 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. Previously, there was no provision which required the suspect or representative to be informed in writing of their right to obtain those records.

#### Amendment (9)

This amends proposed section 3ZN by replacing subsection (2) with two subsections. The second, subsection (2A) introduces a requirement that the constable must notify the suspect 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. Previously there was no requirement to advise the person in writing that this was available.

#### Amendments (10) to (13)

These are amendments designed to improve the drafting of the Bill. They relate to proposed section 3ZP (Announcement before entry). By removing “executing officer and constable assisting” and inserting “a constable” instead, the amendment will make the provision more concise and precise (given that it applies to arrest and the execution of warrants).

#### Amendment (14)

This amends proposed section 3ZT by requiring the police to notify each person the constable believes has an interest in an application for an extension of the 60 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. Previously this was left to the discretion of the court.



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