REVIEW OF POLICE CRIMINAL INVESTIGATIVE POWERS

Discussion paper
Review of Police
Criminal Investigative Powers

DISCUSSION PAPER

Released for public consultation by
Simon Corbell MLA
Attorney General
This paper reflects the state of the law in the ACT as at 28 March 2010.

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**How to lodge a submission**

Interested parties are invited to lodge written submissions via post, email, facsimile or online.

Where possible, submissions in electronic format are preferred. These can be sent to the email address associated with the Review, or submitted via the Department of Justice and Community Safety consultation facility on its website at [www.justice.act.gov.au](http://www.justice.act.gov.au).

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**The closing date for submissions is 30 June 2010.**
MINISTERIAL FOREWORD

The goal of this review is to reform and modernise the Australian Capital Territory’s law as it relates to police investigative powers. The police criminal investigative powers review will comprehensively evaluate, for the first time, all police powers of criminal investigations and ancillary laws in the territory. The review is a long-range project and will result in a proposal for substantial legislative reform.

The development of the Police Criminal Investigative Powers Discussion Paper demonstrates the ACT Government’s commitment to achieving a modern and dynamic suite of criminal investigation laws. We must strike the right balance between giving police adequate powers to enforce the Territory’s laws and ensuring that safeguards for suspects and people in police custody achieve fairness in criminal proceedings.

Many of the New South Wales and Commonwealth laws adopted at the time of self-government were developed decades ago and no longer effectively take account of local issues or practices. As part of the comprehensive reform of police powers in the ACT that I commenced in 2008, the Government has now finalised model legislation that covers areas of controlled operations, assumed identities, and surveillance devices. The protection of witness identity law is next on the agenda.

Each of these steps, together with release of the Government Report on Serious and Organised Crimes and Activities and the recent introduction of the Crimes (Serious Organised Crime) Amendment Bill 2008 underscores the Government’s commitment to dynamic and effective responses to crime in our community.

The members of the ACT community are rightly concerned with the timely and effective prevention of and response to criminal activity, and I encourage readers in considering this Discussion Paper, to have regard to the changing operational needs of law enforcement agencies and the improved methods of monitoring and accountability.

I wish to extend my gratitude to the members of the Police Powers Steering Committee who invested their time, energy and expertise in the preparation of the content and questions in this Discussion Paper.

Simon Corbell MLA
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Executive Summary

In 2008, the ACT Attorney General Mr Simon Corbell MLA introduced the first phase of the cross-border investigations legislation, the Crimes (Controlled Operations) Bill. In doing so Mr Corbell announced a review of police criminal investigative powers.

To progress this review the Attorney General invited key stakeholders to work together with the Department of Justice and Community Safety to prepare a discussion paper, this Review of Police Criminal Investigative Powers – Discussion Paper.

This Discussion Paper was prepared with assistance from the Police Powers Steering Committee which is chaired by the Senior Manager of the Criminal Law Group in the Legislation and Policy Branch of my department. The Committee includes officers from the ACT Magistrates Court, ACT Director of Public Prosecutions, ACT Policing, Legal Aid (ACT) Office, ACT Law Society, ACT Bar Association, the ACT Human Commission, the Human Rights Unit in the Legislation and Policy Branch and the ACT Victims of Crime Coordinator.

At present, the ACT relies on a number of sources of law in both ACT and Commonwealth legislation for its rules and procedures for the conduct of criminal investigations. This presents a number of challenges for both law enforcement and the community as confusion and frustration can occur.

This Discussion Paper provides extensive discussion on a broad range of police powers and advocates the modernisation and consolidation of those powers into a single piece of legislation. The aim of this proposal is to provide the courts, legal practitioners and the community with a single source of legislation for all police criminal investigative powers.

Although other jurisdictions already have schemes in place akin to what the ACT will require, the ACT will need to consider the rights expressed in the Human Rights Act 2004, and break new ground in the area of police powers and responsibilities.

This Discussion Paper also explores the manner in which safeguards and protections for criminal suspects or people in police custody are framed and the thresholds at which police officers are able to exercise powers such as stop, search and arrest. This Paper also advocates the repatriation of important protections and safeguards for people arrested by police which are currently found in the Crimes Act 1914 (Cwlth).

Finally, a number of issues with respect to the carrying out of forensic procedures for the purposes of identification and investigation in criminal cases have been explored.

Where relevant, references and discussion about the legislation and common law, with particular focus on human right jurisprudence from other jurisdictions is included to assist the reader to consider the issues raised.

This Discussion Paper includes a list of questions that serve as a useful summary of the key matters considered in the review process.
List of Discussion Paper questions

Question relating to the adoption of police powers and responsibilities legislation

1. Should all of the relevant provisions relating to police criminal investigation powers be situated in a single piece of legislation?

Questions relating to the application and safeguards in the Crime Act 1914, Part 1C

2. Are the safeguards, protections and police powers relating to suspects in police custody in the Commonwealth Crimes Act 1914 (Cwlth) Part 1C, as currently expressed, consistent with the Territory’s obligations under the Human Rights Act 2004?

3. Should the ACT enact identical provisions to those in Part 1C or should the ACT develop its own laws for criminal investigation powers?

4. Do the protections contained in Part 1C as currently drafted require updating?

5. Should the safeguards and protection provisions apply to summary offences in the same way as they apply to indictable offences?

6. Should the Crimes Act 1900 (ACT), section 187 (2) which exempts road transport offences from Part 1C protections continue as is, be extended or be removed?

Questions relating to the treatment of detainees under Part 1C

7. Does the Crimes Act 1914 (Cwlth), section 23Q statement requiring that a person under arrest be treated with humanity and respect for human dignity adequately reflect the Territory’s human rights context?

8. Should an ACT equivalent to section 23Q refer specifically to the Human Rights Act 2004?

9. If the ACT were to adopt legislative safeguards and protections equivalent to those in Part 1C, should they apply to protected suspects in the same way that they apply to ‘arrested persons’?

10. How should protected suspect be defined in the ACT?

11. Are the rights and interests of Aboriginal and Torres Strait Islander people or people with a disability adequately protected in current Part 1C protections?

12. Is there a category of people who are particularly vulnerable, for whom enhanced protections should apply?
Questions relating to investigation periods

13. What is the maximum period of time that should be allowed to elapse during which police officers conduct investigations (the investigation period) before the detainee must be released from custody, released on police bail or brought before a magistrate?

14. What should be the limit on the investigation period for any detained Aboriginal or Torres Strait Island person?

15. What should be the limit on the investigation period for any detained child or young person?

16. What periods of time should be excluded from the calculation of the investigation period?

17. How should extensions to the investigation period be granted?

18. Who should be empowered to extend the investigation period?

19. What should be the maximum period of extended time for an investigation period?

20. What mandatory criteria should be used in the assessment of applications for an extension of the investigation period?

Questions relating to police cautions

21. Is the wording of the current caution provision in the Crimes Act 1914 (Cwlth), section 23F adequate?

22. Should the audio recording provisions apply to less serious offences?

23. Should the audio recording provisions apply to all offences, including traffic offences?

24. Does the legislation adequately take into account the advances in technology?

25. How should the legislation be drafted such that it captures future technology?

26. Should provisions relating to requirements to record cautions, admissions and other processes apply equally regardless of location?

27. When should it be mandatory for police officers to audio record a caution to a person and to audio record the person’s response to the caution?

28. Should provisions be modified to provide for more onerous requirements if the conversation takes place in a police station?

29. What role do work safety issues play in the requirement to record cautions, admissions and other processes?

30. Should “not practicable” be clarified by setting out in the legislation some of the factors that a Court should take into account in instances where recording requirements have not been satisfied?

31. Should legislation or Ministerial guidelines set out the circumstances in which it is not practicable to record a caution?
Questions relating to legal practitioners

32. Should ACT legislation refer specifically to an ACT based Aboriginal legal services to ensure legal practitioners are familiar with ACT law?

33. At what rank should a police officer be able to refuse access to a legal practitioner?

34. Are the criteria that allow for a police superintendent to refuse access to a legal practitioner for a person in police custody appropriate?

35. Where a decision-maker decides to refuse access to a legal practitioner, should legislation include a requirement for the reporting of the decision?

36. Should the period of time allowed for a telephone response by a specific legal practitioner be limited in the legislation?

37. How should the period of time allowed for a telephone response be treated by ‘down-time’ provisions?

Questions relating to interview friends

38. Should there be provisions that are specific to Aboriginal and Torres Strait Islander people in terms of the ‘investigation period’?

39. Are there other measures that should be included in legislation in order to safeguard the rights and interests of vulnerable groups of people?

40. Are there groups of people whose rights to a lawyer or to other support during police questioning are not adequately protected?

Questions relating to the provision of information

41. Should police be obligated to notify a person such as a next-of-kin when a person is arrested?

42. Should police be required to take proactive steps to seek consent from the arrested person to make contact with an appropriate person to tell them of the current whereabouts of the detained person?

43. When should attempts to contact an appropriate person occur during the period of arrest?

Question referring to interpreters and consular officials

44. Are provisions relating to interpreters and consular officials adequate?

Questions relating to children and young people

45. Should the application of provisions relating to children and young people in the Territory be simplified?

46. How should provisions relating to children and young people in the Territory be simplified?
47. Should the relevant laws, as they apply to young people, reflect the principle that the more serious the offence the more comprehensive the protections for suspects?

**Question relating to forensic procedures and Part 1C**

48. Should Part 1C apply to forensic procedures in the Territory?

49. Is there any reason why ‘down-time’ should not include the period during which a forensic procedure is being conducted under the Territory forensic procedures regime?

**Questions relating to Preventative Action**

50. Do powers in the *Crime Prevention Powers Act 1998* give police appropriate powers to prevent a breach of the peace?

51. Do the limits in the *Crime Prevention Powers Act 1998*, section 4(5), adequately protect a person’s right to freedom of peaceful assembly and association?

52. Should police powers to prevent a breach of the peace be included in ACT legislation?

**Questions relating to the power of search and stop without warrant**

53. Is ‘reasonable suspicion’ or ‘reasonable belief’ the appropriate threshold for the police power of stop and search without warrant?

**Questions relating to use of animals by police**

54. Should the ACT legislate for the use of animals by police?

55. Should the legislation be crafted in general terms (i.e. assistance in lawful execution of duties) or should it apply only in specific circumstances?

56. What specific circumstances, if any, should be legislated for?

57. Should the use of drug detection dogs be specifically legislated for?

58. Should the use of horses for crowd control be specifically legislated for?

59. Should harming or killing a police dog or horse be an aggravated offence that carries a period of imprisonment of greater than 2 years?

**Questions relating to and search warrants**

60. Should the threshold for the issue of a search warrant be ‘reasonable suspicion’ or ‘reasonable belief’ that the search would facilitate a criminal investigation?
61. Should a mechanism for the oversight of the application and issue of search warrants, such as the mechanism in the *Surveillance Devices Act 2004* (Cwlth), be included in the legislation?

62. Should the ACT Chief Police Officer be authorised under the Crimes (Surveillance Devices) Bill 2010 to allow the use of tracking devices without warrant for serious offences?

63. Should a magistrate be able to issue an ‘assistance order’ for search warrants involving computers or data storage devices?

**Questions relating to the power of arrest**

64. Is ‘reasonable suspicion’ or ‘reasonable belief’ the appropriate threshold for the police power of arrest?

65. Are the matters listed in *the Crimes Act 1900*, section 212 (1) (b) that guide whether a police officer should proceed by summons or arrest adequate?

**Questions relating to arrest for domestic violence offences**

66. Should the threshold for the arrest of a person alleged to have committed a domestic violence offence include additional criteria?

**Questions relating to police powers of seizure**

67. Are police powers of seizure adequate?

68. Should legislation provide for compensation for property damages caused in the course of police entry and search for evidence relating to an offence?

69. Are provisions for the destruction of abandoned, illegal goods or hazardous goods adequate?

**Questions relating to crime scenes**

70. Should the ACT adopt crime scene provisions similar to those in New South Wales and Queensland?

**Questions relating to forensic procedures legislation**

71. Should the provisions in the *Crimes Act 1900* and the *Crimes (Forensic Procedures) Act 2000* that apply to the same forensic procedures be amended?

72. Which of the three options (discussed at 8.3) relating to reform of the statutory framework for forensic procedures is preferable?

73. Should it be necessary for police to obtain consent from a suspect, or the suspect’s guardian or parent, to conduct forensic procedures?

74. Should the police be permitted to enter premises and arrest a serious offender in order to facilitate the carrying out of forensic procedures?
75. How should the drafting inconsistencies identified in paragraph 8.2.4 be rectified?

76. In relation to the carrying out of forensic procedures by police on serious offenders, is the current test of ‘justified in all the circumstances’ appropriate?

77. Should the provisions relating to people volunteering for forensic procedure be reviewed?

78. Should Crimes (Forensic Procedures) Act 2000, section 84 be expanded to encompass all offences as opposed to only serious offences?

79. Should the court’s powers to authorise retention of forensic materials following the withdrawal of a volunteer’s consent be broadened in respect of all or specific categories of offence?

80. Are the provisions relating to the destruction of forensic materials and the retention of identifying information satisfactory?

81. Should the “same sex” requirements be amended to increase the circumstances in which a person carrying out or helping carry out a forensic procedure is subject to the “if practicable” proviso?

82. Should police be permitted to use photo-board identification if they are unable to identify sufficient participants for an identification parade?
## Acronyms and Abbreviations

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1 Introduction

In June 2008, Attorney General Simon Corbell announced a review of police criminal investigative powers as he introduced the first phase of the cross-border investigations legislation: the Crimes (Controlled Operations) Bill 2008. This Discussion Paper has been prepared as part of that review the goal of which is to reform and modernise the Territory’s law in this field.

The aim of the police criminal investigation powers review is to comprehensively evaluate, for the first time, all police powers of criminal investigations, and ancillary laws in the Territory. The review is a long range project and will result in a proposal for substantial legislation reform.

To assist the review process, the Attorney General asked key stakeholders to nominate representatives to a Steering Committee. The Police Powers Steering Committee is chaired by the Department of Justice and Community Safety (DJACS) and membership is constituted of key stakeholders in the criminal justice system including the ACT Magistracy, ACT Legal Aid Commission, ACT Director of Public Prosecutions, ACT Policing, ACT Law Society, ACT Bar Association, ACT Human Rights Commission and Office of the Victims of Crime Coordinator.

For the most part, this Paper has been based on the contributions by members of the Steering Committee who will also consider submissions to the review and assist with the preparation of advice to government on possible reforms.

The Australian Capital Territory’s Criminal Investigations Law

To date, the ACT has not enacted its own comprehensive criminal investigation regime. There are a number of pieces of legislation that apply to criminal investigations in the ACT. Many of these provisions were adopted from the Commonwealth and New South Wales legislation that existed at the time of the introduction of self-government in the Territory.

From time to time, confusion and frustration has been caused by the lack of an integrated statutory regime.

Many pieces of Commonwealth legislation relied on by the Territory have been amended and repealed. This has left the Territory in the awkward position of relying on legislation that remains on the statute books only for the Territory and on the understanding that the ACT moves towards introduction of its own legislation.

Consequently, there are many inconsistencies and differences in procedures and forms between jurisdictions, for example in obtaining warrants. The ACT is unable to directly amend Commonwealth legislation and any request to do so must be made, and considered, by the Commonwealth in the context of its priorities and legislative reform agenda.

A prime example of Commonwealth legislation relied on by the ACT is the Crimes Act 1914 (Cwlth), Part 1C. Part 1C sets out important procedures and safeguards for the conduct of criminal investigations. The ACT is unique among jurisdictions in that Part 1C provisions apply to both ACT as well as Commonwealth offences. This is seen as an advantage by the Australian Federal Police (AFP) as officers are able to employ a single scheme in the conduct of investigations. Any proposal to adopt an ACT specific scheme will need to consider training and implementation issues.
Cross-Border Criminal Investigations

In 2008, the ACT Legislative Assembly passed the *Crimes (Controlled Operations) Act 2008* as part of a national project to develop model laws that aid criminal investigations across state and territory borders. In September 2009, the Government passed the *Crimes (Assumed Identities) Act 2009*, as the second stage of the project. In February 2010, with the introduction of the Crimes (Surveillance Devices) Bill 2010 the ACT Government has moved closer to implementing the model cross-border criminal investigations law. In future, the Government will complete the adoption of the model law with a Bill establishing provisions for witness protection. Once complete, these laws will provide specific police powers for criminal investigations that occur wholly within the Territory as well as those that cross borders into other jurisdictions.

Purpose of this review

It is also expected that the review will identify a number of deficiencies in express statutory powers available to police. Furthermore a review provides a valuable opportunity to ensure that current police powers of investigation comply with the *Human Rights Act 2004*.

On 24 June 2009, the Attorney General, Mr Simon Corbell tabled the *Government Report to the ACT Legislative Assembly — Serious Organised Crime Groups and Activities*.

The Government Report provides advice on:

- The nature and operation of existing Territory laws used to combat organised crime groups and any proposed review of such laws;
- issues arising from the South Australian *Serious and Organised Crime (Control) Act 2008*, the New South Wales *Crimes (Criminal Organisations Control) Act 2009* and similar laws internationally, including any available early evidence as to its operation and efficacy in reducing organised criminal activity;
- the human rights issues raised by legislation that provide mechanisms that allow for the banning of certain organisations; and
- legislative changes that may be considered to enhance the ACT's response to serious organised crime groups and activities.

It is expected that the outcomes of this review will accord with ACT efforts to detect and disrupt serious organised criminal groups and their activities.

1.1 Structure of this Paper

This Paper has been divided into 8 Chapters that set out the major sources of police investigative powers. Each Chapter is then broken up into sub-chapters outlining specific issues. Chapters canvass the existing sources of law and discuss issues that arise with respect

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to the operation of the law. Where appropriate, chapters also explore the relevant human rights jurisprudence before going on to pose questions about possible reform.

The paper makes a number of references to the legislation and case law of other jurisdictions. Examples from jurisdictions such as Canada, the United Kingdom and New Zealand are relied on to describe the human rights implications of particular issues. The law of other Australian jurisdictions and the United Kingdom is used to serve as a comparison for existing and proposed provisions.

As this Paper draws on the legislation of a number of jurisdictions, any reference to legislation where the jurisdiction of origin is not specified is ACT legislation. Legislation from other jurisdictions is labelled as such.

1.2 Policing context

The ACT is unique among Australian jurisdictions in that its policing services are provided by the Commonwealth of Australia through the Australian Federal Police. The legislative framework that underpins the current provision of policing services to the ACT is governed by Commonwealth legislation that prescribed the establishment of the AFP and self-government in the ACT.

Community Policing in the ACT

As it stands, the legislation assumes that the Territory will negotiate with the AFP for the provision of community policing services.

The Australian Federal Police Act 1979 (Cwlth) (AFP Act) at Section 8 describes the functions of the AFP as, among other functions, “the provision of police services in relation to the Australian Capital Territory”.

The Australian Capital Territory (Self-Government) Act 1988 (Cwlth) (the Self Government Act), section 23 excludes the ACT Legislative Assembly from having the power to make laws with respect to “the provision by the Australian Federal Police of police services in relation to the Territory”. DJACS has interpreted this provision as prohibiting Territory legislation dealing with purely operational aspects of the AFP, such as staff numbers and rosters.

Policing Arrangements in the ACT

The AFP Act, section 8 also states “the Minister and the Australian Capital Territory may enter into arrangements for the provision of the police services in relation to the Australian Capital Territory that are in respect of Territory functions as defined by section 3 of the ACT Self-Government (Consequential Provisions) Act 1988, and, where the arrangements have been entered into, the provision of those services shall be in accordance with the arrangements.”

The first such Arrangement was signed on 25 July 1990. The second Arrangement was signed on 15 March 2000. The third and current Arrangement was signed on 14 June 2006 and expires in June 2011. This Arrangement, clause 13.2 requires that two years prior to its expiry, the parties shall commence negotiations about the terms and conditions of a renewal of the Arrangement. If either party decides the Arrangement shall not be continued or renewed, it shall give at least two years notice in writing to that effect.

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DJACS and the AFP have held preliminary discussions on the scope of the matters that the negotiations should take into account as well as the methodology and governance. The Chief Executive for DJACS and the Chief Police Officer for the ACT will jointly write to relevant stakeholders regarding the parameters of the negotiations seeking views on issues that may inform the negotiations. A working group will be established to progress the negotiations comprising DJACS, ACT Treasury, ACT Policing and the Commonwealth.

Under the Arrangement, policing services in the Territory are provided by ACT Policing. The AFP provides this service to the people of the ACT through its community policing arm — ACT Policing. The Chief Police Officer of ACT Policing also serves as one of eight AFP Assistant Commissioners and reports directly to the Commissioner of the AFP.

The Policing Arrangement provides the enabling framework between the Commonwealth and ACT Governments; it defines the role of the Chief Police Officer and details the requirements for the provision of information to the ACT Minister for Police and Emergency Services.

The Arrangement is supplemented by annual Purchase Agreements that detail resource and performance requirements associated with the delivery of policing services to the Territory.

The annual Purchase Agreement identifies those goods and services purchased by the ACT through budget appropriations. It also specifies the policing outcomes, outputs, performance measures, targets and facilities to be provided by the ACT, the powers and obligations of the ACT Minister and Chief Police Officer and associated administrative arrangements.

The *Legislation Act 2001*, dictionary defines chief police officer to mean ‘the police officer responsible to the commissioner of police for the day-to-day administration and control of police services in the ACT’. This definition is used in legislation where the Chief Police Officer exercises powers in ACT legislation delegated to operational officers in the ACT.

Important examples of these powers are in the *Crimes (Controlled Operations) Act 2008* and the *Crimes (Assumed Identities) Act 2009*.

### 1.3 England and Wales review of police powers legislation

The law in relation to police powers and responsibilities in England and Wales is the *Police and Criminal Evidence Act 1984* (PACE). The United Kingdom Home Office is conducting a comprehensive review of PACE. The review is being conducted “to determine whether there are areas where existing legislation could be consolidated or could rationalise current provisions to raise operational effectiveness and increase accountability.

In August 2008, government proposals for the PACE Review were released. In his Ministerial foreword, Tony McNulty MP, Home Office Minister of State for Security, Counter-terrorism, Crime and Policing stated:

> We must recognise the changing operational needs of the police and other investigating agencies; the impact of improved methods of monitoring and accountability; and the changing structure on how the Criminal Justice System deals with offenders such as the use of summary powers.

Our fundamental approach is and remains that the balance between the powers of the police and the rights of the individual must remain proportionate. The proposals in this paper aim to refine the provisions of PACE to ensure that we are better able to meet our objectives in terms of improving the criminal justice system and the
Government’s health and social care agenda.³

More recently, in March 2010, the UK Home Office released a summary of responses to the public consultation on the review of PACE.⁴ Given the experience and degree of sophistication of the England and Wales police force and the fact that the United Kingdom is a human rights jurisdiction, the outcomes of the PACE review will provide important lessons for the ACT.

2 The Human Rights Act 2004

On 2 March 2004, the ACT Legislative Assembly passed into law Australia’s first Bill of Rights. The Human Rights Act 2004 (HR Act), sections 8 to 27 give express recognition to certain civil and political rights enshrined in international human rights law. The primary source of these rights is the International Covenant on Civil and Political Rights (ICCPR). The Act gives effect to the following rights:

- Recognition and equality before the law (section 8);
- Right to life (section 9);
- Protection from torture and cruel, inhuman or degrading treatment (section 10);
- Protection of the family and children (section 11);
- Privacy and reputation (section 12);
- Freedom of movement (section 13);
- Freedom of thought, conscience, religion and belief (section 14);
- Peaceful Assembly and freedom of association (section 15);
- Freedom of expression (section 16);
- Taking part in public life (section 17);
- Right to liberty and security of the person (section 18);
- Human treatment when deprived of liberty (section 19);
- Children in the criminal process (section 20);
- Fair trial (section 21);
- Rights in criminal proceedings (section 22);
- Compensation for wrongful conviction (section 23);
- Right not to be tried or punished more than once (section 24);

• Right not to be bound by retrospective criminal laws (section 25);
• Freedom from forced work (section 26);
• Protection of minorities (section 27).

Section 31 of the HR Act provides that when interpreting a human right, international law (which includes human rights treaties to which Australia is a party, and general comments, views and declarations of the United Nations and its bodies) and the judgements of foreign and international courts and tribunals, may be considered. As a result, this Paper considers international human rights jurisprudence.

2.1 Proportionality

The HR Act, section 28 provides that most rights may be subject to ‘reasonable limits sets by Territory laws that can be demonstrably justified in a free and democratic society’. This section gives statutory effect to the international human rights law concept of “proportionality”.

The process for establishing whether a limitation on a human right is proportionate, and thus a “reasonable limit” which is “demonstrably justified in a free and democratic society”, is now well established. To satisfy the test set out in section 28 the limitations must fulfil a pressing and substantial social need, pursue a legitimate aim and be proportionate to the aims being pursued. Further, the concept of proportionality requires that the limit must be:

• necessary and rationally connected to the objective;
• the least restrictive in order to accomplish the object; and
• not have a disproportionately severe effect on the person(s) to whom it applies.

Some rights are absolute, meaning they cannot be derogated from under any circumstances. Absolute rights include: recognition as a person before the law5 and the right to be free from retrospective criminal laws6.

Not every exercise of a power under legislation will require consideration of the question of whether the power or its exercise is a breach of a human right. In R v Fearnside, Besanko J considered the steps involved in deciding whether a power can be interpreted consistent with human rights.7

Besanko J used a three stage process to discern human rights issues:

(1) consider whether the legislation “enlivens” a human right;

(2) if, but only if, the answer to the first question is yes, it is necessary to consider whether the legislation contains a limitation which is reasonable within s 28;

(3) if, but only if, the answer to the first question is yes and the answer to the second question is no, it is necessary to consider whether the legislation is able to be interpreted in a way that is compatible with human rights.8

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5 Human Rights Act 2004, section 8(1).
6 Ibid, section 25(1).
2.2 Pressing and substantial need

The limitation on a human right must be intended to overcome a problem which is “pressing and substantial.” The test for satisfying this requirement was put succinctly in the often quoted *R v Oakes* [1986] 1 S.C.R. 103 where Dickson J held (at para. 69), that:

First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.

In any argument as to whether a limitation on a right is justified, the burden of persuasion always lies on the party seeking to uphold a limitation. It is insufficient for that party to merely assert the existence of a pressing and substantial need. It must produce some evidence supporting its position. In *Irwin toy ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927, the Canadian Supreme Court held that:

Where the basis for its legislation is not obvious, the government must bring forward cogent and persuasive evidence demonstrating that the provisions in issue are justified… in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective (see *R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713, at p. 769).

2.3 Rational connection to the objective

Assuming a “pressing and substantial” problem exists in respect of ordinary violence offences which necessitate limitations on human rights, it must be asked whether the limitations are rationally connected to the objective. That is to say, “the measure must be fair and not arbitrary, carefully designed to achieve the objective in question and be rationally connected to that objective”. The Canadian Supreme Court has held that in order to pass the “rational connection test”, the “proven fact… must rationally tend to prove the presumed fact. In other words, the proven fact must raise a probability that the presumed fact exists” (see: *R v Oakes* [1986] 1 S.C.R. 103). The United States Supreme Court adopted a similar approach when, in the context of statutory presumption which engaged the presumption of innocence, it held that:

…a criminal statutory presumption must be regarded as “irrational” or “arbitrary”, and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to follow from the presumed fact on which it is made to depend (*Leary v United States*, 395 U.S. 6 (1969)).
2.4 Least restrictive intrusion on the right

To be reasonable and demonstrably justified, the limitations on a human right must impair the infringed right or freedom as little as possible. The extent of the impairment “must be no more than is necessary to accomplish the objective”: De Freitas v Minister for Agriculture, Fisheries, Lands and Housing (1999) 1 A.C. 69. Furthermore, the law imposing the limitation must be carefully crafted to attend to the objective of the legislation such that rights are impaired to the minimum amount and no more than necessary: R v Oakes [1986] 1 S.C.R. 103; Harper v Canada (Attorney General) [2004] 1 S.C.R. 827.

2.5 Proportionate in all the circumstances

The European Court of Human Rights has stated that any limitation must also strike a fair balance between the general interests of the community, and the requirements of the protection of an individual’s fundamental rights: Soering v United Kingdom (1989) 11 E.H.R.R. 439. This will usually entail asking whether the measures used to achieve the objective are unacceptably broad in their application, or whether they impose an excessive or unreasonable burden on certain individuals: Sporrong and Lonroth v Sweden (1983) 5 E.H.R.R 35.

3 Legislation relating to police criminal investigative powers in the ACT

As mentioned above, police criminal investigative powers currently used in the ACT exist in a range of Commonwealth and Territory enactments. The following is a list of those enactments and a broad description of the relevant powers. Relevant provisions are reproduced at Annexure A to assist the reader.

3.1 Crimes Act 1900

Part 10 deals with criminal investigation and sets out the requirements and powers for:

- preventative action (including powers of entry) (division 10.2);
- search warrants (division 10.3);
- power to stop and search (division 10.4);
- arrest and related matters (division 10.5).

The Crimes Act 1900, section 187 provides that Part 1C of the Crimes Act 1914 (Cwlth) is to apply to summary offences in the same way as it applies to indictable offences in the Territory.

The Legislation Act 2001, section 190 defines an indictable offence as an offence that is punishable by imprisonment for longer than 2 years or is declared to be an
indictable offence. An indictable offence includes an indictable offence that is or may be dealt with summarily.

By virtue of section 187 (2), the Part 1C obligations do not apply to an offence against the *Road Transport (Alcohol and Drugs) Act 1977* or an infringement notice offence for the *Road Transport (General) Act 1999*. However, this exemption only applies if the police officer concerned intends to serve an infringement notice under that Act for the offence on the offender concerned, or intends to take no further action against the offender concerned in relation to the offence.

3.2 *Crimes Act 1914 (Cwlth)*

The *Crimes Act 1914 (Cwlth)*, Part 1C sets out powers of detention and obligations of investigating officials for all Commonwealth offences. Obligations that apply in relation to protected suspects as well as to people under arrest include the giving of cautions and informing the person about their right to communicate with a friend, relative or legal practitioner.

The *Crimes Act 1914 (Cwlth)*, Part 1C protections and requirements have almost universal application in the Territory. Part 1C applies to all ACT indictable offences by virtue of section 23A(6). Part 1C also applies to all summary offence aside from a small number of exceptions in road transport legislation (see 3.1 above).

Section 23C empowers an official to detain a person suspected of committing an offence for up to 2 hours if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander or for up to 4 hours in any other case.

Sections 23K (which deals with people under 18) and section 23V (tape recording of confessions and admissions) only apply if the person being interviewed or questioned is under arrest. Obligations set out in Part 1C apply in instances where a person is under arrest or is a protected suspect.

A protected suspect is defined in the Act as being someone who has not yet been arrested if an official suspects that there is sufficient evidence to establish that the person has committed the offence and the official would not allow the person to leave if the person wished to do so. The definition of ‘under arrest’ is discussed further in Chapter 4.

The Commonwealth has recently indicated its intention to make amendments to the *Crime Act 1914 (Cwlth)*, Part 1C, as part of its national security legislation amendments. Further, there are indications that the Commonwealth could be planning to review Part 1C generally in the near future.

The protections and procedures in the *Crimes Act 1914 (Cwlth)* are described in greater detail through this Paper.

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3.3 Cross-Border Investigative Powers for Law Enforcement

In June 2009, the Government Report on Serious Organised Crime Groups and Activities explained the national process to make consistent cross-border laws dealing with criminal investigation:

In 2002, the Leaders Summit on Terrorism and Multi-jurisdictional Crime agreed to the development of model laws and mutual recognition for a national set of powers for cross border investigations covering controlled operations, assumed identities legislation, surveillance devices and witness anonymity. These powers are often used across jurisdictional borders and involve covert methods of investigation. The creation of a national set of investigative powers is intended to facilitate seamless law enforcement across jurisdictions.10

The task of developing the model laws was given to a national Joint Working Group established by the Standing Committee of Attorneys-General (SCAG) and the Australasian Police Ministers Council (the JWG). The JWG was chaired by the Commonwealth, and included representatives from law enforcement agencies and justice departments in each jurisdiction.

In February 2003, the JWG published a Discussion Paper titled Cross-Border Investigative Powers for Law Enforcement. The Discussion Paper was designed to facilitate public consultation on the model legislation by providing an overview of the existing law in each jurisdiction, and setting out the proposed provisions with an accompanying commentary. The JWG received 19 written submissions in response to the Discussion Paper.

The JWG then released the Cross-Border Investigative Powers for Law Enforcement – Report November 2003 which included a model Bill drafted to address issues raised during the consultation process (‘JWG Report’).11 This model bill covered controlled operations, assumed identities, surveillance devices and the protection of witness identities.

3.3.1 Crimes (Controlled Operations) Act 2008

The Crimes (Controlled Operations) Act 2008 (Controlled Operations Act) provides a formal process for ACT Policing to use an investigative method to identify suspects and obtain evidence for criminal prosecution. A controlled operation is defined as an investigative method used by law enforcement agencies to identify suspects and obtain evidence for criminal prosecution.

In a controlled operation, instead of seeking to immediately terminate a criminal scheme, law enforcement officers allow the scheme to unfold under controlled conditions. During the process of allowing this to occur, an informant, agent or undercover police officer may need to commit acts that would be regarded as offences unless protected by law, for example, participating in the possession or sale of illegal drugs.


The aim of a controlled operation is to gather evidence and intelligence against those who organise and finance crime, rather than merely focusing on couriers and intermediaries. The Act goes further than the model legislation, in that it applies the cross border controlled operations to both local and cross border investigations. This provides ACT Policing with certainty as to the applicable law. This is particularly relevant given that the ACT is surrounded completely by another jurisdiction.

The Controlled Operations Act is the ACT legislative response to the implementation of the cross border investigative powers on controlled operations.

As this legislation is based on the model approved by the SCAG and was only recently enacted, no detailed discussion on its provisions is included.

3.3.2 Crimes (Assumed Identities) Act 2009

The Crimes (Assumed Identities) Act 2009 (Assumed Identities Act) provides a formal process for the acquiring by police of identity documents and establishing legal recognition of documents produced to support an assumed identity used by authorised law enforcement officers or authorised civilians in the conduct of an investigation.

An assumed identity is an identity that is used by an officer or other person for a period of time for the purpose of investigating an offence or gathering intelligence in a hostile or dangerous environment. To do this, they rely on identification documents produced in the assumed name, including birth certificates and drivers’ licences.

The Act creates a more efficient, transparent and accountable legislative regime for acquiring and using false identity documents and allowing the use of documents produced in one jurisdiction in another.

As this legislation is based on the model approved by SCAG and was only recently enacted, no detailed discussion on its provisions is included.

3.3.3 Crimes (Surveillance Devices) Bill 2010

At the time of publication, the Crimes (Surveillance Devices) Bill 2010 had been introduced in the ACT Legislative Assembly. If passed, the Bill will provide the ACT with a legal framework for a surveillance devices warrants scheme. The scheme will authorise the use of surveillance devices by law enforcement officer in the ACT that can also be used in other jurisdictions with corresponding law. Conversely, the Bill will enable other jurisdictions with corresponding law to use their surveillance devices warrants in the ACT.

The warrant scheme contained in this Bill will cover four categories of surveillance devices:

- Data surveillance devices: devices, equipment or programs that are capable of being used to record or monitor data entered into or received by a computer on an ongoing basis;
- Listening devices: devices that monitor and record conversations and other audio emissions in the open air;
- Optical surveillance devices: devices including cameras and, video recorders that permit an image to be seen and/or recorded; and
• Tracking devices: devices that emit a radio signal that allow the movement of a vehicle or object to which they are attached to be monitored.

3.4 Listening Devices Act 1992

This Act regulates the use of listening devices for the purpose of listening to or recording private conversation. This Act includes a power to make regulations to exempt groups from operation of the Act but no such regulation currently exists. The making of a regulation exempting ACT Policing from the operation of the Act may alleviate concerns relating to the use of listening devices.

3.5 Crimes (Forensic Procedures) Act 2000

This Act provides a scheme for taking and using forensic material, including deoxyribonucleic acid (DNA) material, for criminal investigations. The Act is based very substantially on the Model Forensic Procedures Bill that was developed by the Model Criminal Code Officers Committee for the SCAG. The range of forensic material covered by the Act includes fingerprints and other prints, dental casts, photographs and body tissue samples.

3.6 Drugs of Dependence Act 1989

This Act provides a search, seizure and analysis regime for controlled drugs and plants under the Criminal Code 2002 (ACT). The Act currently includes provisions dealing with the Treatment Orders made by a Court as well as the role and responsibilities of the Treatment Assessment Panel. These provisions will be repealed upon the passage and commencement the Health Legislation Amendment Bill 2010.

3.7 Firearms Act 1996

This Act sets out a regulatory scheme for the licensing of individual and corporate entities to possess and use certain classes of firearms. Part 14 of this Act sets out police powers of entry, search and seizure of firearms.

3.8 Terrorism (Extraordinary Temporary Powers) Act 2006

This Act provides for special powers, preventative detention and the conduct of personal searches. These powers apply where a person is planning to commit or has committed a terrorist act. As required by section 100, a review of the Act has commenced as it has now been in operation for
three years. The Act, section 101 contains a sunset clause that provides that the Act expires after five years of operation.

3.9 **Australian Federal Police Act 1979 (Cwlth)**

Although repealed so far as the Commonwealth is concerned, Division 2 of Part II of the Act still applies to the ACT in relation to the use of listening devices in respect of offences against the law of the ACT by virtue of Item 3 of Schedule 1 of the Act. Division 2 of the Act provides a scheme for the provision of listening device warrants for criminal investigations. The provisions have remained on the statute book on the presumption that the ACT will enact equivalent provisions. Once commenced, the Crimes (Surveillance Devices) Bill will replace these provisions so these provisions will no longer be needed.

### Questions relating to police powers and responsibilities legislation

1. Should all of the relevant provisions relating to police criminal investigation powers be situated in a single piece of legislation?

4 **Application and safeguards in the Crimes Act 1914 (Cwlth), Part 1C**

In broad terms the Crimes Act 1914 (Cwlth), Part 1C is designed to provide guidance to criminal investigators where a person has been arrested or detained. It contains provisions about how the police must treat such people, and it lays down rules about a range of matters such as:

- how long the person may be detained;
- the period during which a suspect may be questioned;
- circumstances where the person is entitled to a lawyer or friend; and
- when a person’s admissions must be recorded.

Although it is not an offence for a police officer to breach Part 1C, failing to comply with Part 1C can have serious consequences such as rendering evidence obtained inadmissible and creating liability for civil damages through the courts.

**General protection of rights**

Part 1C provides that a person who is under arrest or being detained must be treated with humanity and respect for human dignity.

Some provisions in Part 1C are enlivened only in the case of a person who is ‘under arrest’ and not in the case where the person is a protected suspect. For example, the time limits in section 23C apply only where the person has been arrested. The
question of when a person is under arrest is discussed further in 4.2.1 below.

It is not always clear whether a person is ‘under arrest’ or a protected suspect. The definitions relating to this matter are found in section 23B.

‘Investigation period’ – time limits

Part 1C, Division 2 establishes rules about the amount of time that a person can be detained when the person has been arrested. The Division differentiates between terrorism offences and other offences. In either case, the person must be released or taken to a judicial officer within the investigation period or as soon as practicable after that period. Generally speaking, the investigation period is 4 hours. In the case of an Aboriginal or Torres Strait Islander person or a child the time is limited to 2 hours. Issues pertaining to the investigation period are discussed at length at 4.2.2.

Rights before Questioning

Part 1C sets out a range of things that police must do before starting to question a person. The things that police must do include:

- cautioning the person that they do not have to say or do anything; discussed further at 4.2.3.
- telling the person that they can speak to a lawyer; (discussed further at 4.2.4.)
- advising Aboriginal and Torres Strait Islander people, children and young people that they are also entitled to have an ‘interview friend’ present. (discussed further at 4.2.5.)
- Advising certain people that they may also be entitled to an interpreter or to contact a consular official. (discussed further at 4.2.7.)

History of Part 1C

In July 2009, the Hon Robert McClelland, Attorney-General released a discussion paper on National Security Legislation that proposed a series of amendments to legislation including to the Crimes Act 1914 (Cwlth), Part 1C.12 That discussion paper includes a short history of Part 1C part of which has been reproduced below.

At common law, a person must be brought before a judicial officer following arrest as soon as reasonably practicable. A person who is arrested may be detained only for the purpose of bringing the person before a judicial officer to be dealt with according to law. This common law principle was restated in Williams v R [1987] HCA 36; (1986)161 CLR 278.

In Williams, the High Court looked at the issue of whether a suspect, after his arrest, was detained longer than was reasonably necessary to enable him to be brought before a magistrate. The relevant State law had provided that the suspect should be taken before a justice as soon as practicable. The High Court held that ‘as soon as practicable’ gave no power to question an arrested person about the offence for which he had been arrested or other offences, and did not make justifiable a delay

12 Ibid.
which resulted only from the fact that the arresting officers wished to question him. If legislation were to abrogate the common law principle, it needed to be very clear. [Williams v R (1986) 161 CLR 278 per Wilson J and Dawson J at pp 304 and 313]

Following the High Court decision in Williams, Part 1C was inserted into the Crimes Act 1914 to make it clear that an arrested person may be detained, prior to being brought before a magistrate or other judicial officer, for the purpose of:

- investigating whether that person committed the offence for which they were arrested, and/or
- investigating whether the person committed another Commonwealth offence that an investigating official suspects them of committing.

Part 1C provides a framework for how a person can be detained and questioned once they have been arrested for a Commonwealth offence. It also contains important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer.13

Part 1C was introduced into the Crimes Act 1914 (Cwlth) in 1990. One of the stated objects of Part 1C is to ‘maintain and defend civil liberties’ and balance the need to ensure that investigative agencies can ‘investigate and prosecute offences effectively’.14

Part 1C of the Crimes Act 1914 (Cwlth), applies (by its own power) to the investigation of offences against Commonwealth law in the Territory. In the ACT, Part 1C applies generally (with a small number of exceptions discussed further at 4.1 below) to the investigation of most offences against Territory law.

### 4.1 Application of Part 1C in the ACT

Part 1C applies to most offences being investigated by ACT Policing in the ACT. The protections and safeguards in Part 1C apply in the following circumstances:

- To the investigation of all Commonwealth offences in its own right (see, for example, section 23(1) of the Crimes Act 1914 (Cwlth)), and;
- Any offence with a penalty of over 12 months being investigated by the ACT Policing (section 23A (6) of the Crimes Act (Cwlth). This provision means that where the AFP is investigating an offence against a law of the ACT punishable by over 12 months then Part 1C applies to that offence as if:
  - references to Commonwealth offences included references to the ACT offence being investigated; and
  - references to a law of the Commonwealth included references to a law of the ACT.

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13 Ibid, pp. 87-88.
14 Hon Michael Duffy, MP, Attorney-General, Second Reading Speech, Crimes (Investigation of Commonwealth Offences) Bill 1990, House of Representatives
In summary, where the offence attracts a maximum penalty of over 12 months imprisonment, and the offence is being investigated by ACT Policing in the ACT, Part 1C applies.

Finally, the Crimes Act 1914 (Cwlth) Part 1C also applies generally to offences punishable by less than 12 months in the ACT by virtue of the Crimes Act 1900, section 187. This ACT section extends the application of Part 1C to offences not punishable by imprisonment, or punishable by imprisonment for 12 months or less, in the same way that it applies to offences punishable for over 12 months imprisonment.

There are exceptions to this application of Part 1C (and the Schedule) contained in section 187, which are described in this Paper at 3.1.

The stated reason for the non application of offences described in the Crimes Act 1900, section 187 (2) is ‘to ensure that dealing with routine traffic matters will not take up a disproportionate amount of police time’.15

To cease the application of Part 1C to either of these groups of offences, it would be necessary to seek a change to the Crimes Act 1914 (Cwlth) from the Australian Government.

Furthermore, if the Territory wishes for Part 1C to apply only to ‘indictable’ offences, a change to Commonwealth law would also be necessary. This is because the Crimes Act 1914 (Cwlth) currently applies to offences which attract a penalty of more than 12 months imprisonment rather than the definition of ‘indictable offence’ employed in ACT legislation. This threshold was previously the definition for indictable offence. It was increased in 2009 as part of the committal reform process.

It is unsatisfactory that the ACT should continue to rely on Commonwealth legislation for its investigative powers, in particular in relation to important protections for alleged offenders. The review has identified that the ACT needs to enact its own equivalent of Part 1C. It was always envisaged by the Commonwealth that this would occur. The primary question to be determined is what the ACT scheme will look like.

### 4.1.1 The Dual system

The Crimes Act 1914 (Cwlth) does not apply to State or Territory offences in any other jurisdiction in Australia. The effect of this is that the ACT is currently the only jurisdiction in Australia where a single set of provisions applies to almost all offences – Commonwealth and State.

This is particularly helpful in the ACT for two reasons:

- AFP provides policing services both to the ACT and the Commonwealth jurisdiction;
- The ACT has a large number of Commonwealth places and organisations, such as the Parliamentary zone and other Commonwealth land within its jurisdiction. This means that the number of Commonwealth offences is more significant than is the case in other jurisdictions.

Notwithstanding the greater prevalence of Commonwealth offences in the Territory,

ACT Policing advise that cases which present both Commonwealth and Territory offences in the one matter are few in number.

Enacting ACT specific legislation may have an impact on resourcing in terms of training and re-training for the AFP members in new procedures and safeguards. This, however, is not unusual feature of major law reform projects.

Moreover, the possibility of innocent errors being made in the application of the provisions will be higher. Even though a person has been afforded the full rights and protections prescribed under one set of legislation, it might be that the correct set of rules was not applied. Ultimately, this may lead to prosecutions being lost on the basis of technical or procedural non-compliance with the relevant legislation.

The concerns with the introduction of ACT police investigation procedures and safeguards equivalent to those in Part 1C can be overcome in a number of ways. The implementation of changes through training and systems changes will need to be carefully considered as amendments are developed. It may be that if a new series of provisions can be crafted to fit with the ACT environment, then the advantages contained in the enactment of such provisions will outweigh the immediate disadvantages.

The content of Part 1C is described in more detail below.

### Questions relating to the application of Part 1C

1. Are the safeguards, protections and police powers relating to suspects in police custody in the Commonwealth *Crimes Act 1914 (Cwlth)* Part 1C, as currently expressed, consistent with the Territory’s obligations under the *Human Rights Act 2004*?

2. Should the ACT enact identical provisions to those in Part 1C or should the ACT develop its own laws for criminal investigative powers?

3. Do the protections contained in Part 1C as currently drafted require updating?

4. Should the safeguards and protection provisions apply to summary offences in the same way as they apply to indictable offences?

5. Should the *Crimes Act 1900 (ACT)*, section 187 (2) which exempts road transport offences from Part 1C protections continue as is, be extended or be removed?

### 4.2 Part 1C in detail

#### 4.2.1 Treatment

The application of Part 1C is very wide, encompassing both arrested people as well as protected suspects. Part 1C, section 23Q makes a general statement about the treated of arrested persons. A person who is under arrest or a protected suspect must be treated with humanity and with respect for human dignity and must not be subject to cruel, inhuman or degrading treatment (see section 23Q).
‘Arrested’ is defined in section 23B (1) as a person who is arrested and the arrest has not ceased. Essentially, a person is ‘under arrest’ until they are remanded by a magistrate, the watch house Sergeant or assisting police in a covert operation in relation to the offence. The legislation is otherwise silent as to what arrest means. The common law describes the concept of arrest as being one that turns on the state of mind of the suspect.16

Protected suspect is defined in section 23B (2) and its aim is to capture the broader common law definition of arrest. In its simplest terms, a person is a protected suspect if the person is in the company of an investigating official, has not been arrested but would not be allowed to leave if he or she wished to do so. This also includes a person to whom police have given reasonable grounds to believe that they would not be allowed to leave if they wished to do so.

The Crimes Act 1900 in relation to children and young people applies if the young person is ‘in the company of a police officer’ in connection with an offence. This definition is broader again than the Crimes Act 1914 (Cwlth) and would capture children and young people in the company of police even in circumstances where they could leave if they wanted to.

### Questions relating to the treatment of detainees under Part 1C

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### 4.2.2 ‘Investigation period’ – division 2

Part 1C, division 2 establishes rules about the amount of time that a person can be detained after arrest. The division differentiates between terrorism offences and other offences. The division sets out relevant requirements and safeguards to ensure that a reasonable pre-charge investigation period can occur before the person must be brought before a magistrate.

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The purpose of the investigation period in Part 1C

Part 1C was enacted to provide certainty in the law, providing a balance between the need for police to be able to properly investigate and to protect individual freedoms.\(^\text{17}\)

In the Second Reading Speech, the then Attorney General, the Hon Michael Duffy MP, noted that there were two models in existence in Australia: the first one being a reasonable investigation period within a specified maximum period, usually with provision for its extension by application to a Magistrate; and, on the other hand, a system that allows for a reasonable period of pre-charge detention, with statutory criteria to determine what is ‘reasonable’.

In choosing the time limits in the legislation, the Commonwealth Government aimed to ‘provide investigating officers with a reasonable opportunity to interrogate an arrested person and conduct other necessary investigations before taking the person before a magistrate’. It was recognised that the ‘questioning of suspected people was not in itself an evil, but a necessary part of law enforcement’. The approach taken was designed to strike a balance between flexibility and the provision of appropriate oversight.

Provisions in other Australian jurisdictions (discussed in more detail below) differ widely in respect of time limits. Victoria’s only limit is that the time in custody must be ‘reasonable’. The relevant New South Wales Act applies a blanket provision of four hours, which can be extended by warrant; no provision at all is made for down time. The Queensland legislation is the most complex, with basic detention period being eight hours and (within that) questioning time being four hours. Again, no provision is made for down time, although there is a provision in case of unexpected down time.

The purpose of having time limits set within the legislation is to prevent the police from detaining people longer than is ‘reasonable’. There are varying approaches to providing a ‘check’ on police activity in this respect. In terms of Part 1C, in cases where police detain a person longer than is ‘reasonable’, Part 1C will be breached and any evidence obtained is in danger of being excluded.

The legislation explained

In the case of a child or young person or Indigenous person, the investigation period is 2 hours. In any other case, the investigation period is 4 hours (see section 23C (4)).

The division provides a list of circumstances where the recording of time for the purpose of calculating the period of detention can be ‘stopped’, commonly known as ‘down time’ or ‘dead time’. Examples include a period waiting for the arrested person’s lawyer to arrive or a period during which a detained person receives medical treatment. There is currently no limit placed on the possible amount of ‘down time’ allowed by the legislation.

Although there is no specified maximum period of ‘down time’, in any proceeding, the onus is on the prosecution to prove that the person was brought before a magistrate ‘as soon as practicable’ or that any particular period of time was covered by the provisions dealing with ‘down time’.\(^\text{18}\)


\(^{18}\) *Crimes Act 1914 (Cwlth)*, section 23C (8).
Investigating officers are able to apply, on a single occasion, to a Magistrate for an extension of the investigation period for up to a maximum of 8 additional hours.

In ordinary matters, the investigation period cannot be extended beyond eight hours and cannot be extended more than once. For terrorism offences, investigators are able to make any number of applications but the investigation period cannot be extended beyond 20 hours.

The Magistrate may extend the investigation period if satisfied of certain matters, including that further detention is necessary for the police to preserve or obtain evidence and that the investigation is being conducted properly and without delay. It is also necessary that the person or their legal representative has been given the opportunity to make representations about the application (see section 23D (4)).

In either case, where a person is arrested, the person must still be released or brought before a judicial officer within the investigation period or as soon as practicable after that period (see section 23C(3) and section 23CA(3)).

There is no clear maximum time period dealing with how long a person who is arrested for an offence can be detained until being delivered before a Magistrate for a bail hearing. The Bail Act 1992, section 17 states that a person in police custody must be put before a court within 48 hours of being charged with an offence, but the Act is silent on how long they may be held in custody until they are charged.

In Canada, under the Criminal Code C-46, a person may be arrested without warrant and detained and questioned for a period of up to 24 hours. After this time, the person must appear before a judge.

The National Security Legislation Discussion Paper

The National Security Legislation Discussion Paper proposes amendments to the manner in which applications for an extension to the investigation period are made. For terrorism offences, the list of matters that can ‘stop the clock’ are more extensive.

An amendment proposed in the National Security Legislation Discussion Paper is the inclusion of a new provision, section 23C (7A) that would have the effect of clarifying two points:

- where two events occur that would allow for the recording of ‘down time’ the time can only be recorded as ‘down time’ once;
- where an event is occurring that would allow for the recording of ‘down time’ for example while the person is waiting for medical attention, that event does not prevent the person from being questioned. However, if the person is questioned in these circumstances, the period of questioning is not to be regarded as ‘down-time’.

The following is an excerpt from the National Security Legislation Discussion Paper:

Currently, section 23D provides that an application for extension of the investigation period may be made before a judicial officer, or in writing, by telephone or other electronic means, and the person or his or her legal representative may make representations to the judicial officer about the application. Section 23D does not require the application to include any particular statements or information.

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19 Criminal Code C-46 (Canada), subsection 503(1).
It is proposed that the process for the application and granting of an extension of the investigation period should be clarified. The revised process will ensure that sufficient procedural fairness safeguards are in place. Under proposed section 23D, the process would be as follows.

An application could only be made in writing (not by telephone). Before the application is considered by the magistrate, the investigating official would need to give a copy of the application to the person (or legal representative) and inform the person (or legal representative) that the person may make representations to the magistrate. The application would be required to include certain information to ensure that the magistrate is able to appropriately consider whether to grant the extension or not. If the magistrate decides to grant the extension, the magistrate must give the investigating official a copy of the instrument granting the extension, who must then give a copy to the person (or legal representative). If the application was made electronically, the magistrate would need to inform the investigating official of the matters included in the instrument, who would then inform the person (or legal representative).

‘Dead time’ in counter terrorism matters

For terrorism offences only, the investigation period can be suspended by a judicial officer for the purposes of a range of things to be done by police under section 23CB, including for example, where inquiries need to be made with overseas jurisdictions. This ‘specified time’ (sometimes called ‘dead time’) is not the same as ordinary down time under the legislation. Ordinary down time applies automatically when the arrested person is doing certain things which effectively prevent their questioning, such as when they are talking to their lawyer, resting, or receiving medical attention. Although ordinary down time also suspends the investigation period, it does not require an application to a judicial officer.

The Commonwealth is considering limiting this specified ‘dead time’ to a maximum seven day limit. The maximum seven day limit would be set under section 23CB and would be the maximum time that can be disregarded from the investigation period for a terrorism offence (see section 23CA (8) (m)).

The Commonwealth is not considering capping ordinary down time under Part 1C.


The investigation period and human rights law

The absence of a fixed maximum time period for which a person can be detained after arrest before being put before a court runs the risk of breaching the HR Act, section 18(4) (a) that provides:

(4) Anyone who is arrested or detained on a criminal charge—

(a) must be promptly brought before a judge or magistrate;

…

Key to section 18(4) (a) is the notion of “promptness”. For the purpose of the current discussion, it is necessary to ask the following question. After what period time does

police action in putting a detained person before a court cease to be prompt?

The HR Act, section 18(4)(a) is based on Article 9(3) of the *International Covenant on Civil and Political Rights*, and similar to Article 5(3) of the *European Convention on Human Rights* and section 23(3) of the *New Zealand Bill of Rights Act 1990* (NZ). As such, it is useful to look to the jurisprudence on those provisions as a starting point.

The remainder of this chapter sets out a summary of safeguards appearing in legislation in other jurisdictions.

**United Kingdom**

In *Brogan v United Kingdom* (1989) 11 EHRR 117, the European Court of Human Rights observed that Article 5(3) of the ECHR was to be interpreted in light of its object and purpose which is “the protection of the individual against arbitrary interferences by the state with his right to liberty.” It went on to observe that “the degree of flexibility attached to the notion of promptness is limited.” In *Brogan* the Court held that a period of four days detention before the accused were put before a court violated the promptness requirement, notwithstanding the exceptional nature of the terrorism charges that were laid against them.

In Australia, the first court appearance is to consider the question of whether bail should be granted. Although the strength of the case comes into the question of bail, the principal questions relate to whether the person will reappear in court, harass a victim or interfere with evidence or a witness.

**New Zealand**

In *R v Greenway* [1995] 1 NZLR 204, the New Zealand Court of Appeal had to consider whether a failure by police to put a person who was arrested early on a Saturday morning before a bail court breached section 23(3) of the *New Zealand Bill of Rights Act 1990* (NZ). In that case, it was not the practice of the relevant court to sit on a Saturday morning, although a special hearing could be arranged before a justice of the peace in special cases. As a result of the failure of police to take steps to request the court to sit, the defendant was not produced before a court until the following Monday morning.

The Court of Appeal held that, having regard to the “forthright wording of section 23(3)”, the delay until Monday “could only be justified if the defendant had made an informed decision not to seek bail, in effect waiving the urgency involved in according him his right to be taken to Court as soon as possible”. As the defendant had not waived his right to request bail, the Court held that the right to be taken promptly before a court had been violated, and admissions which were made in police interviews as a result of the detention were excluded in the subsequent prosecution of the defendant.

In *R v Te Kira* [1993] 3 NZLR 257 the New Zealand Court of Appeal cautioned that the requirement that a person arrested should be taken promptly before a court must be interpreted realistically. It would not, of course, mean that as soon as a person is arrested the police officer should march the person over to the court. The court observed that section 23(3) allows police a reasonable time to make a decision whether or not to charge a person arrested (by consulting with a senior officer) and, if the person is to be charged, for the process of laying the charge and incidental matters (such as drafting an information, and completing other necessary paperwork). The
court also clarified that the relevant time from which an assessment of ‘promptness’ commences is the time when the person loses their liberty (i.e., of the initial arrest), and not the point at which a decision to charge a person and deny them police bail is made.

The United States of America

The United States Supreme Court was required to consider how long a person could be held by the Government before being produced before a judicial officer for a probable cause hearing without breaching the Fourth Amendment of the United States Constitution in *County of Riverside v McLaughlin*, 500 U.S. 44 (1991). In *Gerstein v Pugh*, 420 U.S. 103 (1975) the Supreme Court had previously held that “the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pre-trial detention…”

The Court reasoned in *McLaughlin* that in determining the maximum amount of time for which a person could be held before going before a judge it was required to “reconcile important competing interests”:

> On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause. On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly “imperil [a] suspect's job, interrupt his source of income, and impair his family relationships”.22

The Court went on to hold that, as a general rule, a person should not be detained without judicial oversight for more than 48 hours, although in some cases, even that may be too long:

> Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges.

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.23

Scalia J issued a strong dissent in the case, arguing that a 48 hour limitation was

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22 *County of Riverside v McLaughlin*, 500 U.S. 44 (1991), para. III A.
23 Ibid., para. III B.
excessively generous to police. He agreed with the majority that the task of the Court was one of "balancing the competing concerns of 'protecting public safety,' on the one hand, and avoiding 'prolonged detention based on incorrect or unfounded suspicion,' on the other hand." However, His Honour was concerned that a 48 hour limit would mean that:

> a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days — never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made.²⁴

His Honour suggested that a 24 hour limit should suffice. In reaching this number he noted that most courts in the federal jurisdiction require prisoners to be produced within 24 hours, as do most states. He noted that "[s]ince the States requiring a probable-cause hearing within 24 hours include both New York and Alaska, it is unlikely that circumstances of population or geography demand a longer period."

Notwithstanding the vast size and population of the United States, the provision of justice is, in the first instance, the responsibility of small counties and municipalities, of which there are thousands. As a practical consequence of the Court’s decision in *McLaughlin*, thousands of small jurisdictions, many of which are smaller than the ACT, are required to produce their prisoners before a judge for a probable cause hearing in less than 48 hours; and in many cases, state legislation mandates that it occurs within 24 hours.

**Investigation period — issues**

In many serious Commonwealth cases, experience is that much of the investigation has been completed by the time of an arrest or an approach to a person of interest. For example, in serious fraud matters, drug matters or serious on-line child sexual exploitation cases, the vast bulk of the evidence will have been collected before the person of interest is approached.

In serious Territory based matters, this is often not the case. If police are called to the scene of an armed robbery or a murder or a fatal accident, for example, it may be that police wish to detain a particular person while they conduct enquiries related to the investigation. However, police may wish to speak to a number of other people, and take statements, before speaking to that person.

ACT Police advice is that four hours is often not long enough to accomplish this task. The quality of the investigation and accompanying processes can sometimes suffer as a result of the time limits, with the time limits creating a culture of rushed paperwork, a lack of consideration about the collection of evidence and generally inferior presentation of the evidence. This can also have a negative impact on the accused’s ability to respond to the case put against them.

Limiting down time would take the Part 1C model away from the existing hybrid model and toward a more prescriptive model such as that adopted by New South Wales. It may be that the structure of Part 1C does not easily allow for such a transition. It may be that the best way of introducing a more prescriptive model would be to review the structure and application of the time-restriction provisions.

As noted above, down time can only be justified under the legislation where a certain,

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²⁴ Ibid., Salia J dissenting, at II.
limited range of scenarios applies. Although the legislation does not provide an upper limit for the amount of down time which can be accrued, because the scenarios are specific, the amount of time that could be accumulated as ‘down time’ is limited in practice.

The down-time matters are listed in section 23CA. Some of these provisions might require review. It might be, for example, that conducting crime scene investigations could count as down time under the Act. This may alleviate the problem that there is simply insufficient investigation time currently available for more complex offences.

In addition, section 23CA (8) (a) allows for time whilst the person is transported to the ‘nearest’ premises to be able to comply with the Part. However, there may be good reasons for the officer needing to take the person to a place other than the ‘nearest’ premises. For example, the officer may need to take the person to the Regional Watch House, or to the investigating official’s station or place of work - for example, because the relevant files for a complex investigation are located there. This should be reflected in the Act.

There may be other situations which should be captured as ‘down time’. For example, there is no allowance under the legislation for time to be given to a person being detained to conduct religious rites, such as praying.

Issue —police questioning

In considering what delays are reasonable in an assessment of the HR Act, section 18(4) (a), it is important to consider what bearing delays in bringing a person before a court occasioned by a police desire to conduct a formal interview might have.

The common law on police questioning

In R v Te Kira [1993] 3 NZLR 257, the New Zealand Court of Appeal considered whether a delay in bringing a suspect before a court because police wanted to formally question him violated the right to be taken promptly before a judge in section 23(3) of the New Zealand Bill of Rights Act 1990 (NZ). Unlike the ACT, there is no applicable statutory regime establishing procedures for the police interview of suspects. The Court ruled that the delay violated section 23(3). In reaching this conclusion, the Court drew heavily, inter alia, on the common law of England and Australia. The Court of Appeal referred to the Australian High Court’s decision in Williams v The Queen (1986) 161 CLR 278. In that case Mason and Brennan JJ observed that:

"The common law requires an arrested person to be taken before a justice as soon as is reasonably possible and the words 'as soon as is practicable' should be taken to mean the same thing. Neither the common law nor the statute permits delay merely for the purpose of further investigation either of the offence for which the person was arrested or of any other offence or offences. What is reasonable will depend upon all the circumstances, including the availability of a justice, but it does not
encompass delay of that kind.

Gibbs CJ was prepared to accept that police may question a person whilst they are waiting for the person to be brought before a justice. That is to say, where the purpose of the person’s detention is to bring him before a judge, police may use any idle time for an interview. If the person’s detention is not incidental to them being brought before a judge, but for the purpose of interview, the detention will be unlawful:

The critical question is whether the arrested person was detained any longer than was reasonably necessary to enable him to be brought before a justice. If he is detained for the purpose of enabling him to be brought before a justice, the fact that he is questioned, whether about the offence for which he was arrested, or about other offences, will not necessarily mean that there has been a failure to bring him before a justice as quickly as was reasonably practicable. On the other hand, if he is detained, not for that purpose, but solely for the purpose of questioning him, the detention will be unlawful. The line may be a fine one, as it often is when a discretion has to be exercised in sensitive matters.

After reviewing these authorities, the NZ Court of Appeal held that it is lawful for police to question an arrestee in relation to offences in respect of which he or she is a suspect and/or he or she has been charged with, so long as:

- the arrestee voluntarily submits to the questioning or wishes to make a statement; or
- attendance at Court cannot, for other than non-questioning related reasons, take place immediately.\(^{25}\)

The Court of Appeal’s decision was influenced, among other things, by the fact that there was no statutory regime for questioning suspects in New Zealand. That, of course, is not the case in the ACT; Crimes Act 1914 (Cwlth) Part 1C creates a detailed regime for questioning suspects. It is also important to note that other human rights jurisdictions, such as the United Kingdom, also have statutory regimes in place regulating when detainees can be interviewed by police: see the Police and Criminal Evidence Act 1984 (UK) (PACE).

**Police questioning — discussion**

Relying on the authorities described above it can be said that any delay in bringing a person before a court caused by a police desire to interview a detainee will be *prima facie* inconsistent with the HR Act, section 18(4)(a). However, notwithstanding this *prima facie* limitation on the right, a carefully regulated statutory regime for police questioning will be a justifiable and proportionate limitation on the right to be brought promptly before a court, in accordance with the HR Act, section 28.

In order to be a justifiable and proportionate limitation on a right, the limitation must include the following features:

- Directed towards a “pressing and substantial social issue”;
- “Rationally connected to its objective”;
- Limit the right to the minimum extent necessary;

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“Proportionate in all the circumstances”; and

Strike a “fair balance” between the interests of the individual and the interests of the community.\(^{26}\)

Allowing police to question suspects furthers two important public interests:

- it allows police to obtain evidence to apprehend offenders and prevent further crime; and,
- just as importantly, it may give an innocent person accused of a crime an opportunity to demonstrate their innocence and avert at an early stage a misconceived criminal prosecution.

A regulated statutory scheme allowing for police questioning would be rationally connected to these objectives where a detained person agrees to cooperate and be interviewed. Where a person asserts their right to silence and makes it clear that they do not wish to be interviewed, any detention for the purpose of questioning beyond that point will cease to be rationally connected to the public interests referred to above.

Also, in order to be a proportionate limitation on section 18(4) (a), any scheme allowing for a person to be interviewed will have to impair the infringed right or freedom as little as possible. The extent of the impairment “must be no more than is necessary to accomplish the objective”: *De Freitas v Minister for Agriculture, Fisheries, Lands and Housing* (1999) 1 A.C. 69. "The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary": *R v Oakes* [1986] 1 S.C.R. 103; *Harper v Canada (Attorney General)* [2004] 1 SCR 827.

It can be argued that the 4 hour limitation on questioning in the Crimes Act 1914 (Cwlth), section 23C (4) is reasonable, and in principle there are no reasons why a similar provision could not be duplicated in any ACT legislation that might be enacted on the issue. However, the ‘down time’ contemplated in section 23C (7) of that Act is open ended and could conceivably run for some time. It is arguable that given the open-ended and imprecise nature of such ‘down time’, it could not be characterised as a ‘carefully tailored’ limitation on section 18(4) (a) of the HR Act which impairs the right no more than necessary. Although there is no reason why such ‘down time’ could not be duplicated in ACT legislation, it is suggested that a finite limit on how long ‘down time’ can run for should be considered (e.g. 3 or 4 hours).

### Questions relating to investigation periods

13 What is the maximum period of time that should be allowed to elapse during which police officers conduct investigations (the investigation period) before the detainee must be released from custody, released on police bail or brought before a magistrate?

14 What should be the limit on the investigation period for any detained Aboriginal or Torres Strait Island person?

\(^{26}\) *R v Oakes* [1986] 1 SCR 103.
15 What should be the limit on the investigation period for any detained child or young person?

16 What periods of time should be excluded from the calculation of the investigation period?

17 How should extensions to the investigation period be granted?

18 Who should be empowered to extend the investigation period?

19 What should be the maximum period of extended time for an investigation period?

20 What mandatory criteria should be used in the assessment of applications for an extension of the investigation period?

4.2.3 Cautions and admissions

Cautions and admissions – the law

Under Part 1C, where a person is arrested or is a protected suspect an investigating official must caution the person before starting to question the person. The person must be cautioned that they do not have to say or do anything, and if they do, it may be used in evidence (see section 23F).

Section 23U requires that the caution and the response must be tape recorded, if practicable.

If a suspect is being questioned and makes a confession or admission to an investigating official, the confession or admission is inadmissible as evidence against the person unless:

- if it was reasonably practicable to tape the questioning, the questioning was taped; or
- in any other case, the answers of the person were written down, an explanation was given to the person about the procedure to be adopted, the writing was read to the person with a chance to interrupt and correct matters, and a tape recording was made of the reading and anything said by the person (see section 23V(1)).

A court may admit evidence even if the section has not been complied with (or there is insufficient evidence of it) if the court is satisfied that in the ‘special circumstances’, admission of the evidence would not be contrary to justice (see section 23V(5)).

Cautions and admissions – issues generally

These requirements apply generally, including to less serious matters. In effect, this requirement means that, currently even in very minor cases, where a police officer wishes to ask questions of a person, they may take that person back to the station to question them. This may not be the most appropriate course of action to take, from either a police perspective or the public’s perspective.

It may be that in order to provide the most flexible and effective police service possible, the tape recording requirements of Part 1C should not apply to less serious offences in the ACT.
Currently, Part 1C does not apply to most road traffic offences. The question is whether Part 1C, or the tape recording provisions, should be extended to these offences also.

The application of Part 1C to traffic offences will place significant obligations on investigating authorities and provide a range of potential arguments to defendants which may prolong court action and place a burden on the judicial system.

**Recording equipment**

At the time the current provisions relating to requirements to record under the Crimes Act 1914 (Cwlth) were enacted the technology only allowed for such recordings to be made on hardware - either tape cassettes of various descriptions or video tapes.

The terminology used in the definitions to Part 1C, although amended to contemplate other forms of recording available, is still entitled "tape recording". The majority of recordings by investigating officials are now made digitally. The use of the word ‘tape’ is therefore obsolete.

Consistent with the history of the inclusion of legislative provisions requiring the recording of cautions, admissions and other processes, was the policy objective of ensuring police stations in particular, installed suitable equipment to record all dealings with people within that environment. At the time, mobile technology to allow the recording of events was not readily available and was cumbersome and expensive.

Since this time, technological developments have meant that the equipment is not only readily available but is affordable, compact and less prone to malfunction. Police often attend call outs with mobile technology available to them including hand-held digital audio and video devices, lapel activated microphones and some police vehicles have been equipped with full recording systems, both visual and audio.

Now that the technology is available, and has been provided to investigating officials, there is an issue about when it is appropriate to use it. Prior to these technological advancements it was possible to argue that it was not practicable to record these conversations because of the limits to technology. This is no longer the case.

**When should police record interactions with suspects and people in custody?**

The requirement for tape recording presents some practical difficulties for ACT Policing, and it will not always be possible to tape record interactions between police and suspects (or members of the public). Not only does this present significant resource issues for police, but there are also a range of risk management factors to consider. These include failing to turn the recording on and off at the relevant times, as well as the availability of equipment or equipment failure.

The physical location of the investigating officials is relevant in determining which interactions between police officers and suspect must be recorded. For example, when attending a call out police are often responding to situations and circumstances with limited information. This is relevant for two reasons:

1. There are work safety issues that relate to the decision as to whether to access equipment to allow for recording, to use equipment to allow for recording and to carry equipment to allow for recording. All of these things may impact on the safety of both the officers and members of the community at the scene.

2. Officers may be unable to ascertain whether a crime has allegedly been
committed, and if so, by whom.

These issues and circumstances will be very different in the physical environment of a police station - where the work safety issues are very different and where often it has already been ascertained what the alleged offence is, who the alleged offender is, and the purpose of the interaction.

The issue of when the investigating officials are:

(a) attempting to ascertain what has happened; and
(b) actually gathering evidence with respect to the commission of an alleged offence,

will inform the way the law should impose requirements for the recording of interactions between police officers and suspects and people in police custody.

These issues are best illustrated by examples.

**Scenario one**

A mobile police patrol consisting of 2 officers responds to a job at a residential address. It is dark. The details provided to officers are very limited. The officers are advised that it is believed there are 3 adults at the residence. One of the adults is reported to be armed with a knife and it is alleged that an assault has taken place. There may be children at the residence as the call to 000 was made by a child.

When police arrive at the scene the house is dark. There are 2 adults sitting on the front lawn. Both have visible injuries. The police car is equipped with digital recording equipment.

**Scenario one – issues**

In this scenario, police have yet to ascertain if a crime has been committed. They are not sure of the location of the 3rd person reportedly at the premises, or the presence, and safety of any children. No weapon has been observed.

If a crime has been committed, the identity of the alleged offender has yet to be ascertained. Police officers’ paramount concern will be their own safety and the safety of those at the scene. Once they have made some initial inquiries they may be able to identify both an alleged offender and an offence.

In these circumstances the following issues need to be considered:

- What type of recording equipment is appropriate for the situation?
- Can recording equipment be deployed, and used safely?
- Who is responsible for ensuring the equipment is functioning before, during and after the incident?
- Are there any safeguards to ensure equipment is operating properly?
- Are the circumstances appropriate for the issue of a caution?
- Do police have adequate details and information to be satisfied of the offender's identity and that a crime has been committed?

In this scenario, there may be a number of compelling reasons that make recording at the scene impracticable. These include:
• safety issues concerning both the investigating officials and those present;
• availability of the equipment, malfunction of the equipment;
• inability to use the equipment due to any number of reasons;
• providing first aid, restraining offender, crowd control, lighting, and crime scene preservation.

Scenario two
A person walks into the Civic police station and approaches the front desk. The person places some items of evidentiary value on the counter and confesses to a crime recently committed.

Scenario two – issues
In this scenario, both the offender and the alleged offence are apparent. The physical location is a police station. The premises are fitted with video and audio recording devices.

The alleged offender is taken into custody and immediately cautioned. The offender is then placed into the custody of two assigned investigating officials who take the offender to an interview room. The interview room is fitted out with recording devices, and the officers have a computer available to them.

The police station has clear maintenance policies and regular testing and safeguards (e.g. more than 1 recording source and ability to test and ensure equipment working properly).

In this scenario, it would be difficult to establish that it was not practicable to record police interactions with the alleged offender.

Recording equipment – the law
The legislation currently makes no distinction relating to physical location. This has become an issue in recent years given the roll out of mobile equipment. Previously it was possible to argue that it was always impractical to make such recordings outside of a police station because the mobile equipment was not available to patrols and patrol cars.

The legislation currently does not provide any guidance as to what should be taken into account when considering whether recording is reasonably practicable. This is relevant for a number of provisions under the relevant Crimes Act 1914 (Cwlth) provisions and may ultimately determine the admissibility of the conversations.

### Questions relating to police cautions

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25 How should the legislation be drafted such that it captures future technology?

26 Should provisions relating to requirements to record cautions, admissions and other processes apply equally regardless of location?

27 When should it be mandatory for police officers to audio record a caution to a person and to audio record the person’s response to the caution?

28 Should provisions be modified to provide for more onerous requirements if the conversation takes place in a police station?

29 What role do work safety issues play in the requirement to record cautions, admissions and other processes?

30 Should “not practicable” be clarified by setting out in the legislation some of the factors that a Court should take into account in instances where recording requirements have not been satisfied?

31 Should legislation or Ministerial guidelines set out the circumstances in which it is not practicable to record a caution?

4.2.4 Legal practitioners – section 23G

Generally speaking, if a person is under arrest or a protected suspect, an investigating official must inform the person that they can contact, or attempt to contact a legal practitioner and try to arrange for that person to be present during questioning. The investigating official must delay the questioning for a reasonable time to allow this to occur.

The investigating official must tape record the information being given to the person, if practicable (see section 23U (1)).

The investigating official must allow the legal practitioner to communicate with the person in circumstances where the conversation will not be overheard (see section 23G (2) (b)). If the legal practitioner is present, then the investigating official must allow the person to consult with the legal practitioner in private and provide reasonable facilities for that to happen. The investigating official must also allow the person to be present during the questioning, but only while the legal practitioner does not unreasonably interfere with the questioning (see section 23G (3)).

If the person is an Aboriginal or Torres Strait Islander person, then the investigating official must immediately:

(a) inform the person that an Aboriginal legal aid organisation will be notified that the person is under arrest or a protected suspect, and

(b) inform an Aboriginal legal aid organisation that the person is under arrest or a protected suspect (see section 23H (1)).

The exceptions to these rules are found in section 23L.

In ‘exceptional circumstances’, a police office of the rank of Superintendent (or higher) can make a determination that it is appropriate not to allow a person access to a legal practitioner or to a particular legal practitioner. The officer can only do this if
allowing the person access to a legal practitioner where the delay in questioning cannot be complied with, having regard to the urgency of the situation and the safety of other people or where the allowing access would likely result in:

(a) an accomplice of the person taking steps to avoid apprehension; or
(b) the concealment, fabrication or the destruction of evidence or the intimidation of a witness.

The determination must only occur in exceptional circumstances and must be recorded in writing.

### Questions relating to legal practitioners

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#### 4.2.5 Interview friends

Under Part 1C, certain people are entitled to an ‘interview friend’. An interview friend is basically a friend or relative chosen by the person, but can also be a legal practitioner (see especially section 23H (9)) or a volunteer coordinated through the ACT Aboriginal Justice Centre.

**Interview friends — the law**

Under section 23J, the Commonwealth Attorney-General must keep a list of people who are suitable to help Aboriginal people, and who are willing to give such help in the region.

If the investigating officer believes that a person who is under arrest or a protected suspect is an Aboriginal or Torres Strait Islander person, then the investigating person must not question the person without an interview friend being present unless the person has waived that right (see section 23H(2)). The investigating official must also make arrangements to allow the person to communicate with the interview friend in circumstances where the communication will not be overheard (see section 23H (2)).

That provision does not apply to people under the age of 18 years of age. Where an investigating officer believes on reasonable grounds that an arrested person, a protected suspect, or any other suspect being interviewed is under 18 years of age (whether under arrest or not), then the officer must not question the person unless an
interview friend is present (see section 23K). The investigating official must also make arrangements to allow the person to communicate with the interview friend in circumstances where the communication will not be overheard (see section 23K (2)). Once again, the exceptions to these rules—for both Aboriginal and Torres Strait Islander people and children—are found in section 23L.

The investigating officer must tape record any information being given to the person about the interview friend, if practicable (see section 23U (1)). References to ‘tape recording’ are now obsolete. Reference to the recording of certain information should not refer specifically to the medium for recording the information.

In the ACT, the appropriate Aboriginal legal aid organisation is the NSW ACT Aboriginal Legal Service. An ‘interview friend’ is defined as:

- a relative or other person chosen by the person; or
- a legal practitioner acting for the person; or
- a representative of an Aboriginal legal aid organisation; or
- a person whose name is included in the relevant list maintained under subsection 23J (1).

**Interview friends — issues**

Where a relative, friend, solicitor or a representative of an Aboriginal legal aid organisation is not sought by the person in custody or is not available, an Aboriginal Interview Friend is able to attend the interview. The ACT Aboriginal Justice Centre coordinates the volunteer Aboriginal Interview Friend program. The Aboriginal Interview Friends are on call as an independent people to sit in on interviews conducted by ACT Policing.

Aboriginal Interview Friends resulted from Recommendation 145 of the 1991 Royal Commission into Aboriginal Deaths in Custody which related to the introduction of a cell visitors scheme to assist when an Indigenous person is taken into custody.

The role of the Aboriginal Interview Friend is similar to the mainstream ACT Public Advocate’s (ACT PA) Interview Friends Program. Established under the Children and Young People Act 2008, the ACT PA program coordinates volunteers to attend police interviews held with young people.

In both cases the role of the Interview Friend is not to act as an advocate for the person. Rather, they attend as a support person to ensure that any statements made are voluntary and that the interview process is conducted in an appropriate manner.

A training program for volunteer Aboriginal Interview Friends is available through the Yurauna Centre at the Canberra Institute of Technology.

Although it is noted that the investigation time with respect to Aboriginal people is 2 hours, it does not take less time to appropriately investigate an offence because the suspected offender is an Aboriginal person. Advice from ACT Policing is that 2 hours (and, in many cases, 4 hours) is simply insufficient to conduct appropriate investigative inquiries in cases other than straightforward cases.

Having said that, it is recognised that Aboriginal and Torres Strait Islander people have special needs when it comes to dealing with the criminal justice system. The
Human Rights and Equal Opportunity Commission has noted that:

[t]he over-representation of Indigenous people in custody, in large, is due to historically derived disadvantage and ongoing systemic discrimination. Experiences of separation through the criminal justice system, juvenile justice and care and protection systems, combined with dysfunctional behaviours such as family violence and alcohol and other substance misuse are indicative of the inequality and extreme marginalisation faced by Indigenous Australians.27

Although Part 1C applies all over Australia including in the Northern Territory and Western Australia, some of the same concerns apply to Aboriginal and Torres Strait Islander people in the ACT. Aboriginal people may be particularly disadvantaged in their engagement with police, for example, in terms of lack of proficiency in English, lack of education, and lack of awareness of rights. There may also be a range of cultural factors which serve to disadvantage Aboriginal and Torres Strait Islander people in their dealings with law enforcement officers.

It may be appropriate to review this 2 hour time limit and to discuss ways in which the particular needs of Aboriginal people can be addressed. It might be that the needs of Aboriginal people can be met in some other more applicable way, rather than limiting the investigation time.

Further, it might be that limiting the investigation time is not the best method for ensuring that Aboriginal and Torres Strait Islander people and children and young people rights are appropriately addressed. It might be better to ensure, for example, that people have access to lawyers and support in dealing with police.

It may also be appropriate for the legislation to focus on people who may be disadvantaged for a range of reasons, such as intellectual incapacity or lack of proficiency in spoken English. It may be appropriate for the legislation to apply a high standard of safeguards to people with impaired decision such as an intellectual disability, mental illness or acquired brain injury in the same way that safeguards are applied to Aboriginal people.

In Victoria, for example, the Office of the Public Advocate (OPA) coordinates an interview friends scheme which assists people with cognitive disabilities and mental illness in their interactions with police. Although not currently legislatively based, the Victorian OPA has called for this safeguard to be incorporated in legislation and for a central point of referral for all interview friend requests for children and young people and people with cognitive disabilities and mental illness, as well as Aboriginal people.

Questions relating to interview friends

38 Should there be provisions that are specific to Aboriginal and Torres Strait Islander people in terms of the ‘investigation period’?

39 Are there other measures that should be included in legislation in order to safeguard the rights and interests of vulnerable groups of people?

40 Are there groups of people whose rights to a lawyer or to other support during police questioning are not adequately protected?

4.2.6 Provision of information

If a person who is a relative, friend or legal representative of a person asks where an arrested person or protected suspect is, then an investigating official must tell the arrested person or protected suspect that a request for information has been made (see section 23M). The investigating official must then tell the relative, friend or legal representative the information about where the person is, unless (a) the arrested person or protected suspect does not want them to; or (b) the investigating official believes on reasonable grounds that the person is not the person’s relative, friend or legal representative (see section 23M).

Once again, the exceptions to these rules are found in section 23L. The officer can only apply the exception where the delay in questioning cannot be complied with, having regard to the urgency of the situation and the safety of other people or where the allowing access would likely result in:

(a) an accomplice of the person taking steps to avoid apprehension; or
(b) the concealment, fabrication or destruction of evidence or the intimidation of a witness.

The determination must only occur in exceptional circumstances and must be recorded in writing.

The investigating official must tape record the information about the relative, friend or legal practitioner being given to the person, if practicable (see section 23U(1)). Once again, references to ‘tape recording’ are obsolete and reference to the recording of audio or video with audio recording should occur in a technology neutral manner.

Questions relating to the provision of information

41 Should police be obligated to notify a person such as a next-of-kin when a person is arrested?

42 Should police be required to take proactive steps to seek consent from the arrested person to make contact with an appropriate person to tell them of the current whereabouts of the detained person?

43 When should attempts to contact an appropriate person occur during the period of arrest?
4.2.7 Interpreters and consular officials

Where an investigating officer believes that an arrested person or protected suspect is unable to communicate orally with reasonable fluency – because of a physical disability or inadequate knowledge of English - then the official must arrange for an interpreter and defer the questioning until the interpreter arrives (see section 23N).

Police officers report significant difficulties with finding interpreters when conducting interviews with suspects from culturally and linguistically diverse backgrounds. In some cases, officers have no other option but to use family or community members as interpreters. Although this arrangement can provide important support for the suspect, there can also be conflicts of interest, for example in family violence cases where suspects or witnesses can be influenced in their statements for reasons relating to cultural or family obligations or expectations. In these circumstances, the reliability of statements made by a suspect through an interpreting family member can be compromised.

Generally speaking, where an investigating official believes that an arrested person or a protected suspect is not an Australian citizen, the person is entitled to contact the consular office of their choice (section 23P (1)). The investigating official must not start to question the person unless the person has been told that he or she can communicate with the consular office and has been given a reasonable opportunity to do so (see section 23P(2)).

Once again, the exceptions to these rules are found in section 23L. The officer can only apply the exception where the delay in questioning cannot be complied with, having regard to the urgency of the situation and the safety of other people or where the allowing access would likely result in:

(a) an accomplice of the person taking steps to avoid apprehension; or
(b) the concealment, fabrication or destruction of evidence or the intimidation of a witness.

The determination must only occur in exceptional circumstances and must be recorded in writing.

The investigating official must tape record the information being given to the person, if practicable (see section 23U (1)).

Questions relating to interpreters and consular officials

44 Are provisions relating to interpreters and consular officials adequate?

4.2.8 Children and young people

The Territory has introduced similar, separate, legislation which provides for young people — the Children and Young People Act 2008. This legislation operates in
addition to the Crimes Act 1914 (Cwlth).

For the purposes of both pieces of legislation, a child is a person under 12 years of age and a young person is a person who is over 12 years of age but not yet an adult.28 The Crimes Act, subdivision 10.7.2, deals with preliminary procedures in relation to children and young people. As mention in chapter 2, the HR Act incorporates the ICCPR into ACT law. Various provisions in the ICCPR protect the rights of the child, including Articles 10, 14, 23 and 24. The provisions in subdivision 10.7.2 comply with the HR Act and are also consistent with the United Nations Convention on the Rights of the Child.

Amongst other things, subdivision 10.7.2 prescribes some rules about the interviewing of children and young people. In accordance with section 252G, if a police officer suspects that a child or young person may be implicated in the commission of an offence or the police officer is holding the child or young person under restraint, then the police officer must not interview the child or young person or cause the child or young person to do anything in relation to the offence unless a suitable adult is present.

In accordance with section 252H, the police officer may interview a child or young person without a suitable adult present if the officer believes that it is necessary to do so without delay to avoid a risk of death or serious injury to a person or serious damage to property.

Section 252K obliges a police officer to inform a parent or responsible person if the police officer has charged a child or young person.

The net effect of the two Acts with respect to children and young people is that:

- The Crimes Act 1914 (Cwlth) will apply in relation to the investigation of all Commonwealth offences and includes section 23K which specifically relates to young people;
- Most of the Crimes Act 1914 (Cwlth) will apply in relation to the investigation of all Territory offences, except for
  
  (a) offences against the *Road Transport (Alcohol and Drugs) Act 1977*; or
  
  (b) infringement notice offences for the *Road Transport (General) Act 1999* if the police officer concerned intends to serve an infringement notice under that Act or intends to take no action in relation to the offences.

- Section 23K (about interviewing young people) will only be picked up by the Crimes Act 1900, section 187 if the child or young person is under arrest (and not, for example, being ‘restrained’ or in the ‘company of police’) for an offence punishable by less than 12 months imprisonment.

- Where the child or young person is not under arrest (in relation to an offence punishable by less than 12 months imprisonment), then the Crimes Act 1900 will apply (alongside the other relevant parts of Part 1C of the Crimes Act 1914 (Cwlth)) (provided that the offence is not a road type offence.

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28 *Children and Young People Act 2008*, ss 11 and 12.
The following excerpt from the Explanatory Statement for the Children and Young People Bill 2008\textsuperscript{29} explains existing provisions in the Crimes Act 1900 relating to important safeguards for the rights and interests of children and young people:

Section 252D provides a definition of ‘under restraint for subdivision 10.7.2.

A child or young person is “under restraint” if any of the circumstance described in section 252E apply.

Section 252E describes the circumstances when a child or young person will be taken to be under restraint in subdivision 10.7.2. When a child is under restraint, other sections in subdivision 10.7.2 require the police to follow procedures intended to protect the interests of the child or young person and ensure the integrity of any evidence collected.

The concept of being under restraint extends beyond being under arrest or in lawful detention and includes circumstances where a child or young person is in the company of a police officer in relation to the investigation of an offence or possible offence. The section needs to be read in conjunction with section 252F.

The broad definition of the term under restrain is intended to engage the procedural rights and safeguards afforded to children and young people in circumstances where children or young people are more likely to make admissions or incriminating comments. These safeguards are intended to assist in ensuring that any admissions or statements made by a child or young person during the course of an investigation are made voluntarily and are reliable, and to ensure the integrity of other evidence obtained from the child or young person in the course of an investigation.

Section 252F replaces existing section 77 of the Act and expands on the term “in the company of a police officer” contained in section 252E(c), and is based on section 139(5) of the Evidence Act 1995 (Cwlth) and the definition of “protected suspect” in section 23B (2) of the Crimes Act 1914 (Cwlth).

The clause excludes specific instances of contact between young people and police involving minor traffic offences from falling within the concept of “being in the company of a police officer” in section 252F as these instances are not considered to be of a nature that warrant extra protection.

Section 252G is based on existing section 79 and deals with police interviews of children and young people in circumstances where a police officer suspects that a children and young people may have committed certain offences or where a police officer suspects that a child or young person may be implicated in the commission of certain offences. The provision makes it clear that a police officer must not interview the child or young person or cause the child or young person to do anything in relation to the investigation of an offence (such as participate in a line-up or provide a forensic sample) unless one of the specified adults is present. If one of the persons listed is present, the police can only interview the child or young person or cause them to do something if authorised by another law. This requirement is intended to ensure that the child or young person’s legal rights and interests are protected, and assumes that the child or young person will not always be in a position to effectively protect their own legal rights and interests.

If a new set of legislation is created in the Territory, it would be desirable that all of

the relevant legislation be co-located. This will assist to simplify the interpretation and application of the legislation.

The application of the current legislation about young people is not straightforward. However, in effect, the ACT legislation extends the categories of people to whom the legislation applies – beyond ‘arrested people’ and ‘protected suspects’ to ‘restrained’ people and people ‘in the company of police’ – but only for certain offences.

Where the application of legislation is complex, there is a greater chance of innocent errors being made about which legislation applies. This might lead to a person being afforded the full protections prescribed under one set of legislation, but the applied legislation being the incorrect regime. Evidence may be excluded on this basis.

Questions relating to children and young people

45 Should the application of provisions relating to children and young people in the Territory be simplified?

46 How should provisions relating to children and young people in the Territory be simplified?

47 Should the relevant laws, as they apply to young people, reflect the principle that the more serious the offence the more comprehensive the protections for suspects?

4.2.9 The application of Part 1C to forensic procedures

Currently, Part 1C applies in the Territory where the investigating official is ‘questioning a person’. ‘Questioning a person’ is defined in section 23B (6) to be ‘carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any …offence (including an offence for which the person is not under arrest)’.

This definition is very broad, except the definition specifically excludes where the officer is conducting a forensic procedure under Part 1D of the Crimes Act 1914(Cwlth). Further, ‘down-time’ under the Act (for the purposes of an ‘investigation period’) can include where a forensic procedure is being carried out under of the Crimes Act 1914 (Cwlth), Part 1D.

The ACT forensic procedures regime mirrors Part 1D of the Crimes Act 1914 (Cwlth).

However, the legislation does not contain a specific exclusion for forensic procedures – either for questioning a person or for down time - conducted under the Crimes (Forensic Procedures) Act 2000 (FP Act).

The better view is that Part 1C does not apply where procedures are being conducted under the Crimes (Forensic Procedures) Act and that down time is applied where a forensic procedure is conducted under that Act. This is because references in the
Commonwealth legislation should be read to include references to the Territory legislation. The words in section 23AA of the Crimes Act 1914 (Cwlth) that “references to a law of the Commonwealth include references to a law of that Territory” should be understood to mean that a reference to Part 1D of the Commonwealth Act can be read as also including the FP Act.

However, the matter is not free from doubt. It would be desirable if the application of the legislation was clarified.

The forensic procedures regime in the Territory is designed (amongst other things) to protect the rights of people from whom forensic samples are taken. It may not be necessary or desirable to impose a further set of (possibly conflicting) obligations on investigating officials.

Questions relating to Forensic Procedures and Part 1C

48 Should Part 1C apply to forensic procedures in the Territory?
49 Is there any reason why ‘down-time’ should not include the period during which a forensic procedure is being conducted under the Territory forensic procedures regime?

4.3 Safeguards in other jurisdictions

Similar legislation to Part 1C exists in several other States and Territories\(^{30}\), although the provisions differ widely in both their scope and application. Although jurisdictional variations are complex, there are a number of key points that can be made when comparing the schemes:

- Not all jurisdictions apply the provisions (or all of the provisions) to all offences. Some jurisdictions have limited the application of the provisions (or some of the provisions) to indictable offences. For example, Queensland provisions apply only to indictable offences.
- Not all jurisdictions have set time limits for investigation time or questioning time. For example, Victoria has no time limits at all.
- Some jurisdictions do not have the detail set out in Part 1C, but some jurisdictions have additional provisions, such as, provisions relating to intoxicated people, incapacitated people, and people who are not from an English speaking background.

Notably, the Crimes Act 1914 (Cwlth) applies in all jurisdictions with respect to the

\(^{30}\) See for example, Police Powers and Responsibilities Act 2000 (Qld), chapter 15; Crimes Act 1958 (Vic), Pt III (Procedure and Punishment); Police Administration Act (NT) esp Part VII Div 6 and 6A; Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) Part 9 (Investigations and Questioning).
investigation of all Commonwealth offences. It is therefore the case that all investigators across Australia operate within an environment which calls for the application of a different legislative regime depending on the offence being investigated.

4.3.1 Queensland

In Queensland, the Police Powers and Responsibilities Act 2000 (Qld), Chapter 15, Part II, Div 3 sets out a regime for questioning people about indictable offences. It is broadly similar in scope and form to Part 1C of the Crimes Act 1914 (Cwlth).

In very general terms, a police officer can detain a person for questioning for a reasonable time, and there are a range of factors which must be considered when determining what is reasonable. A detention period is 8 hours and (during that time) the period of questioning period cannot be more than 4 hours; both of these times may be extended.

There are a range of other provisions in the Queensland Act designed to protect the rights of the person being questioned. For example, a police officer must tell the person that they can telephone a friend or a lawyer before asking any questions (see sections 418 and 419). Special protections exist for Aboriginal people, children, incapacitated people and intoxicated people (see sections 420 to 423). People are entitled to be cautioned, contact an Embassy, and the questioning must be tape recorded (see Division VI and Division VII).

4.3.2 New South Wales

In New South Wales, the Law Enforcement (Powers and Responsibilities) Act 2002, Part 9 deals with Investigating and Questioning. That Part applies to all people arrested for an offence (see section 111). In general terms, the person cannot be detained for longer than is reasonable and must be released after the expiry of the ‘investigation period’. The investigation period is limited to 4 hours, but can be extended by way of ‘detention warrant’.

Division 3 contains a range of measures designed to protect the rights of the person being questioned. For example, the person must be cautioned (section 122), has a right to a lawyer, a friend, an interpreter (sections 123 and 128), can contact the Embassy (see section 124). The person also has a right to medical attention and reasonable refreshments and facilities (sections 129 and 130).

Section 112 provides that regulations can be made about the way in which these provisions apply to children, Aboriginal people, people with disabilities and people who do not come from an English speaking background.

There are specific powers outlined in Part 10, Division 1 for police to take identifying material from people in custody.

4.3.3 Victoria

The Victorian equivalent is contained with the Crimes Act 1958 (Vic) at Part III, Division 30A. In general terms, that Part applies to people under arrest in the company of police officers, regardless of the suspected charge. Various rights are set out, including the right to a lawyer (section 464C), an interpreter (section 464E), and the right to communicate with an Embassy (section 464F). If the offence is
indictable, the police officer must record the giving of certain of this information (section 646G).

In accordance with section 464A, a person can only be held in custody for a reasonable time. There are a range of factors outlined in the legislation for what constitutes a ‘reasonable time’, but there are no explicit time limits at all. Before the person answers any questions, the person must be warned that they do not have to do so (see section 464A (3)).

4.3.4 Northern Territory

The relevant Act in the Northern Territory has a more limited scope. In accordance with section 136 of the Police Administration Act (NT), a person who has been taken into custody must be taken before a justice as soon as practicable unless, for the purposes of an investigation, the police detain the person for a reasonable period. There are a range of factors to consider in determining what a reasonable period (see section 138) is. If the person is intoxicated, then the police must take the person before a justice as soon as practicable after the person is no longer intoxicated (section 138A). There are no specific time limits. The person must be cautioned (sections 140 and 141). There do not appear to be any special provisions for Aboriginal people, children or incapacitated people.

The Act requires that an admission or confession for a ‘relevant’ offence must be recorded. In general terms, a relevant offence is an offence attracting a penalty of over two years imprisonment (see sections 142 and 139).

4.3.5 United Kingdom

The Police and Criminal Evidence Act 1984 (PACE) (England and Wales) is the statutory framework which governs police powers on all matters from initial stop and search through to charge including arrest.

Under PACE, section 41, the initial period that a suspect can be held without charge is 24 hours. This period is calculated from arrest or arrival at the police station, whichever is the earliest. PACE does not include a scheme for the exclusion of ‘down-time’ or ‘dead-time’.

Detainees charged with summary only offences must be released with or without bail after 24 hours. In respect of indictable offences, detention beyond 24 hours can be authorised by a police officer of the rank of superintendent or above up to 36 hours, that is, an extra 12 hours (PACE, section 42). The continued detention must be necessary to obtain evidence in relation to the offence, including by questioning of the suspect and the reasons must be recorded in the custody record.

Applications for further detention up to 96 hours (from the time of arrest/arrival at police station) must be made to the Magistrates’ Court (PACE, section 42). The application must be by way of an information, a sworn written submission supported by oral evidence. The application is served on the suspect, who must be brought before the court and is entitled to legal representation.

Applications for further detention represent only a very small minority of the total number of detentions. The UK Ministry of Justice, Statistic Bulletin provides the following commentary:
Warrants of further detention issued by Magistrates under PACE, which authorise detention without charge, were applied for on at least 470 occasions during 2006/07(4), 55 less than recorded in 2005/06. In all years since 1997/98, almost all applications have been granted. In 2006/07, 70% of the detainees were charged, a decrease of three percentage points on the previous year.31

The Magistrates Court can order a maximum of 36 hours further detention at the first application and can then order a further 36 hours (PACE, section 44), but as this is subject to the overall 96 hour maximum, the extension does depend on the timing of the application. There is an obligation not to grant the application beyond such time as the court thinks fit i.e. it is not an automatic 36 hours or nothing. The court must consider the evidence and fix an appropriate period not being more than 36 hours.

The overall time limits are subject to ongoing review to ensure that persons are not held unless necessary (PACE, section 40). The first review must take place no later than six hours after detention is first authorised, then every nine hours.

PACE, section 31 requires that an arrest for a further offence must occur as soon as a person is liable to arrest, that is as soon as there is a reasonable suspicion that the person committed the offence. This means that where it becomes apparent that a person in custody has committed an offence other than the one for which he was arrested, the police can not get round the detention provisions by releasing and then arresting for the new offence, thus starting a new detention period.

Any designated police station (basically if has been authorised as suitable for the detention of arrested persons) must have a custody officer of at least the rank of sergeant (PACE, section 36). The object of the section is that the functions of the investigating officer and the custody officer should be kept separate – so that in effect, the custody officer independently reviews the conduct of the investigation.

**PACE — Duties of custody officer before charge**

The custody officer must create a written record, detailing the reasons for detention. PACE provisions also require entries to be made in the custody record (section 37).

PACE, section 66 provides for the making of Codes of Practice by the Secretary of State and are supplementary to the statutory provisions of PACE. Code C regulates the detention, treatment and questioning of persons by police officers.32

Code C requires that a separate custody record be opened as soon as practicable after a person’s arrival at the police station. The record may be viewed by a legal representative at any time and after release, a copy must be supplied on request to the legal representative or the detainee. In general terms, the custody record will contain every occurrence during the detention period – including matters such as details of grounds of arrest and detention, property detained, periods of review, details of food, drink and sleep, removal and return from interview, details about when the suspect is charged or released.

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5 Preventative action

In the normal exercise of their powers, police will often need to enter premises for the purpose of preventing injury or further injury. Police also have powers aimed at preventing possible future offending or aimed at reducing the likelihood of future offending behaviour.

Powers to prevent injury

These powers are currently set out in the Crimes Act, Division 10.2.

Police are able to take action that is necessary and reasonable when entering premises. Entry onto premises can be either by invitation, under a warrant or in circumstances of emergency.

Police officers are able to enter premises either under a warrant or in circumstances of emergency where there is a suspicion that a person on the premises has suffered or is in imminent danger of suffering physical injury at the hand of another person.

Attached to these powers of entry is the power to seize firearms, ammunition and any licence to possess or use any firearm. Police only have the power to seize these items where the police officer has ‘reasonable grounds for believing that the seizure is necessary to prevent the commission or repetition of an offence or of a breach of the peace or to protect life or property’.

Division 10.2 also set out police powers for the seizure of firearms, ammunition and firearms licences in order to enforce orders under the Domestic Violence and Protection Orders Act 2008 (DVPO Act). Where an emergency, interim or final order is made by the Magistrates Court, the person’s firearms licence is automatically suspended (in the case of emergency and interim orders) or cancelled (in the case of final orders).

Both NSW and Queensland legislation provide for similar entry powers. Both jurisdictions also provide provisions to specify the amount of time that police officers are allowed to remain on premises as that time that is reasonable under all the circumstances. In the NSW provision, a police officer who enters premises may remain on the property ‘only as long as is reasonably necessary in the circumstances’.

The preventative action provisions in the Crimes Act 1900 also include a provision that empowers police officers to search a person for the purpose of finding and seizing a knife. The requirements to allow police to undertake a search are threefold.

1. The person must be in a public place or on school grounds;

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33 Crimes Act 1900, section 188 (a).
34 Crimes Act 1900, section 188 (b).
35 Crimes Act 1900, section 188 (c).
36 Crimes Act 1900, section 191 (1).
41 Crimes Act 1900, section 193.
(2) The police officer must have a reasonable suspicion that a person is carrying a knife.

(3) The police officer must produce identification and then inform the person about to be searched of the reason for the search.

The power to conduct search of person for knife along with offence provisions relating to the possession of a knife was inserted into the Crimes Act 1900 by the Crimes (Amendment) Act (No 2) 1998. The stated purpose of the Act was to ‘enact common sense and workable legislation to enable police to deal with the increasing prevalence of violent offences involving knives in our community’. The legislation was based on the knife legislation introduced in New South Wales by the Carr Labor Government.

**Move on powers**

The Crime Prevention Powers Act 1998 provides police officers with ‘move-on’ powers. These powers enable police to direct a person to move on from a particular public place if the officer has reasonable grounds to believe that the person has engaged, or is likely to engage, in violent conduct in that place.42

The officer may also direct the person to not return to that place for a period of up to 6 hours. Police officers do not have this power in instances where the person is picketing a place of employment; demonstrating or protesting about a particular issue; or publicise the person’s view about a particular issue.43

Although police do not capture data on the number of times directions to move-on are issued, in the 12 months to 28 February 2010, police apprehended 64 people for failure to follow a direction to move-on.44

Police use of move-on powers have been the subject of criticism as a result of what is perceived as their indiscriminate use with a disproportionate impact on young people and Aboriginal and Torres Strait Islander people.45 James Farrell, Legal Practitioner writing in the Alternative Law Journal states that:

> The legislation could perhaps be justified as a means to improve public perception of crime prevention or reduction. However the fear of crime is often based on irrational beliefs and perpetuated by mainstream media and there is no empirical evidence to suggest that the removal or exclusion of persons from public space actually reduces the incidence of crime.46

On 10 November 2009, the Hon. Peter Batchelor introduced the Summary Offences and Control of Weapons Acts Amendment Bill 2009 in the Victorian Parliament. As stated in the second reading speech, the Bill ‘provides a range of stronger powers for Victoria Police to assist in tackling the growing incidence of drunkenness, disorderly behaviour and violence, which involves the carrying and use of weapons in the Victorian Community’.47

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In introducing the Bill, the Victorian Government issued, for the first time, a ‘statement of partial incompatibility’. The Bill included a power for police to stop and search a person without warrant if the person is in a public place that is within a designated area.

In response to the Victorian Scrutiny of Acts and Regulations Committee the Minister advised that

‘new sections 10G and 10H of the Principal Act are incompatible with both the right to privacy (s13(a) of the Charter) and the right of children without discrimination, to such protection as is in their best interests and which is needed by reason of their being children (s17(2) of the Charter).

In relation to the right in s13 (a) of the Charter, as noted in the statement of compatibility, new sections 10G and 10H of the Principal Act are incompatible to the extent that they provide powers for police to randomly search persons and vehicles in public places within the designated areas, even if police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon.’

5.1 Breach of the peace

Existing statutory preventative action powers are closely related to common law powers to prevent a breach of the peace.

At common law, where a person is found to have breached the peace, the courts have power to bind that person over to keep the peace. As such it is not strictly an offence, but rather a power designed to prevent offending behaviour. The common law power has been incorporated into the Crimes Act at section 397, but note that this requires an information and summons or warrant, and is not the usual method for bringing breaches of the peace to court.

A breach comes before the court by way of information and if satisfied that there has been a breach the only power Magistrates have is to require someone to enter into a recognizance to keep the peace. This recognizance may include a surety. Breaches of the peace would only come to court where a person has been refused bail in the Regional Watch House.

In order to bind someone over to keep the peace a Magistrate must be satisfied that there has been a breach of the peace. Although it is not clear whether a breach of the peace is a criminal or civil wrong, the finding must still be to the criminal standard. This is because it can ultimately result in serious consequences, for example failure to comply with the order to enter into a recognizance could theoretically result in imprisonment.

However, a hearing would be rare. It is not a matter which could result in a criminal conviction, and there may be little to be gained by proving the breach. Once the accused has been removed from whatever situation the breach arose out of, the

51 Percy v DPP [1995] 3 All ER 124 at 133.
52 Forbutt v Blake (1980) 51 FLR 465 at 475.
preventative power has largely served its purpose. If it were considered that further breaches could occur, it may once have been important to prove the breach so that a person would be under a continuing court order as incentive to keep the peace. However, if a matter is serious enough there are now other ways of dealing with this for example through the Domestic Violence and Protection Orders Act 2008.

By default the matters may be heard where a breach of the peace is what initiates police involvement for more serious charges, that is, where the issue is power of arrest or entry.

**What is a breach of the peace?**

A breach of the peace is defined in *R v Howell*:

> …we cannot accept that there has been a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks upon a person’s body or property.\(^53\)

The following are some factual situations which may or may not fit within this formulation:

In an industrial dispute, forming a picket line and preventing people from entering property. Even if no force is applied this is a breach of peace because it may incite those who are prevented from entering to take “measures of self help”.\(^54\)

Trespassing in itself is not a breach of the peace. It may be if violence would be the natural consequence of the trespass, for example if a trespasser faces threats of violence to remove them. In *Percy v DPP* the appellant climbed into a military air base to stage a protest. There was no evidence that showed that the non-violent act of trespass would have provoked the service personnel to violent reaction, so it was not a breach of the peace.\(^55\)

In *Gardiner v Marinov* (1998) 143 FLR 352 the appellant refused entry to a bailiff executing an enforcement warrant for costs. This was not a breach of the peace, so police entering the premises were trespassing.

Exhibiting the Serrano photograph “Piss Christ” was not a breach of the peace because there was no evidence of unrest at the exhibition:\(^56\) (If it were a breach of peace it may also offend against the ancient common law preventing “blasphemous libel”, although the court wasn’t sure that anyone quite knows what that is anymore.)

A noisy party can be a breach of the peace:\(^57\). Justice Marks said “In my opinion there is no conduct more likely to promote violence than prolonged disturbance of the sleep of neighbours by noise and behaviour of the kind disclosed by the uncontradicted facts…”\(^58\)

\(^53\) *R v Howell* 73 Cr App Rep 31 at 37.

\(^54\) *The Commissioner of Police for the State of Tasmania; Ex parte North Broken Hill Ltd* (1992) 61 ACrinR 390.

\(^55\) Op. Cit., *Percy v DPP*.


\(^58\) Ibid, at 221.
Breach of the peace — police powers

The police have a power of arrest at common law where there is “reasonable apprehension of imminent danger of a breach of the peace”\textsuperscript{59}. Ordinary citizens also have this power to arrest.

This power exists where:

(a) the breach has been committed in the presence of the police, or
(b) the police reasonably believe the breach will be committed in the immediate future; or
(c) the breach has been committed and the police reasonably believe it will be renewed.

As a breach is not strictly an offence, the powers of arrest in Crimes Act 1900, section 212 may not apply to the breach of the peace (unless the breach is accompanied by an offence, e.g. property damage).

Police officers do not necessarily have to arrest the accused. They may be detained or removed from the scene and a temporary detention may not constitute and arrest\textsuperscript{60}. Consistent with the preventative nature of the law, police (or any citizen) may take action to prevent a breach of the peace and that action may include detention.

The power to arrest sometimes needs to be considered together with the police powers of entry in Crimes Act 1900, section 199. Under section 188, police may only enter property when invited, under a warrant or in circumstances in circumstances of seriousness and urgency, in accordance with section 190. In relation to breaches of the peace, section 190 gives an emergency power of entry where the police believe on reasonable grounds that a breach of the peace is being or about to be committed and that it is necessary to enter the premises immediately to prevent the breach.

Questions relating to preventative action

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\textsuperscript{59} R v Howell, op. cit., p. 37.
\textsuperscript{60} Op. cit., The Commissioner of Police for the State of Tasmania; Ex parte North Broken Hill Ltd, 396.
6 Arrest, search and the issue of warrants

Powers of arrest, and search either with or without a warrant represent important steps in the criminal investigatory process. Arrest, search and the issue of warrants are discussed together in this part as some issues such as the thresholds for certain powers are similar in nature.

6.1 Powers to stop and search

The primary objective for stop and search powers is to enable police officers to either confirm or dispel a suspicion about an individual without resorting to their power of arrest.

6.1.1 Crimes Act 1900 – stop and search power

The Crimes Act 1900 contains a regime for stopping and searching without warrant, commencing at s207. The Drugs of Dependence Act also authorises search without warrant under certain circumstances (discussed further at 6.1.2). In the Crimes Act 1900, a search of a person or a conveyance is authorised under the following conditions without warrant:

- **Suspicion on reasonable grounds** that a person has a thing relevant to a serious offence or stolen or unlawfully obtained;
- **Suspicion on reasonable grounds** that it is necessary to search to prevent concealment, destruction or loss;
- **Suspicion on reasonable grounds** that it is so serious and urgent as to require the use of the power without a warrant

The powers that may be exercised include:

- The ability to stop and detain a person only for as long as is necessary and reasonable to conduct a frisk or ordinary search;
- The ability to stop and search a conveyance in a public place or place readily available to the public and only for as long as is necessary and reasonable to search the vehicle;
- The ability to conduct a frisk or an ordinary search;
- Seizure of the thing;
- Seizure of evidentiary material other than the thing if the officer suspects on reasonable grounds that it is necessary to seize it to prevent concealment, destruction or loss and that it is so serious and urgent as to require seizure without a warrant.

A further power to search is consequent upon the arrest of a person. The arrest provisions commence at section 212, for both arrest pursuant to a warrant and arrest without a warrant. Section 223 gives powers in relation to search on arrest. The power to search arises where:

- the police officer suspects on reasonable grounds that it is prudent to search to
ascertain whether any seizable items are being carried; or

- the police officer suspects on reasonable grounds that the person is carrying evidential material in relation to any offence or a seizable item;

The powers that may be exercised include:

- entry onto premises to arrest (under certain restrictions);
- seizure in those premises of items in plain view where the officer believes on reasonable grounds that the items are evidential material or seizable items;
- frisk search;
- ordinary search.

### 6.1.2 Drugs of Dependence Act – stop and search power

The Drugs of Dependence Act authorises search without warrant under certain circumstances. These provisions commence at s188. A search of a person is authorised under the following conditions without warrant:

1. belief on reasonable grounds that it is necessary to search to prevent concealment, loss or destruction of any thing connected with an offence;
2. belief on reasonable grounds that the circumstances are of such seriousness and urgency to require the immediate search rather than waiting for a warrant

The powers that may be exercised include:

- detention of a person (on belief on reasonable grounds that the person is carrying anything connected with an offence);
- stopping a vehicle (on belief on reasonable grounds that any thing connected with an offence is in that vehicle);
- entry of premises;
- search of a person

A strip search may be conducted, although not an internal search. The thresholds of ‘reasonable belief’ and ‘reasonable suspicion’ for police powers are discussed in detail at 6.5.

#### Questions relating to the power of search and stop without warrant

| 53 | Is ‘reasonable suspicion’ or ‘reasonable belief’ the appropriate threshold for the police power of stop and search without warrant? |
6.1.3  **Major Events Security Act 2000 – stop and search power**

The *Major Events Security Act 2000* allows the Executive to declare an event as a ‘major event’.\(^\text{61}\) The purpose of the declaration may be for the safety of people attending the event and in order to avoid a disruption to the event. As a result, powers under the Major Events Security Act can be classified as preventative in nature.

The effect of a declaration is that searches may be conducted by police officers in the absence of reasonable suspicion that an offence has been or will be committed, the normal test for exercising such a power without a warrant. Failure to comply with a search request constitutes a strict liability offence (that is, an offence that does not require proof of a mental element or mens rea), as does taking a prohibited item into, or having a prohibited item in a major event venue.

A further strict liability offence applies if a police officer requests a person entering, or about to enter, a major event venue, to state the person’s name and home address.

Police also have the power to refuse a person entry to a major event venue if the officer believes, on reasonable grounds, that the person has committed, or is likely to commit an offence under the Major Events Security Act. This power also applies where the officer believes the person is likely to contravene a condition of entry to the venue and may direct a person to leave a major event venue if the police officer has reasonable grounds for believing that the person has, while seeking to enter or remain in the venue, committed an offence against a law in force in the ACT.

Declarations under the Major Events Security Act were made at the time of the staging of events during:

- the Sydney 2000 Olympic Games;
- games hosted in Canberra as part of the 2003 Rugby World Cup; and
- the Canberra leg of the 2008 Beijing Olympic Torch relay.

The material in this section is included as it forms a part of the landscape of police powers in the area of stop and search powers. The Government does not propose to amend provisions in the Major Events Security Act.

6.2  **Use of animals in the execution of lawful duties by police**

Animals have long been established as providing assistance to law enforcement and emergency services personnel. Dogs are currently used in most Australian jurisdictions to assist with searches for both people and specific items of property, rescue operations and with the apprehension of offenders. Dogs also assist detection of explosive devices, firearms, human remains and illegal substances.

Horses are often used with respect to crowd control.

Animals are known to often have a conciliatory and de-escalating affect in volatile and emotive situations. Many jurisdictions have legislation that authorises the use of animals, dogs in particular, with respect to the lawful execution of duties by law enforcement agencies.

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enforcement officers. In NSW these provisions extend the offence of assault and obstruct police officers to assaults and interference with police dogs and horses. Some jurisdictions have legislated generally for the use of dogs and horses whilst others focus on the use of drug detection dogs.62

The Corrections Management Act 2007, section 125 allows the Chief Executive to direct a corrections officer to use a corrections dog to conduct a search. The Corrections Management (Searching) Policy 2010 provides that:

Any person entering a correctional centre or the grounds of a correctional centre may be subject to a search by a dog handler and a corrective services dog.63

In the Explanatory Statement for the Corrections Management Bill 2006, the use of dogs in the conduct of searches is described as follows:

Trained dogs have great acuity for smelling and identifying particular substances, such as drugs or explosives. Enabling dogs to be used for searches will reduce the time taken for searches and the level of intrusiveness required for the search.64

There are no specific legislative provisions in the ACT that address or authorise the use of animals by police although it is understood that both dogs and horses are routinely used in the ACT to assist police in the execution of their duties, presumably under common law powers.

As there are no specific legislative powers for the use of dogs or horses by police, there is no specific offence for intentionally injuring one of these animals. As these animals and their handlers or riders are often in the front line of police operations, the potential for injury to an animal can be high. Horses in particular are at risk of injury in crowd control situations. As for many working animals, the costs for training a police dog or horse are very high.

In legislating for the use of police dogs and horses the Northern Territory has created an indictable offence that applies to acts leading to the injury or death of such animals which carries a maximum of 5 years imprisonment.65 Queensland has defined police dogs and horses as ‘police officers’ for the purpose of the summary offence of ‘assault or obstruct police’ which carries a maximum of six months imprisonment.66

In the absence of such an offence, a person who intentionally harms an animal while it is performing its duties as a police dog or horse can only be charged and prosecute under animal welfare laws.

The ACT Animal Welfare Act 1992 creates three offences involving cruelty to animals:

- Section 7 – ‘cruelty’ carries 100 penalty units, one year imprisonment or both;
- Section 7A – ‘aggravated cruelty’ where serious injury or death is caused carries a maximum of 200 penalty units, two years imprisonment or both;

62 For examples, see Law Enforcement (Powers and Responsibilities) Act 2002 (NSW); Controlled Substances Act 1984 (Vic); Police Administration Act (NT); Police Powers and Responsibilities Act 2000 and the Police Service Act 2003 (Tas).
65 Police Administration Act (Northern Territory), section 159A.
66 Police Powers and Responsibilities Act 2000 (Queensland), section 790.
Section 8 – ‘pain’ where a person kills the animal in a way that causes it unnecessary pain cruelty’ carries 100 penalty units, one year imprisonment or both.

Questions relating to the use of animals

54 Should the ACT legislate for the use of animals by police?
55 Should the legislation be crafted in general terms (i.e. assistance in lawful execution of duties) or should it apply only in specific circumstances?
56 What specific circumstances, if any, should be legislated for?
57 Should the use of drug detection dogs be specifically legislated for?
58 Should the use of horses for crowd control be specifically legislated for?
59 Should harming or killing a police dog or horse be an aggravated offence that carries a period of imprisonment of greater than 2 years?

6.3 Searches with warrants

In New South Wales v Corbett67 Kirby J explained the tension in the law with respect to search warrants and the individual’s right to privacy.

“A tension in the law: From its earliest days, this Court has insisted on a rule of strictness in expressing the law governing search warrants. It has done so, despite a recognition that, as Brennan J observed, in Halliday v Nevill:

"There is ... a tension between the common law privileges that secure the privacy of individuals in their own homes, gardens and yards and the efficient exercise of statutory powers in aid of law enforcement."

In intermediate courts, opinions are sometimes expressed reflecting a perceived need to moderate the rule of strictness. This has followed the inconvenience that the application of the rule can sometimes occasion and a sympathy for those who seek and execute search warrants (generally police officers) who are accountable in law for defaults when the rule of strictness is rigorously applied. Instances of such opinions may be seen, for example, in the dissenting reasons in two important cases in the New South Wales Court of Appeal. The dissents concern, and respond to, the tension to which Brennan J referred in Halliday.

Notwithstanding such differences, intermediate courts in Australia have normally adhered to the rule of strictness. They have correctly interpreted that to be their duty, conforming to the unanimous reasons of seven Justices of this Court in George v Rockett. Those reasons, in turn, constituted a strong reaffirmation of a line of federal cases such as R v Tillett; Ex parte Newton and Parker v Churchi, extracted and cited with approval in Rockett.”

Kirby J goes on to list the reasons for this strictness as including:

67 New South Wales v Corbett [2007] HCA 32 (1 August 2007).
(1) The protection of the ordinary quiet and tranquility of the places in which people live and work and of their possessions as a precious feature of our type of society and the happiness of its people;

(2) The avoidance of disruption and the occasional violence that can arise in the case of unwarranted or excessive searches and seizures;

(3) The beneficial control of the agents of the State exerted because of their awareness that they will be held to conformity with strict rules whenever they conduct a search and will require statutory or common law that clearly supports their searches and seizures;

(4) The incentive that strict rules afford for the maintenance of respect for the basic rights of individuals who become subject to, or affected by, the processes of compulsory search and seizure; and

(5) The provision in advance to those persons of a warrant signifying, with a high degree of clarity, both the lawful ambit of the search and seizure that may take place and the assurance that an independent office-holder has been persuaded that a search and seizure, within that ambit, would be lawful and has been justified on reasonable grounds. (references omitted)

The issue or execution of a search warrant that does not meet the requirements for search warrants can lead to the exclusion of evidence obtained from the warrant. The fact that evidence is obtained illegally or improperly makes it prima facie inadmissible but it brings about a judicial discretion to allow the evidence. The Evidence Act 1995 (Cwlth), section 138 provides:

that evidence that was obtained either:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

The proper criteria for the exercise of the discretion to exclude relevant evidence unlawfully obtained cannot be prescribed in the abstract but only by reference to the case at hand.

6.3.1 Crimes Act 1900 – search warrants.

The Crimes Act, Division 10.3 contains provisions relating to search warrants. The general criteria to issue are:

1. Information on oath (unless it is an urgent telephone or fax application);

2. Satisfaction that there are reasonable grounds for suspecting there is or will be within the next 72 hours (or 48 hours if it is an urgent telephone or fax application), evidential material at the premises / in possession of a person.

The warrant itself must contain the following information:

1. the offence;

2. identification of the premises or person to be searched;

68 R v Ireland (1970) 126 CLR 321 at 335, see also, Evidence Act 1995 (Cwlth), section 138.

69 Bunning v Cross (1978) 141 CLR 54 at 77.
3. the type of a search of a person near the premises being searched;
4. the kinds of material to be searched for;
5. what can be seized;
6. the name of the responsible officer;
7. the period allowed for the search;
8. the times at which a search is authorised.

An officer may seize an item believed to be relevant to any serious offence. There is no power to compel either a strip or cavity search by warrant. An occupier is entitled, subject to some limits, to be present during the search.

6.3.2 Drugs of Dependence Act 1989 – search warrants

The warrant provisions commence at s187. The general criteria to issue are:

1. Information on oath;
2. Alleging reasonable grounds for suspecting that there is or will be within 28 days things connected with a particular offence;
3. Satisfaction that there are reasonable grounds for the issue of the warrant.

The warrant itself must contain the following information:

1. The purpose of the warrant, including the nature of the offence;
2. Identification of the person to be searched;
3. The kinds of material to be seized;
4. The period allowed for the search;
5. The times at which a search is authorised;
6. Any conditions to which the warrant is subject

An officer may seize an item believed on reasonable grounds to be connected with any other offence. A strip search may be conducted, although not an internal search.

A power to strip search arises where an arrested person is brought to a police station and:

1. a police officer suspects on reasonable grounds that the person has evidential material or a seized item or that it will provide evidence of involvement in an offence; and
2. a police officer suspects on reasonable grounds that it is necessary to conduct a strip search; and
3. a superintendant (or higher) has approved the search.

The powers that may be exercised (subject to certain conditions as to privacy etc) include:

1. the use of a medical practitioner;
2. is restricted to the removal of garments where there is a belief on reasonable grounds that it is necessary to remove those garments;

3. does not allow a search of cavities

6.3.3 Search warrants - issues

A number of issues are immediately apparent with respect to search warrants under ACT legislation.

Uniform search warrant provisions

Different statutory regimes for the issue of search warrants have the real potential for creating unnecessary complexity for law enforcement. The development of uniform search warrant provisions would allow law enforcement, issuing officers and the courts reviewing search warrants to deal with a single set of rules and procedures.

Suspicion or belief

The degree of satisfaction, suspicion or belief that the police officer and issuing officer must arrive at before applying for or issuing a search warrant is relevant. This issue is discussed in greater detail below at 6.5. The threshold for the issue of a search warrant that appropriately reflects human rights jurisprudence is a key goal for this reform process.

The threshold for the issue of a search warrant will need to strike the right balance between the community interest in the proper investigation of offences and the interest in the protection of the individual from arbitrary interference with their privacy and liberty.

This balancing exercise is referred to by Brennan J in Alister v R:

It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man’s liberty, and the balance must tilt that way: cf. Sankey v. Whitlam (1978) 142 C.L.R., at pp.42, 61–62.70

One option is for the ACT to retain a distinction between the exercise of some police powers requiring a standard of 'reasonable suspicion' and other powers requiring 'reasonable belief'. Jurisprudence on statutory regimes in Europe and other jurisdictions with human rights legislation envisages the application of a lower or high degree of satisfaction about a matter depending on the degree of intrusion on the rights of the suspect.

Another important consideration is where on the spectrum of the criminal investigation a power is to be exercised. For instance, a warrant to search premises may require that officers and the issuing magistrate arrive at a reasonable suspicion, rather than a belief, that evidence about an offence will be found. It may be appropriate for the relevant test for the exercise of the power reflect factors such as the purpose of the power and the invasiveness of the exercise of that power. A tailored approach to the scheme outlining the exercise of police powers better protects human rights in the ACT as it ensures that a balance is maintained between the specific police power and the rights of the individual concerned.

ACT Policing has advocated that a 'reasonable suspicion' should remain the basis for search warrants. The powers to enter and search under a warrant can be extensive and the invasion of privacy only justifiable on the basis of reasonable factual grounds for suspecting that the search would facilitate a criminal investigation. Police officers utilise a search warrant to assist the investigating officer to reach the level of 'belief' requisite to effect a charge and or arrest.

ACT Policing applications for search warrants in the ACT must be made to an issuing officer who themselves must be satisfied that there are reasonable grounds for suspecting evidential material is located at the stated premises. Information provided to the issuing officer must be sworn with material supporting the application for a warrant presented in an affidavit.

\textsuperscript{71} Crimes Act 1900 (ACT), section 194(1).
Search warrant — an example

To illustrate the process and factors that are considered by ACT Policing in seeking a search warrant the following example is used. This example is a composite of a number of actual search warrants issued and executed in the ACT.

ACT Policing receives intelligence from members of the community and its own community policing activities that indicate that a residence may be used to cultivate cannabis. Initial reports and investigations including observation by police officer of the property establishes that there may in fact be reason to suspect that cannabis is being cultivated. It is also established that Stephen, a person known to police has control of the property. Some of the factors informing this suspicion include the presence of extensive security infrastructure such as padlocks to doors and security camera systems, reports of premises being attended to only occasionally or late at night, reports of people carrying unusual items in to the house such as large light shades or chemical glassware as well as the presence of a strong and unpleasant smell of chemicals.

At this stage, the beginning of 'reasonable suspicion' is formed in the mind of the investigator. The investigator will make further checks with external agencies and attempt to identify the owner or persons with a connection to the property.

Once all the information has been reviewed, and the investigator 'suspects' that the residence is being used to cultivate cannabis and that there is evidential material related to that offence on the premises, an application for a search warrant is made.

A search warrant is subsequently issued by a Magistrate giving police approval to execute the warrant at the location. 3 bedrooms of the residence have been converted into an elaborate hydroponic cannabis growing system. Police discover 12 cannabis plants (a controlled plant under the Criminal Code), and equipment used in the cultivation of a controlled plant. Police have now formed the 'belief' that cannabis is being cultivated on the premises. Additional evidence establishing Stephen’s connection to the property and the plants and equipment is also found at the premises. Police now have sufficient evidence to arrest and charge Stephen. Police charge Stephen with possessing plant material and cultivating 12 controlled plants.

Oversight mechanism for search warrants

There are further issues which arise in relation to the use of search powers which are not apparent on the face of the legislation. These include the absence of governance mechanisms to ensure that warrants are appropriately issued. It is of little assistance to the community to maintain a safeguard of a system for the issue of warrants if that system itself is not subject to adequate scrutiny. Burchett J summarised the important
task performed by those responsible for the issue of warrants in the following terms\footnote{Parker v Churchill (1985) 9 FCR 316 at 322 cited in R v Stankovich [2004] ACTSC 93, para 38.}:

[T]he duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.

At present there is no mechanism (other than on those occasions where there is error on the face of the warrant) by which it can be tested whether the function described by Burchett J is properly being met. There is little disclosure of the information provided to justify the issue of the warrant, and no systematic audit of such material. In short, there is no way of knowing whether a consistent standard is being applied to the issue of warrants, and whether it is in accord with the legislative basis for the issue of the warrants.

Similarly, there are no mechanisms in place to monitor recurring problems relating to warrants, such as whether sufficient information is being provided by the applicant, or whether trials courts are ruling that evidence obtained pursuant to a warrant is inadmissible because procedural safeguards surrounding the application for, and issue of, a warrant is not being complied with.

In this respect, current procedure in relation to the issue of warrants constitutes a marked departure from the principle set out in the HR Act, section 2:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

In particular, the act of the issue of a warrant to authorise interference with a person’s property or person is not a matter which is determined after a public hearing. It is determined in chambers on an ex-parte basis.

These issues have come to light in recent years in a number of ACT Supreme Court cases involving issues with search warrants.

The case of \textit{R v Stankovich} [2004] ACTSC 93 was concerned with the admissibility of evidence obtained from an improperly executed search warrant under the Drugs of Dependence Act. Although Spender J was prepared to admit the evidence on the basis that it was obtained by a police officer not specified in the warrant, he took a different view on the question of the search of the suspect’s person given the manner the warrant purported to authorise such a search. Spender J held that:

there has not been “strict compliance with the statutory requirements” governing the issue of a warrant to search a person. So egregious has been the departure from those requirements, that the warrant can only be regarded as a laughable parody of what is required to render lawful what would otherwise be a violation of a person’s right to the integrity of his person.

Having regard to the gravity of the departure from what is required under Australian law for a valid warrant to search a person (the factor referred to in
The issue of validity of warrants affecting a number of cases brought by defendants was lamented by Crispin J in *R v Caruso* [2006] ACTSC 45.

I regret to say that these cases suggest a pattern of warrants being issued without those charged with the relevant statutory responsibilities even bothering to ensure that the appropriate pro forma paragraphs have been downloaded from the computer correctly.

This is disturbing. As Connolly J observed in *R v PJ* [2006] ACTSC 37 (2 M), the provisions under which search warrants are issued are Territory laws. Hence, s 30(1) of the Human Rights Act 2004 (ACT) requires the court to interpret the provisions in a manner that is, as far as possible, consistent with human rights. Those rights include the right of everyone “not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily” (s 12) and “the right to liberty and security of person” (s 18). Yet, there is little reason to believe that the importance of these rights has been reflected in a consistently conscientious approach to applications for the issue of warrants to substantially override them. It may be difficult for the community to accept that a requirement for warrants to be issued by judicial officers will be an effective safeguard against any abuse of the new “anti-terror laws”, if those presently charged with issuing warrants repeatedly fail to undertake their responsibilities conscientiously.

Although it cannot be assumed that the cases cited above evidence a systematic flaw in the way police and issuing officers deal with search warrants, it does raise the question of whether an oversight mechanism to assess compliance may be required.

**Oversight mechanism — *Surveillance Devices Act 2004 (Cwlth)***

The *Surveillance Devices Act 2004 (Cwlth)* creates a regime for the application and issuing of warrants authorising the use of surveillance devices (such as covert listening devices, tracking devices or devices that can intercept email communications). As discussed at 3.3.3, the Crimes (Surveillance Devices) Bill 2010 was recently introduced into the ACT Legislative Assembly. Both the Surveillance Devices Act (Cwlth) the Crimes (Surveillance Devices) Bill establish a compliance and monitoring scheme which requires law enforcement agencies to record certain statistics in relation to warrants which must be tabled in Parliament, and the ACT Legislative Assembly by the Attorneys General.

In recommending that a detailed breakdown of the type of surveillance warrants issued the Joint Working Group noted that “[t]his will provide the public with a better understanding of the scope of surveillance activity undertaken by Law enforcement agencies”.

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73 *R v Stankovich* [2004] ACTSC 93, paras 44 and 45. See also Kola v R [2007] ACTCA 16 (8 August 2007) and *R v Khajehnoori* [2005] ACTSC 76 where errors on the face of the warrant were rectified by severing the invalid part of the warrant thus validating evidence obtained during the search.

The Surveillance Devices Act (Cwlth), section 50 provides that:

(1) The chief officer of a law enforcement agency must submit a report to the Minister that includes the following information in respect of each financial year:

(a) the number of applications for warrants made by or on behalf of, and the number of warrants issued to, law enforcement officers of the agency during that year; and

(b) the number of applications for emergency authorisations made by, and the number of emergency authorisations given to, law enforcement officers of the agency during that year; and

(c) the number of applications for tracking device authorisations made by, and the number of such authorisations given to, law enforcement officers of the agency during that year; and

(d) the number of remote applications for warrants made by or on behalf of law enforcement officers of the agency during that year; and

(e) the number of applications for warrants, emergency authorisations or tracking device authorisations made by or on behalf of law enforcement officers of the agency that were refused during that year, and the reasons for refusal; and

(f) the number of applications for extensions of warrants made by or on behalf of law enforcement officers of the agency during that year, the number of extensions granted or refused and the reasons why they were granted or refused; and

(g) the number of arrests made by law enforcement officers of the agency during that year on the basis (wholly or partly) of information obtained by the use of a surveillance device under a warrant, emergency authorisation or tracking device authorisation; and

(h) the number of instances during that year in which the location and safe recovery of children to whom recovery orders related was assisted (wholly or partly) by information obtained by the use of a surveillance device under a warrant, emergency authorisation or tracking device authorisation; and

(i) the number of prosecutions for relevant offences that were commenced during that year in which information obtained by the use of a surveillance device under a warrant, emergency authorisation or tracking device authorisation was given in evidence and the number of those prosecutions in which a person was found guilty; and

(j) any other information relating to the use of surveillance devices and the administration of this Act that the Minister considers appropriate.

(2) The information referred to in paragraphs (1)(a), (b) and (c) must be presented in such a way as to identify the number of warrants issued, emergency authorisations given, and tracking device authorisations given, in respect of each different kind of surveillance device.

(3) The report must be submitted to the Minister as soon as practicable.

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after the end of each financial year, and in any event within 3 months after the end of the financial year.

(4) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives it.

In addition, clauses 39 – 41 provide a detailed list of documents and records that must be kept by the chief officer of a law enforcement agency. This includes the creation of a statutory register of warrants and emergency authorisations.

**Ombudsman reports on Surveillance Devices Act 2004 (Cwlth)**

Reporting on surveillance device warrants obtained under the Commonwealth Act has provided some valuable information which has identified potential problems in the issue of such warrants. In 2007-2008, 355 warrants were applied for under the Commonwealth Surveillance Devices Act. Six applications made by the AFP were rejected on the basis of factors such as:

- lack of connectivity to the vehicle by the suspects;
- a lack of evidence linking the suspect to the offence; or
- the issuing officer could not reasonably be satisfied that the contents of the affidavit allowed the issue of the warrant.

The Ombudsman has also expressed concerns that Commonwealth warrant applications do not contain sufficient detail to enabling the issuing officer to get an overall understanding of the investigation (e.g. whether an existing warrant is in place), and providing adequate information to allow the issuing officer to determine what all the relevant privacy implications might be.

**Oversight mechanism — discussion**

Similar accountability mechanisms for the issue of warrants are also contained in Parts 2.7 and 2.8 of the *Telecommunications (Interception and Access) Act 1979* (Cwlth).

It may be appropriate for the ACT to introduce an accountability and oversight regime similar to that contained in the Surveillance Devices Act (Cwlth) and the Crimes (Surveillance Devices) Bill for all warrants. Whilst the introduction of such a regime would have significant resourcing and cost implications which would need to be considered, the question will be whether these costs are outweighed by the benefits to the community offered by these safeguards.

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76 Ibid. p 9.

Surveillance devices – tracking devices

As discussed in 3.3.3, the Crimes (Surveillance Devises) Bill will give police the power to seek warrants for the use of certain devices specified in the Bill. The devices include tracking devices used for the tracking of suspects to assist law enforcement to gather intelligence and evidence in relation to the commission of serious offences.

A number of oversight and mechanisms are included in the Bill including:

- The retention of all records relating to surveillance device warrants
- A requirement for the Chief Police Officer to provide the Attorney General with an Annual Report on specified information on surveillance device warrants;
- A requirement for the Attorney General to present a copy of the annual report to the ACT Legislative Assembly;
- The power for the Ombudsman to inspect law enforcement surveillance device records.
- The establishment of a warrant register.
- Comprehensive provisions relating to information, documents and records that must be kept.

Tracking devices without warrant – the law

The Surveillance Devices Act 2004 (Cwlth) section 39 allows for the use and retrieval of tracking devices without warrant in certain circumstances. This applies where an offence with a period of imprisonment of 3 years or more and in other specified circumstance such as offences under the Anti Money Laundering and Counter Terrorism Financing Act 2006 (Cwlth). The Commissioner or a Deputy Commissioner for the AFP are authorised to allow the use of tracking devices in these circumstances.

Tracking devices without warrant – discussion

The stated justification for the power to use a tracking device without recourse to a warrant is:

[I]n reflection of the less intrusive nature of Tracking Devices as compared with other types of Surveillance Devices. However, where such use requires a greater level of intrusion (such as entry onto premises without permission) a full Surveillance Device warrant would be required.78

A power to use tracking devices in this way raises human rights questions in particular in relation to the right to privacy and rights in criminal proceedings.

ACT Policing has indicated that this power is desirable as the requirements for obtaining a warrant are disproportionately onerous for the degree of intrusion on a person’s privacy. ACT Policing propose that the Chief Police Officer, who is also a Deputy Commissioner in the AFP organisation structure, should be able to

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authorise the use of tracking devices for serious offences.

The 2003, the JWG Discussion Paper referred to in 3.3 considered the reasons why approval for tracking devices would be appropriately issued by a senior law enforcement officer. The JWG concluded that all surveillance warrants should be issued by a judicial officer.79

The JWG report referred to the rationale for judicial oversight set out in the New South Wales Law Reform Commission’s *Surveillance: An Interim Report*:80

…the power to issue warrants should be limited to judicial officers. It is important that a decision to authorise such intrusive conduct as the carrying out of covert surveillance be made by an impartial authority, skilled in the appraisal of evidence and the likelihood of obtaining information or evidence by other means, and experienced in the weighing of the community interest to investigate and prosecute offences against the privacy interests of the individuals.

**Assistance to access computers and data storage devices**

At present, the Crimes Act does not impose a requirement for a person in possession of a computer or data storage device to assist police executing a search warrant involving such devices.

The Crimes Act (Cwlth), section 3LA provides a warrant application process to require a person to provide police officers with assistance. The Explanatory Memorandum for the Cybercrime Bill 2001 provides that this provision:

would enable a law enforcement officer executing a search warrant to apply to a magistrate for an ‘assistance’ order. To grant the order, the magistrate would have to be satisfied (i) of the existence of reasonable grounds to suspect a computer on search premises contains evidence of an offence; (ii) that the subject of the order is reasonably suspected of the offence or is the owner of the computer or computer system, or a current employee of the owner; and (iii) that the subject of the order has relevant knowledge of the functioning of the computer or system or measures applied to protect the computer or system.

The person to whom the order is directed would be required to provide the officer, to the extent reasonably practicable, with such information or assistance as is necessary to enable the officer to access data on the computer system, copy it to a storage device or convert it to documentary form. For example, a person could be required to explain how to access the system or to provide a password to enable access. The maximum penalty for non-compliance with the order would be 6 months imprisonment.81

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81 *Cybercrime Bill 2001* (Commonwealth), Explanatory Memorandum, Item 12.
60 Should the threshold for the issue of a search warrant be ‘reasonable suspicion’ or ‘reasonable belief’ that the search would facilitate a criminal investigation?

61 Should a mechanism for the oversight of the application and issue of search warrants, such as the mechanism in the Surveillance Devices Act 2004 (Cwlth), be included in the legislation?

62 Should the ACT Chief Police Officer be authorised under the Crimes (Surveillance Devices) Bill 2010 to allow the use of tracking devices without warrant for serious offences?

63 Should a magistrate be able to issue an ‘assistance order’ for search warrants involving computers or data storage devices?

### 6.4 Arrest

Powers in relation to arrest, search and the issue and use of warrants are spread across different pieces of legislation, with the different pieces of legislation providing a diverse set of criteria for the use of each power.

An arrest\(^{82}\) or search\(^{83}\) can occur either without a warrant or with a warrant issued by the court. This chapter discussed issues with arrest, search and the issue of warrants as many factors affecting these powers are in common.

In 1987, the New South Wales Law Reform Commission (NSW LRC) issued a discussion paper for community consultation — *Criminal Procedure: Police Powers of Arrest and Detention*.\(^{84}\) The NSW LRC discussion paper provides an extensive discussion on common law and statutory police powers as they were then.

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\(^{82}\) For arrest powers see: *Crimes Act 1900 (ACT)* s 212; *Human Rights Act 2004 (ACT)* s 18; *Crimes Act 1914* ss 3W-3ZD (Cwlth), *Criminal Code* ss 546-442 (Qld), *Criminal Code* ss 564-569 (WA), *Criminal Code* ss 301-303 (Tas), *Police Administration Act* ss 121-127 (NT), *Crimes Act 1900* ss 352-352A (NSW), *Crimes Act 1958* ss 457-463B (Vic); *Charter of Human Rights and Responsibilities Act 2006* s 21 (Vic).

\(^{83}\) For search warrants see: *Crimes Act 1900 (ACT)* s 194; *Drugs of Dependence Act 1989 (ACT)* s 184; *Crimes Act 1914 (Cwlth)* ss 3E, 3F; *Customs Act 1901 (Cwlth)* ss 198 – 199; *Criminal Code (Qld)* ss 679 *Drugs Misuse Act 1986 (Qld)* ss 14-18, 43J, *Criminal Code (WA)* s 71; *Misuse of Drugs Act 1981 (WA)* s 24; *Police Act 1892 (WA)* s 70, *Search warrants Act 1997 (Tas)* s 5; *Misuse of Drugs Act 2001 (Tas)* ss 33 – 34; *Police Administration Act (NT)* ss116-120; *Search Warrants Act 1985*; *Poisons and Therapeutic Goods Act 1966 (NSW)* ss 42, 43A and 43B; *Magistrate’s Court Act 1989 (Vic)* s 75; *Crimes Act 1938 (Vic)* s 465; *Drugs Poisons and Controlled Substances Act 1981 (Vic)* ss 81 and 82; *Summary Offences Act 1953 (SA)* s 67; *Controlled Substances Act 1984 (SA)* s 52.

In basic terms, the power of arrest is aimed at allowing the apprehension of a person suspected of committing an offence. The principal aim of the arrest is to bring the person before a court where the person is subsequently charged with an offence. Although not central to arrest, the power also enables police officers to conduct a criminal investigation to gather information and evidence relating to the commission of the offence.

In the ACT, the powers for a police to arrest are set out in the Crimes Act, Division 10.5. Section 212 describes the arrest without warrant powers and section 219 describes the arrest by warrant power.

### 212 Power of arrest without warrant by police officers

1. A police officer may, without warrant, arrest a person for an offence if the police officer suspects on reasonable grounds that—
   a. the person has committed or is committing the offence; and
   b. proceedings by summons against the person would not achieve 1 or more of the following purposes:
      i. ensuring the appearance of the person before a court in respect of the offence;
      ii. preventing a repetition or continuation of the offence or the commission of another offence;
      iii. preventing the concealment, loss or destruction of evidence relating to the offence;
      iv. preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
      v. preventing the fabrication of evidence in respect of the offence;
      vi. preserving the safety or welfare of the person.

2. A police officer may, without warrant, arrest a person for a domestic violence offence if the police officer suspects on reasonable grounds that the person has committed or is committing the offence.

3. If—
   a. a person has been arrested under subsection (1) or (2) in connection with an offence; and
   b. before the person is charged with the offence, the police officer in charge of the investigation into the offence does not have, or ceases to have, reasonable grounds to suspect that—
      i. the person committed the offence; or
      ii. for a person arrested under subsection (1)—holding the person in custody is necessary to achieve any of the purposes referred to in subsection (1) (b);

   the person shall forthwith be released from custody in respect of the offence.

4. A police officer may, without warrant, arrest a person whom he or she suspects on reasonable grounds has escaped from lawful custody to which the person is still liable in respect of an offence.

5. In this section:
   - *domestic violence offence*—an offence that a person is suspected of committing is a *domestic violence offence* if the conduct making up the offence is domestic violence under the *Domestic Violence and Protection Orders Act 2008*. 
A number of issues are important when considering the power of arrest without warrant in section 212.

(1) The threshold which must be satisfied before a police officer is able to arrest a person is ‘reasonable suspicion’ about a range of factors. A discussion on the jurisprudence on ‘reasonable suspicion’ and ‘reasonable belief’ referring to both the power of arrest and search is included in Part 6.5 below.

(2), the officer be must satisfied that proceedings by summons against the person would not achieve one or more of a series of factors listed in subsection 212 (1) (b). For police, the alternative to arrest is the issue of a summons to the alleged offender85 or the issue of a Court Attendance Notice.

(3) Perhaps most controversially, a police officer may, under section 212(2) arrest a person for a domestic violence offence if the police officer suspects on reasonable grounds that the person has committed or is committing the offence.

The alternative to arrest requires police officers to attend court to ‘lay information’ before a Magistrate so that the court can issue a summons for the attendance of the defendant on a particular date. This causes great time and financial expenditure for the police, courts, Director of Public Prosecutions (DPP) and other court stakeholders.

The Court Legislation Amendment Bill 2008 introduced the Court Attendance Notice (CAN) to address the inadequacies of commencement by summons. A CAN is issued at the time of charging and provides the following information to the defendant:

• the offence;
• a brief outline of the particulars of the offence;
• name of the police officer or person authorised under a law of the Territory;
• the time and date that the accused must appear in court;
• advises that non-attendance will result in a warrant for arrest; and
• explains that in non-attendance scenarios, the case may be heard in the defendant’s absence.

The CAN system of commencement has many advantages over other methods of commencing proceedings. It is intended to reduce the amount of time accused persons remain in police custody, as significantly simplifies the process by which criminal matters are commenced. Another benefit to the accused is the receipt of more information about the charge at the point of release, and greater certainty about the nature of the charge. The system is also intended to lead to more efficient use of resources, as police are not required to attend court to “lay information”, saving time and keeping more police on the street.

ACT Policing is progressing the implementation of CANs through training of members and systems and other changes. It is anticipated that CANs will be operational in the ACT in late 2010.

85 Commencement proceedings are governed by the Magistrates Court 1930, Chapter 3.
6.5 ‘Reasonable suspicion’ and ‘reasonable belief’

As the threshold for the arrest, or search of a person either with or without a warrant represents a significant although small part of this review, a comprehensive analysis of the difference between reasonable suspicion and reasonable belief has been included. This section also serves as an aid when addressing questions relating to the setting thresholds for the exercise of powers such as the power of arrest and the issue of search and arrest warrants.

The setting of thresholds for police powers has been extensively considered in case law and in academic texts both in Australia and in other jurisdictions. The subject of thresholds also emerged in the context of the Crimes (Surveillance Devices) Bill 2010.86,87

The following is a description of the requirement of a ‘reasonable suspicion’ drawn from the New South Wales Law Reform Commission Discussion Paper on Police Powers of Arrest and Detention.

Some powers of arrest without warrant both at common law and under statute law require a police officer (since the concept is applicable to them alone) making the arrest to have a “reasonable suspicion”. The suspicion may be based on material which would not be admissible in evidence, such as the arrested person’s criminal record, his or her failure to answer question posed by the person making the arrest, and upon information given by others. The fact that police powers of arrest without warrant must be exercised on the basis of reasonable suspicion suggests that the officer making the arrest must indeed have a suspicion with respect to the commission of a crime by the arrested person in order for the arrest to be lawful.88

In *Kelly v Dann* (1992) 8 WAR 225 Ipp J held:

1. a police officer is only entitled to arrest if has ‘reason to suspect’ under the *Police Act 1892* (WA), s 49 or if has “just cause to suspect” the person of having something stolen or unlawfully obtained under s 43(1);

2. it was insufficient merely for a police officer to entertain a suspicion and for him to genuinely believe it was reasonable. The test was an objective one and went to whether, on the facts upon which a suspicion was formed,

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it was reasonable;

3. reasonableness of the suspicion could not be determined by reference to facts not taken into account by the police officer at the time the suspicion was held.

In *Hussein v Kam* [1970] AC 942m Devlin LJ said suspicion “in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove!’” Similarly, in *Queensland Bacon Ltd v Rees* (1966) 115 CLR 266, Kitto J stated that “a suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a slight opinion, but without sufficient evidence.”

In *Seven Seas Publishing v Sullivan* [1968] NZLR 663, McGregor J, sitting on the New Zealand Supreme Court, noted that to suspect something “is to imagine something wrong or evil to be possible”, whereas to believe something to be the case “is to have evidence or faith and consequently to rely on, or give credence to, the existence or occurrence of something.”

The notion of arrest on the basis of reasonable suspicion is contemplated by Article 5 of the European Convention on Human Rights:

> Everyone has the right to liberty and security of person.

> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

> ...

> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

> ...

In *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, the Court concluded that a power to arrest required a reasonable suspicion that could be objectively informed by some facts or information capable of satisfying a court that the arrested person was reasonable suspected of committing the offence.

This view was re-iterated in *Murray v United Kingdom* (1994) 13 EHRR 193. Furthermore, the court supported this view in *O’Hara v United Kingdom* (2002) 34 EHRR 32:

> 34. The Court emphasises that the “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention laid down in Article 5 § 1 (c) of the Convention. This requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case.

The Court in O’Hara also noted that the threshold of reasonable suspicion was not to the extent of evidence that would satisfy a charge:

> 36. It may also be observed that the standard imposed by Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest. The object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the
concrete suspicion grounding the arrest. Thus facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge which comes at the next stage of the process of criminal investigation (see Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A no. 145-B, p. 29, § 53, and Murray v. the United Kingdom, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55).

As discussed in Treschel in *Human Rights in Criminal Proceedings*, detention on remand can be distinguished into particular stages:

- stopping by police to verify identity or conduct a search
- police detention
- detention on remand for investigation
- detention on remand after investigation but awaiting trial
- detention on remand during appeal
- detention on remand following conviction but awaiting sentence.

In the context of these stages, the European Court also distinguishes between detention in the first instance of arrest, and subsequent exercise of power to continue detention. For example in *W v Switzerland* (1993) 17 EHRR 60, para 30:

> The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices: the Court must then establish whether the other grounds given by judicial authorities continued to justify the deprivation of liberty.

In *George v Rockett* (1990) 170 CLR 104, a case relating to the validity of a search warrant, the High Court also explained what it meant by the term ‘reasonable belief’ when it observed that:

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards as assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

In *Debot v The Queen* [1989] 2 SCR 1140, the Canadian Supreme Court held that the phrase ‘reasonable belief’ equates to a standard of ‘reasonable probability’. This standard is lower than that of ‘on the balance of probabilities’, a ‘prima facie case’, or ‘proof beyond reasonable doubt’.

In *Greffe v The Queen* [1990] 1 SCR 755, the Canadian Supreme Court held that information provided by an informer may form the basis of a reasonable belief, even though the information may be hearsay or otherwise inadmissible under the rules of evidence in court proceedings. Whether a reasonable belief exists must be determined in light of the “totality of the circumstances” known to the person deciding whether to issue a warrant or make an arrest. The Court suggested that “bald conclusory
statements” or “mere gossip or rumour” will be insufficient to form probable cause. The Court also noted that the concept of “reasonable belief” is the same as the concept of “probable cause” which forms the basis of U.S. jurisprudence on the requisite level of suspicion on which to make arrests and issue warrants.

In *Ornelas v United States*, 517, U.S. 690 (1996), the United States Supreme Court affirmed that ‘probable cause’ exists “where known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found”. In *Maryland v Pringle*, 540 U.S. 366 (2003) the Court observed that:

> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities that depend on the totality of the circumstances. We have stated, however, that the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and the belief must be particularized with respect to the person to be searched or seized.

Similarly, in *Illinois v Gates*, 462 U.S. 213 (1983) the Supreme Court observed that:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis for knowledge” of persons providing hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Based on the above survey of the relevant jurisprudence, it is clear that the terms “reasonable suspicion” and ‘reasonable belief’ cannot be defined with clinical or empirical precision. However, the following general points can be made:

a. ‘reasonable suspicion’ is a lesser standard than ‘reasonable belief’;

b. there must be some evidence or proof underpinning a reasonable belief, although that evidence or proof may be hearsay evidence, may be provided by an informant, and need not be admissible in court under the rules of evidence;

c. A ‘reasonable belief’ can be loosely defined as a ‘reasonable probability’ or a ‘fair probability’ of something existing. This is a lesser standard than ‘the balance of probabilities’, ‘a prima facie case’, or ‘proof beyond reasonable doubt’.

### 6.5.1 The concept of arbitrariness

In *Hugo Van Alphen v The Netherlands* (Communication No. 305/1988, 15 August 1990), the United Nations Human Rights Committee held that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

In *Fok Lai Ying v Governor in Council* (1997) 7 HKPLR 327, Cooke LJ, sitting on the Privy Council, considered the meaning of ‘arbitrary’ in the context of the right to privacy. He approved of the United Nations Human Rights Committee’s interpretation of “arbitrariness” in *Hugo Van Alphen*, and observed that:

> …The introduction of the concept of arbitrariness is intended to guarantee that every interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.
6.5.2 What is reasonable?

It is clear that any interference with a person’s privacy or home that is unreasonable in the particular circumstances of a given case will be arbitrary. This begs the following question: when will a search be unreasonable? This question has been the subject of a substantial body of jurisprudence from courts in other jurisdictions. Section 8 of the Canadian Charter of Rights and Freedoms prevents “unreasonable searches and seizures”, as does section 21 of the New Zealand Bill of Rights Act 1990 (NZ). Similarly, the fourth amendment to the United States Constitution provides a “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”.

Canadian jurisprudence

Over a number of cases, the Canadian Supreme Court has laid down a number of principles which will inform whether a search or seizure is reasonable.

The Court has held that in determining whether a search was reasonable, it is first necessary to inquire into whether a person had a reasonable expectation of privacy: R v Plant [1993] 3 S.C.R. 281. In Feeney v The Queen [1997] 2 SCR 13, the Court observed that “there is no place on earth where persons can have a greater expectation of privacy than within their ‘dwelling-house’.

If a privacy interest is at issue, which will almost always be the case in a search on residential premises, then it is necessary to consider whether it is possible to seek a warrant.

The Court has held that, when considering whether a search warrant should be issued, it is principally the task of the judicial officer issuing it to carefully balance between the state’s interest in carrying out searches on the one hand, and the interest of the individual in resisting the state’s intrusion upon their privacy on the other: C.B.C. v. New Brunswick (A.G.) [1991] 3 S.C.R. 459. Whether a search is reasonable will depend upon the point at which the individual’s interest must give way to the state’s, or vice versa.

In Hunter v Southam Inc. [1984] 2 SCR 145, the Court considered the question of what level of suspicion is sufficient to tip this balancing exercise in favour of the state, and allow a search. It started by considering the appropriateness of a standard which would allow a search where the authorising officer only had to form the view that it was reasonable to think that evidence connected to an offence may be found. The Court unanimously held that:

This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.

Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave “strong reason to believe” that stolen goods were concealed in the place to be searched before a warrant would issue…. The American Bill of Rights provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation…” The phrasing is slightly different but the standard in each of these formulations is identical. The state’s interest in detecting and preventing crime begins to prevail over the individual’s interest in being left alone at the point where credibly-based probability replaces
suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state’s interest is not simply law enforcement as, for instance, where state security is involved, or where the individual’s interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.

The Court has subsequently clarified that the concept of “credibly-based probability”, which is the point at which the state’s interest begins to outweigh the individual’s, is encapsulated in the phrase ‘reasonable belief’: Debott v The Queen [1989] 2 SCR 1140; Greffe v The Queen [1990] 1 SCR 755.

The United States Supreme Court reached the same conclusion many years earlier when it held that “anything less [than the probable cause standard] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction”: Terry v Ohio, 392 U.S. 1 (1968).

The issue has only received limited attention in New Zealand because most entry, search and seizure powers in New Zealand legislation already require that a magistrate must have a reasonable belief before a warrant could be issued before the introduction of the New Zealand Bill of Rights Act 1990 (NZ). Most commentators agree, however, that the prohibition on unreasonable searches and seizures in the Bill of Rights Act requires a minimum threshold of ‘reasonable belief’.90 It is also worth noting that the New Zealand Courts usually look to the jurisprudence of the Canadian Courts when interpreting provisions of the Bill of Rights Act which are similar to the Canadian Charter on Rights and Freedoms.91

The European Court of Human Rights has held that searches of a person’s home will usually need to be subject to prior judicial authorisation, and any regime for searches must impose “effective mechanisms against abuse”: Funke v France (1993) 16 EHRR 297.

Given that the very low threshold of ‘reasonable suspicion’ does not require any proof of wrongdoing, and may be found on rumour or ‘inarticulate hunches’, it is arguable that this threshold does not provide an effective safeguard of individual privacy, and tips the scales too heavily in favour of the state. Moreover, in Keegan v United Kingdom [2006] ECHR 28867/03, the European Court found that a failure by police to take reasonable steps to verify information that was given to them meant that a search they conducted under a warrant was in breach of Article 8(1) of the Convention. Although not directly on point, the court’s requirement that police must take reasonable steps to verify information would suggest that it requires a relatively rigorous standard before searches can be carried out, which would not be satisfied by the low standard of reasonable suspicion.

The following are some examples of legislative schemes which require a judicial officer to have a ‘reasonable belief’ before they can issue a warrant to search premises:

Section 8, Police and Criminal Evidence Act 1984 (UK);

91 Ibid, xi.
Section 24(4), *Police and Criminal Evidence Act 1984* (UK);

Section 14A, *Australian Federal Police Act 1979* (Cwlth);

Section 47, *Law Enforcement (Powers and Responsibility) Act 2002* (NSW);

Section 18A (2), *Misuse of Drugs Act 1975* (NZ);

Section 117.04(1), *Criminal Code* (Canada);

Sections 107(3) and 108(1), *Films, Videos and Publications Classification Act 1993* (NZ);

Section 1999(2), *Fisheries Act 1996* (NZ); and

Section 23(1), *Food and Drugs Act 1985* (Canada).

**The human rights instruments**

In the interests of completeness, Article 5(1) (c) of the ECHR provides that a person may be arrested upon reasonable suspicion that they have committed an offence. It should be noted that Article 5(1) (c) of the ECHR is expressed in different terms to section 18(1) of the HR Act, and Article 9 of the ICCPR (on which the HR Act is based). Also, section 18(1) of the HR Act more closely resembles section 9 of the *Canadian Charter of Rights and Freedoms* and section 22 of the *New Zealand Bill of Rights Act 1990* (NZ). The ECHR was drafted in the 1940’s and came into effect in 1950, whereas Article 9 of the ICCPR came into effect in 1966. It was open to the drafters of the ICCPR to adopt the wording of the ECHR, but they did not. Moreover, the North American jurisprudence on arbitrary detention postdates the commencement of the ECHR: the fact that Article 5(1) (c) of the ECHR allows for arrest on reasonable suspicion of an offence has not dissuaded the North American Courts from the view that, as far as their human rights instruments are concerned, an arrest or search will be arbitrary if it is not based on a reasonable belief that the relevant criteria are satisfied.

Finally, it is worth noting that notwithstanding Article 5(1) (c), the British Parliament has decided that police must be satisfied that police reasonably believe that an arrest is necessary before it can be made: section 24(4), *Police and Criminal Evidence Act 1984* (UK). Similarly, a British Magistrate cannot issue a warrant for the search of premises unless, *inter alia*, he or she believes, on reasonable grounds, that an offence has been committed and a search will yield evidence of that offence: section 8, *Police and Criminal Evidence Act 1984* (UK).

**PACE review and warrant provisions**

The setting of thresholds in legislation for the used of powers with or without warrant is applied in different ways in human rights jurisdictions. The law is framed according to the historical foundations and human rights law in each jurisdiction. The lack of clarity on the setting of thresholds and criteria for the use of these powers is highlighted by the United Kingdom’s moves to reform this area of the law.
The United Kingdom has proposed to remove ‘the arbitrary threshold’ that currently governs entry and search for evidence law.\textsuperscript{92} The Review proposes ‘a single power under PACE for the issue of a warrant to search for evidence of an offences based on necessity to replace all such powers in other enactments’\textsuperscript{93}. The Review suggests the following as the criteria to establish necessity:

\begin{itemize}
  \item The likelihood that an offence has been committed;
  \item The need to secure specific (i.e. defined) evidence that is likely to be of substantial value to an investigation and/or prosecution;
  \item Immediate entry to premises is necessary to prevent an investigation from being hindered by evidence being moved or concealed or to prevent evidence of an offence from being tampered with, altered, damaged or destroyed.\textsuperscript{94}
\end{itemize}

A central feature of the United Kingdom’s proposal is the objective assessment of whether an entry and search for evidence will result in the discovery of significant evidence in relation to an offence.

\section*{6.6 Arrest without warrant for domestic violence offences}

\textbf{Arrest for Domestic Violence offences – the law}

The Crimes Act, section 212(1) provides that a police officer can arrest a person without warrant where they suspect on reasonable grounds that they have committed an offence, and proceeding via summons will not achieve one of the purposes listed in subsection 212(1) (b). Simply put, section 212(1) creates a presumption that police should proceed via summons, unless one of the criteria specified are satisfied.

Subsection 212(2) creates an exception to 212(1) for domestic violence offences. It simply states that police may arrest a person they suspect on reasonable grounds of committing a domestic violence offence. There is no requirement that they consider whether it is feasible to proceed via summons, or whether the arrest is necessary in the individual circumstances of the case.

A domestic violence offence is defined in the Domestic Violence Protection Orders Act 2008 and includes a comprehensive list of offences where a person cause harm, harasses, threatens a relevant person or causes damage to their property.\textsuperscript{95}

Section 212(2) should be read in conjunction with the Bail Act, section 9F which deals with persons accused of domestic violence offences. Section 9F provides that an authorised officer, normally the Regional Watch House Sergeant may only grant bail where he or she is satisfied that the person poses no danger to a protected person.


\textsuperscript{93} Ibid. p 18.

\textsuperscript{94} Ibid. p. 15.

\textsuperscript{95} Domestic Violence Protection Orders Act 2008, section 13.
while released on bail. The standard criteria for granting bail must also be considered by the authorised officer.96

**Arrest for domestic violence offences – issues**

One of the principal concerns leading to the introduction of section 212(2) was the “under utilisation by the police of the power of arrest in appropriate cases”97. Since the 1980’s Australia Jurisdictions, New Zealand and many other western countries have moved to a policy of pro-arrest and support for increasing the number of prosecutions for domestic violence.98

The ACT Family Violence Intervention Program (FVIP) is a proactive, multi-agency approach to family violence in the ACT. The ACT has a pro-arrest, pro-charge policy on domestic and family violence. These cases are prioritised through the Magistrates Court in a family violence list. The FVIP encourages sharing of information between agencies about family violence, resulting in a publication in 2006 with data and trends across a number of agencies in the ACT.99

In May 2008 the Hon Tanya Plibersek MP, Minister for the Status of Women asked the National Council to Reduce Violence against Women and their Children (the Council) to draft a national plan to reduce violence against women and their children. In its report, *Time For Action*, the Council advocated a strategy to ‘ensure just civil remedies operate in parallel with criminal law and prioritise safety.’100 The Council called on governments to:

Focus police practices and accountability on gathering evidence to support criminal charges where relevant… in the investigation of domestic and family violence allegations.

**Does section 212(2) provide for arbitrary arrest?**

The power of arrest currently in section 212(2) that provides that police may arrest a person they suspect on reasonable grounds of committing a domestic violence offence will be subject to the same test of compatibility with human rights jurisprudence as all other powers considered in this Paper.

It has been suggested that the power in section 212(2) may represent a possible arbitrary power on the basis that it does not require police officers to consider the

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96 See *Bail Act 1992*, section 22 – Criteria for the granting of bail for adults and section 23 – criteria for granting bail to children.
criteria for arrest in section 212 (1)(b) (these criteria are discussed at 6.4).

An arrest or detention will be arbitrary if it is not “necessary in all the circumstances of the case and proportionate to the ends sought”.101 Further, the Canadian Supreme Court has held that a power of arrest or detention will be arbitrary where it is based on a discretion and “there are no criteria, express or implied, which govern its exercise. Thus detention is arbitrary if it is governed by unstructured discretion”.102

In Attorney-General v Hewitt [2000] 2 NZLR 110 the New Zealand High Court considered whether a pro-arrest policy for domestic violence offences which was integral to the “Kapiti Abuse Intervention Programme” could give rise to arbitrary arrest and detention under section 22 of the New Zealand Bill of Rights Act 1990 (NZ). In that case police arrested a person on suspicion of domestic violence without considering whether the arrest was necessary in the individual circumstances of that case. The Court held that the power to arrest was discretionary, and as such:

should be exercised [according to] the particular circumstances of the case.
When considering whether the discretion has been properly exercised, the rights of the offender are relevant but the public interest in the prevention of crime and the prosecution of offenders is also to be taken into account as well as the exigencies faced by the police in a wide variety of situations.

The court held that it was “satisfied that a failure to consider the discretion to arrest as a result of blind adherence to policy or a fixed determination to arrest come what may is not only unlawful, but must also be regarded as arbitrary for the purposes of section 22 of the NZBORA”.

**Purpose of section 212(2)**

It is useful to further consider the intended purpose of section 212(2).

In considering its recommendations for a pro-arrest provision, the ACT Community Law Reform Commission (CLRC) considered submissions that called for mandatory arrest powers, and decided against recommending such powers.103 The CLRC also considered submissions that the police were not arresting when they should be, and that the focus should be on the victims in domestic violence cases, and that the power in 212(1) (b) was creating uncertainty with respect of these cases. The consequence was a recommendation to create a new power which became 212(2). The CLRC considered the formulation which became 212(2) not to be a ‘mandatory arrest’ power.

Since that time, the power in 212(2) has been an integral part of the ACT’s Family Violence Intervention Program (FVIP). The evidence shows that FVIP is a successful model for addressing domestic violence and is highly regarded nationally.

The exercise of 212(2) is dependent upon evidence that informs reasonable grounds to suspect a person has committed a domestic violence offence. An allegation alone is not enough to exercise the power.

An analysis of the FVIP is set out in Criminal Justice Intervention in Family Violence in the ACT — The Family Violence Intervention Program 1998–2006, prepared by the

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Office of the Victims of Crime Coordinator.

A review of this report shows that the power is being used judiciously and considered as a whole, does not support the view that section 212(2) is used arbitrarily. See for example chart 2, which states that out of a total number of 399 incidents identified as FV between 1 June 2000 and 29 June 2001, only 53% resulted in arrest.104

### Questions relating to arrest for domestic violence offences

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#### 6.7 Police powers to seize property

Section 201 of the Crimes Act provides that if electronic equipment is damaged during a search because insufficient care was taken, compensation is payable to the owner.

Other than that, as far as police searches are concerned, ACT law is silent on what, if any, compensation should be paid to a person where their is property is damaged during the course of a search by law enforcement where no incriminating evidence is found and a person is not convicted of anything.

If property is damaged during a search, should the owner of the property have to bear the cost of that damage? For example, if, during a duly authorised search for drugs, police were to cut open upholstery or dismantle furniture or electrical appliances and thereby damage them, should the property owner have to bear the cost of this damage, particularly where no drugs are found and no charges are laid. If the person has not been charged or convicted, it may be appropriate for any damaged caused in the course of entry and search by police be paid for by the Territory.

### Disposal of hazardous seizures

Currently there is no legislation which provides for ACT Policing or government agencies to lawfully dispose of or destroy hazardous goods or substances. The Drug Misuse and Trafficking Act 1985 (NSW) legislation mirrors the ACT Drugs of Dependence Act (ACT) however the NSW Act confers a power to order the disposal of dangerous exhibits upon an officer of or above the rank of superintendent. The provisions of this section are considered desirable for application in the ACT.

The Drugs of Dependence Act includes provisions setting out the requirements and circumstances where property, including cannabis, prohibited substances and items seized in the course of searches under that Act. The ACT Government Analytical Laboratory (ACTGAL) within ACT Health reports that these provisions work well.

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There are however instances where hazardous substances, sometimes in large quantities, are seized by police and the storage of these substances are dangerous. This can be as a result of the unstable nature or poor condition of the substance. Where this occurs, there are no provisions to dispose of these chemicals without adversely affecting the prosecution's case.

Neither ACT Policing nor ACTGAL have the facilities to safely store (as required by legislation) large quantities of hazardous substances until the finalisation of legal proceedings.

### Questions relating to police powers of seizure

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#### 6.9 Police powers relating to road transport legislation

In February 2010, Jon Stanhope, Minister for Territory and Municipal Services announced that he will introduce in the Legislative Assembly a package of legislation to reform anti-drink driving laws and legislate for roadside drug-testing. These reforms are based on a review of the *Road Transport (Alcohol and drugs) Act 1977* undertaken in 2008.

In August 2000, legislation came into effect in the ACT giving police the power under the *Road Transport (Safety and Traffic Management) Act 1999* to seize, impound and forfeit vehicles for certain offences. Under section 5 of that Act, police may take this action for offences of street racing, speed trials, burnouts and menacing driving.

Provisions in the Road Transport (Safety and Traffic Management) Act empower police to seize a vehicle within 10 days of a relevant offence. The vehicle must be stored in a secure holding yard (currently the Belconnen Property Office), and the informant then has 28 days to swear a summons or the vehicle must be returned and a Traffic Infringement Notice issued. The vehicle is retained by police until the alleged offender is processed through the courts.

If the alleged offender is found guilty of the relevant offence and is a first offender, a Magistrate can order the car be impounded for up to three months. If the offence is a repeat offence, a Magistrate can order the vehicle be forfeited to the Territory. A repeat offender is someone who has been found guilty of a relevant offence within five years prior to the second offence. Since the inception of this legislation, more than 270 motor vehicles have been impounded.
7 Crime scenes

Currently, Police rely on common law powers to secure crime scenes. Some jurisdictions have moved to provide police with specific powers relating to crime scenes.\textsuperscript{105}

As the legislation currently stands Police have no power to control a crime scene in a public place or premises. In order to search for evidence and ‘process’ the scene Police have to rely on obtaining a Crimes Act, section 194 search warrant. This process raises a number of issues.

Firstly a Crimes Act search warrant is not designed for lengthy forensic examinations of crime scenes. It is the vehicle through which Police obtain evidence. Secondly, until the warrant is granted Police have no powers to ‘hold’ a crime scene and prevent its contamination by residents or members of the public.

Thirdly, search warrants cannot be granted for public places. While Police possess arrest powers to detain persons who hinder police in the execution of their duty, this does not give police the right to ‘hold’ a crime scene.

Furthermore it should be noted that there are also limitations in the Coroner Act 1997 concerning crime scenes. As it currently stands police have the power under the Coroners Act to hold a crime scene and prevent people entering it whilst a search warrant is being obtained. However police do not have the power to record, examine and take samples from the crime scene unless under warrant. This is problematic when a search warrant is not required for the investigation for example in the case of a suspected suicide (as there is no suspected offence) and fires where arson is not suspected.

In these instances ACT Policing’s current practice is for police and forensic officers to process the crime scene under the (assumed) consent of the owners.

A review of the Coroners Act is now well underway. Reforms are to be introduced in 2010 which will include reform of crime scene legislation as it related to police responsibilities under that Act.

The Police Law Enforcement (Powers and Responsibilities) Act 2002 (NSW, Part 7 addresses the issues highlighted above and allows Police to establish and hold a crime scene, once identified, for a period of three hours while a search warrant is applied for.

Similarly, the Police Powers and Responsibilities Act 2000 (Queensland), Chapter 7, Part 3 provides for the establishment of crime scenes, specific crime scene powers and a specific crime scene warrant. The adoption of a similar regime in the ACT may provide clarity and consistency with respect to what police powers and serve to inform the public of their rights and obligations with respect to crime scenes.

\textsuperscript{105} Law Enforcement (Powers and Responsibilities) Act 2002, Part 7 (NSW), Police Administration Act (NT), ss 147J-147N, Police Powers and Responsibilities Act 2000 (Qld), Ch 7, Div. 2.
8 Forensic procedures in the ACT

Forensic procedures are the methods by which investigators acquire evidential material from a person’s body for the purposes of identification and court proceedings. There are two separate but overlapping regimes governing forensic procedures in the ACT. The first regime relates to the taking of identification material and is governed by the Crimes Act and, in the case of a person under 18, the Children and Young People Act 2008. The second regime is governed by the Crimes (Forensic Procedures) Act (FP Act).

8.1 Identification material

Identification material as defined by the Crimes Act encompasses prints (such as fingerprints), voice recordings, handwriting samples and photographs. The Crimes Act\(^\text{106}\) permits such material to be taken from an adult in lawful custody either to establish their identity or to link them to an offence.

The Children and Young People Act\(^\text{107}\) provides for the taking of prints, photographs, video recordings, buccal swabs and saliva samples for the sole purpose of establishing identity when a young detainee (a person who is under eighteen or was under eighteen at the time of offending) enters a detention centre. There are currently no provisions for the taking of materials to establish identity on arrest following the repealing of section 84 of the Children and Young People Act 1999 (CYPAA 1999).

8.2 Forensic procedures

The FP Act was enacted primarily to provide for proper mechanisms for obtaining and storing DNA but also includes a wide range of forensic material. The focus of the FP Act is the proving or disproving of guilt as opposed to establishing identity and prohibits procedures for the sole purpose of establishing identity\(^\text{108}\). It regulates the taking of a range of forensic materials from suspects, convicted persons and volunteers as well as the holding and destruction of forensic material and the DNA database.

Forensic material is defined as any of the following taken of or from a person’s body: a sample; a handprint, fingerprint, footprint or toe print; a photograph or video recording; a cast or impression. It encompasses DNA samples, dental casts and samples that consist of matter from someone else’s body.

\(^{106}\) Crimes Act 1900, section 230
\(^{107}\) Children and Young Persons Act 2008, section 158
\(^{108}\) Crimes (Forensic Procedures) Act 2000, section 5(3)(b)
The legislation distinguishes between intimate and non-intimate forensic procedures with greater limitations placed on intimate procedures due to the increased level of intrusion on a person’s privacy. Forensic procedures involving intrusion into a person’s body cavities, other than the mouth, are not permitted. Intimate procedures cover a range of procedures involving the external anal and genital regions, buttocks and the breasts of women and transgender persons identifying as women. The taking of blood samples, dental impressions and pubic hair are also classified as intimate. Non-intimate forensic procedures consist of examination of body parts, the taking of samples, photographs or casts of wounds provided that they are not classified as intimate. The taking of prints is also non-intimate.

The FP Act creates three separate categories of persons on whom forensic procedures may be carried out: suspects, convicted serious offenders and volunteers. There are additional safeguards for those under eighteen and incapable persons.

The regime for suspects is intended to confirm or disprove guilt. Consent is an initial requirement but refusal can be overruled either by the police for non-intimate procedures or the courts for intimate procedures.

The purpose of the legislation relating to persons convicted of serious offences is to use forensic materials to investigate other outstanding offences. The types of materials that can be taken are limited to fingerprints and samples that can be used for DNA matching to enable speculative searching against the fingerprint and DNA databases. Speculative searching involves the entering of information in a particular database with the hope of identifying a match against the contents of the database on a random basis. There is a requirement that taking of material must be justifiable in all the circumstances.

The collection and use of forensic material from volunteers is subject to informed consent. The fundamental premise as set out in the explanatory statement to the Crimes (Forensic Procedures) Bill is that the police should be prohibited from soliciting consent. However, the FP Act merely requires that a person volunteer to undergo the forensic procedure\(^\text{109}\) without further guidance. Any type of material may be taken and placed on either the limited or unlimited DNA database provided that the volunteer is properly informed.

**8.2.1 Destruction of forensic materials.**

The provisions relating to the destruction of forensic materials (as opposed to the information obtained from such materials) are designed to ensure that materials are not held without justification. The FP Act requires that forensic materials taken from persons who are deemed innocent be destroyed. The destruction requirements contained in Part 2.10 of the FP Act do not apply to volunteers. Instead, section 84(2) (d) requires destruction following a specified period agreed by the chief police officer and the volunteer.

However, the requirement to “destroy” is satisfied by the destruction of any means of identifying the forensic material with the person from whom it was taken or to whom it relates.\(^\text{110}\)

\(^{109}\) Crimes (Forensic Procedures) Act 2000, section 10 (a)
\(^{110}\) Ibid, Dictionary.
8.2.2 The DNA database

The DNA database provisions were enacted in anticipation of the creation of a national DNA database. The provisions explain what material may be held on the database, how material may be stored, how the databases may be interrogated, who may access the databases and how information held may be disclosed.

Subsequently, the National Criminal Investigation DNA Database (NCIDD) was created. It is operated by CrimTrac, a Federal Government agency established on 1 July 2000 to develop the technology required to give the police ready access to information needed to solve crimes. DNA samples collected in the ACT are held on the same system as national information held on the NCIDD but are governed by ACT legislation and are accessed separately from national information. The NCIDD contains only sets of numbers which make up the DNA profiles together with a reference number for each profile and therefore can not be used to identify individuals. The identifying material is held by the police agency that placed the relevant profile on the NCIDD so that access to DNA placed on the database by ACT Policing is only permissible in the circumstances specified by the FP Act.

The profiles held on the NCIDD are not destroyed or deleted. However, once the forensic material to they relate is destroyed, it becomes an offence to record or retain any identifying information obtained from that forensic material. Effectively, this requires only that the ability to link a profile with a person be removed.

8.2.3 Issues relating to forensic procedures

The review of investigative powers provides an opportunity to re-examine the efficacy of forensic procedures, particularly in relation to DNA. The starting point for review is to clarify the objectives of obtaining forensic matter from individuals. It is submitted that any legislative scheme should allow, in justifiable circumstances and in accordance with human rights, the ability to reliably identify suspects and confirm or disprove the involvement of individuals in offences. There are a number of areas in the current legislative scheme can be usefully reviewed to achieve these objectives.

It is useful to note that the FP Act was based, in large part, on the Model Bill on which Part 1D of the Crimes Act (Cwlth) was also based. The Commonwealth legislation is currently the subject of a statutory review, the results of which may usefully inform a review of the ACT legislation.

8.2.4 Consent

The FP Act requires that suspects and serious offenders are asked for their “informed consent” prior to providing forensic material. The request must be based in a reasonable belief that the forensic material would confirm or disprove guilt in the case of a suspect or be justifiable in all the circumstances in the case of a serious offender. However, the lack of consent is not a bar to the material being taken, using reasonable force if necessary, due to the powers given to the police and the courts. The FP Act also creates criminal offences in relation to the prevention of carrying out forensic procedures together with the fact of obstruction being admissible leading to an adverse inference in evidence during criminal proceedings in respect of suspects.112

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111 Ibid, section 98
112 Ibid, section 89
Forensic procedures pursuant to the FP Act, in relation to suspects and serious offenders, are therefore substantially non-consensual.

Consideration could be given to removing the initial requirement for consent to reflect the reality of a suspect or serious offender’s position. It may be preferable to retain consent as a concept to prevent unnecessary conflict at the point of initial request and to provide individuals with the opportunity to co-operate.

**Enforcement of orders**

In the event of a suspect or serious offender withholding consent to a forensic procedure, the police may pursue the matter by way of police order or court order depending on the circumstances.

Since the introduction of sections 40A-D of the FP Act, powers of entry and arrest can be attached to a court order in respect of a suspect. As police orders only apply to non-intimate procedures on adults in custody, there is no need for powers of entry or arrest to compel compliance.

The position in relation to serious offenders is more problematic. When a non-intimate forensic procedure is required the police may issue an order\(^\text{113}\) but there is no power to enforce it in terms of entry or arrest. Where an intimate forensic procedure is required, the police can apply for a court order\(^\text{114}\) which may include power to enter any place of detention to carry out the procedure or an order requiring the serious offender to attend a police station.

The lack of enforcement powers in relation to non-intimate procedures impacts on the ability of the police to pursue the least invasive forensic procedure in respect of serious offenders who are not imprisoned (or otherwise detained) and who do not consent to the procedure. The insertion of provisions which enable either the court or police to attach a power of entry and arrest to an order may be appropriate. In light of the general legislative requirement for the police to obtain a warrant to enter premises and the requirements as they relate to suspects, a court warrant might be considered to be the most acceptable option.

In the event of powers of entry and arrest becoming available in respect of non-intimate procedures it would be inconsistent if the enforcement provisions in relation to intimate procedures were not also amended. At present, the court may order that the serious offender attend at the police station to permit the forensic procedure to be carried out\(^\text{115}\). The other penalty is an offence\(^\text{116}\) of intentionally failing to permit the forensic procedure to be carried out.

**Drafting issues**

Section 77(1) permits a police officer to “apply to any court for an order directing a serious offender to consent to an intimate forensic procedure”. There are two issues with this wording. First, the disparity between the wording of section 73(1) which permits a police officer to order the “carrying out of a non-intimate forensic procedure” and the wording of section 77(1). Second, the ordering of consent is a somewhat unusual phrase which does not sit well with the concept of informed

\(^{113}\) Ibid, section 73.

\(^{114}\) Ibid, section 77.

\(^{115}\) Ibid, section 78(2).

\(^{116}\) Ibid, section 78(3).
It is unclear whether a refusal of consent would amount to an offence pursuant to section 63 of the FP Act of obstructing, hindering or resisting a police officer. Whilst the wording of the section appears to be aimed more at third parties, the inclusion of “resisting” would indicate that the offence could be applied to either suspects or serious offenders. Depending on the conclusions with regard to the detention of consent following this review, it may be appropriate for this section to be amended to clarify the intended scope.

There is further inconsistency between section 77(1), the remainder of section 77 and section 78. The majority of section 77 refers to orders to carry out forensic procedures and section 78 refers to the court ordering that a serious offender “permit” a forensic procedure together with the creation of an offence of failing to permit. This creates some uncertainty about whether refusal to comply with a court order issued pursuant to section 77(1) is an offence pursuant to section 78(3). Also, section 78(3) is not specifically restricted to failing to permit the carrying out of a forensic procedure pursuant to a court order although this was the intent according to the explanatory statement to the Bill and is implied by context.

### 8.2.5 Justifiable in all the circumstances

The test that must be applied when requesting forensic materials from a serious offender is that the request must be “justified in all the circumstances”\(^{117}\). There is no specific guidance on what would amount to justification. It should be noted that if the serious offender is a suspect, then forensic materials may only be taken in accordance with the provisions relating to suspects\(^{118}\). The serious offender provisions are purely to speculatively search against databases, where the offender is not a suspect in a particular matter. The explanatory statement to the Crimes (Forensic Procedures) Bill 2000 refers to the recidivist tendencies particularly of those convicted of sexual or violent offences as the rationale for these provisions. However, the provisions are not specifically linked to this rationale.

It may be desirable to either provide statutory guidance on the factors to be taken in to account when applying the test of “justified in all the circumstances”. Alternatively, the provisions could be narrowed to apply only to those convicted of serious sexual or violent offences.

### 8.2.6 Volunteers

Although the explanatory statement to the Crimes (Forensic Procedures) Bill 2000 stressed that the police or law enforcement authorities may not solicit consent from a volunteer, this is not expressly contained in the statute. A volunteer is defined as a person who volunteers\(^{119}\) but the FP Act does not provide further guidance. While the term ‘solicit’ implies that the police may not subject a volunteer to repeated requests or seek to influence a decision, the silence of the FP Act could lead to judicial interpretation of ‘volunteer’ more broadly. The equivalent legislation in New South Wales defines ‘volunteer’ as “a person (other than a child or an incapable person) who consents to a request by a police officer for the person to undergo a forensic

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\(^{117}\) Ibid, sections 71, 74 and 77.

\(^{118}\) Ibid., section 68.

\(^{119}\) Ibid, section 10.
procedure. This definition clarifies that it is acceptable for the police to make a request of a person to submit to a forensic procedure.

If it is intended by the police that information obtained by analysis of forensic material taken from a volunteer should be placed on the DNA database system, this must be explained to the individual. The wording of section 80 of the FP Act requires the police to make the decision as to whether the information should be placed on the limited or unlimited purposes index and then inform the volunteer of their intent and the consequences.

The implication of this is that there is no obligation to explain the alternative to the person concerned. This may, at least in part, explain the imbalance on a national scale that exists in relation to the two indexes on the NCIDD. Of the over 18,000 volunteer profiles on the NCIDD, only approximately 580 are kept on the limited purposes index. These figures also raise the concern that volunteers may not fully appreciate the consequences of their information being placed on the unlimited purposes index. Given that victims fall within the category of volunteer, there is merit in considering creating a presumption in favour of volunteer information being placed the limited purposes index.

A volunteer may withdraw consent at any time which would result in the destruction of material taken or information obtained by analysis unless a court order is obtained authorising retention of the material. Withdrawal of consent requires positive action on the part of the volunteer. Specifically in relation to DNA, the material can only be held for the period of time agreed between the chief police officer and the volunteer.

There is no statutory guidance either as to the appropriate length of time periods or resolution if the event of disagreement.

The circumstances in which a court can authorise the retention of forensic material are constrained by the requirements of section 84 of the FP Act. Destruction may undermine a prosecution and the police are particularly concerned about cases involving domestic violence where it is relatively common for withdrawal of consent by the victim/volunteer to occur. This may create a conflict of interest between the police who wish to prosecute using the best evidence available in the interests of both the public and victim and the rights of the victim. On one hand there is potentially merit in broadening the court’s powers to order retention but on the other is the core concept of consent as it applies to volunteers. Allowing the police to retain forensic material against the wishes of the victim may have a number of consequences including: the further complication of obtaining consent by the explanation of the court’s powers to authorise retention; the potential for more frequent refusal of consent and the reduction in public support for the regime. Another factor to consider is whether it is appropriate to select a particular category of offence for special treatment with the attendant concern that the introduction of one such category may encourage requests for expansion to more categories in the future.

120 Crimes (Forensic Procedures) Act 2000 (NSW), section 76(1)(a)
121 Ibid, section 82.
122 Ibid, section 80(2)(e).
It is informative to note that the Sherman Report\textsuperscript{123} makes the following comment: “It is appropriate that persons who are not suspects or offenders, and who are willing to provide DNA samples voluntarily to assist investigations or other inquiries, should have the final say on the uses to which their sample can be put”.

While the report focused on DNA in reviewing the forensic procedures of the Commonwealth legislation on which the FP Act is based, the principle can be applied to all forensic materials.

\section*{8.2.7 Sex of person carrying out forensic procedures}

When the FP Act was originally enacted, the sex of the person carrying out or helping to carry out intimate and certain non-intimate forensic procedures was required to be of the same sex as a suspect only if it were practicable. In 2008, the provisions were amended to apply to “relevant persons” thus including serious offenders and volunteers and the “if practicable” provisions were altered due to human rights considerations\textsuperscript{124}.

The current position is as follows:

In relation to intimate procedures, the person must be of the same sex as the relevant person unless the forensic procedure is a sample of blood or dental impression, in which case the requirement exists only if it is practicable. In relation to non-intimate procedures, the person must be of the same sex as the relevant person unless the forensic procedure is the taking of a print or does not involve touching of the body or require the removal of specified clothing. There is no application of “if practicable”. A volunteer is able to request a person of the opposite sex.

The provisions may result in operational difficulties for the police where they are unable to satisfy the statutory requirement for a same sex person to carry out or assist in the forensic procedure. Whilst there is a necessary balancing act between practicalities and human rights, the current provisions may bear revision without infringing on an individual’s human rights. For example, the present provisions mean that procedures such as hair plucking and the taking of a buccal swab (unless carried out by the relevant person themselves) would require a same sex person due to the fact that touching is involved. It is arguable that such procedures do not involve a more personal level of contact than the taking of blood or a dental impression and therefore should be subject to the ‘if practicable’ proviso.

\section*{8.2.8 The definition of ‘in custody’}

The provisions of the FP Act relating to suspects make references to the suspect being in custody. The dictionary of the FP Act states that a person is \textit{in custody} if the person is in the lawful custody of a police officer. In the event of the suspect being detained in a correctional facility (for example, on remand), this definition means that there is no power for the police to carry out a forensic procedure on that person. This may have the unintentional effect of hampering an ongoing police investigation.

\section*{8.3 Dual application of the \textit{Crimes Act 1900} and the \textit{Crimes}}


\textsuperscript{124}Crimes (Forensic Procedures) Bill, Explanatory Statement.
(Forensic Procedures) Act 2000 to procedures

The primary difficulty with the present legislative position is duality. For example, prints and photographs may be taken pursuant to section 230 of the Crimes Act 1900 for the purposes of establishing identity and linking to an offence, but also as a non-intimate samples pursuant to the provisions of the FP Act for investigative purposes. This presents the investigating officer with two options which may produce different outcomes. The consequence is a lack of clarity which increases the potential for legal challenge.

The review presents an opportunity to create a cohesive and comprehensible scheme but also raises the question of how best this might be achieved.

Option 1 – create one legislative scheme dealing with all forensic procedures, regardless of purpose but legislate separately in relation the operation of the fingerprint and DNA databases to deal with issues such as destruction.

Option 2 – create one scheme for all forensic procedures bar DNA and a separate scheme for procedures leading to DNA analysis.

Option 3 – create a scheme based on purpose: identification and involvement in crime. This option would be complicated by the dual purpose of many forensic procedures.

8.4 Identification of children and young people

Since the CYPA 1999 was repealed by the CYPA 2008, a lacuna exists concerning the identification of suspects under eighteen. Section 230 (11) of the Crimes Act only permits identification material to be taken from a person under eighteen in accordance with section 84 of the CYPA 1999 (repealed). There is no corresponding provision in the CYPA 2008 and consideration should be given to re-instating this power.

8.5 Forensic procedures and human rights

There is a clear public interest to be served in using forensic techniques to detect offenders. There is also a potential benefit to individuals who may be able to confirm their innocence. However, it is important to ensure that the statutory framework in relation to forensic procedures does not breach human rights as enacted in the HR Act. In particular, the rights to protection from degrading treatment, privacy, liberty, a fair trial and the rights in criminal proceedings may be engaged.

8.6 Identification parades

In 2006, a proposal was put forward that section 114(3)(c) of the Evidence Act 1995 be amended by the inclusion of a further sub-section that permits the court to determine if it is reasonable to hold an identification parade by taking into account –

(c) the practicality of holding an identification parade having regard, among other things:

(iii) if the investigating police are unable to identify sufficient participants for an identification parade after reasonable efforts to do so.

It has been suggested that the Act also be modified to permit the use of photo-board identification if police are unable to identify sufficient participants for an
identification parade.

In the United Kingdom, legislation allows or the use of video technology for the use in the identification of suspects. The Codes of Practice to PACE 1984 only make reference to video identification. The technology involved is commonly known as VIPER. The video identification involves moving images being shown to the witness which will obviously include the suspect and then persons who resemble the suspect. Still images can be used in certain circumstances. Code D 3.14 requires that video identification be the preferred choice of procedure – only if it is not practicable can the police move to an identification parade in the traditional sense. Annex A to Code D sets out the detailed requirements that include:

- A requirement to show the suspect plus at least eight others; and,
- replication to conceal or replicate unusual features of the suspect.

There are also rules about keeping witnesses apart from each other and showing the images to witnesses separately.

The VIPER database now has access to thousands of images, which enables the UK police to conduct identification procedures which are fairer to the suspect, especially in circumstances where it would have been extremely difficult if not impossible to find a sufficient number of volunteers for an identification parade.

Solicitors in the UK are invited to attend the image selection process by the police to ensure transparency and fairness – usually this is done entirely separately from the arrest and charge process. It means that the suspect can have been charged and bailed/remanded or on police bail pending investigations whilst the identification process is conducted (depending on its importance). It also means that witnesses can go to police stations at times convenient to them to view the images.

### Questions relating to forensic procedure legislation

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125 See Code D 3.5 and Annex A.
77 Should the provisions relating to people volunteering for forensic procedure be reviewed?

78 Should *Crimes (Forensic Procedures) Act 2000*, section 84 be expanded to encompass all offences as opposed to only serious offences?

79 Should the court’s powers to authorise retention of forensic materials following the withdrawal of a volunteer’s consent be broadened in respect of all or specific categories of offence?

80 Are the provisions relating to the destruction of forensic materials and the retention of identifying information satisfactory?

81 Should the “same sex” requirements be amended to increase the circumstances in which a person carrying out or helping carry out a forensic procedure is subject to the “if practicable” proviso?

82 Should police be permitted to use photo-board identification if they are unable to identify sufficient participants for an identification parade?
Annexure A – Legislation

**Crimes Act 1914 (Commonwealth)**

**Part IC—Investigation of Commonwealth offences**

**Division 1—Introduction**

23 Outline of this Part

1. This Part:
   a. provides for the detention of people arrested for Commonwealth offences (see Division 2); and
   b. imposes obligations on investigating officials in relation to:
      i. people arrested for Commonwealth offences; and
      ii. certain other people who are being investigated for Commonwealth offences;
         (see Division 3).

2. To avoid doubt, this Part does not confer any power to arrest a person.

3. To avoid doubt, only a person arrested for a Commonwealth offence may be detained under this Part.

23A Application of Part

1. Any law of the Commonwealth in force immediately before the commencement of this Part, and any rule of the common law, has no effect so far as it is inconsistent with this Part.

2. This Part does not exclude or limit the operation of a law of a State or Territory so far as it can operate concurrently with this Part.

3. In subsection (2):
   **law of a State or Territory** includes such a law that is given a particular application by a law of the Commonwealth.

4. Where a law of a State or Territory would, apart from this subsection, require the electronic recording of confessional evidence in relation to a Commonwealth offence (whether or not expressed as a condition of the admissibility of that evidence), that requirement ceases to apply on the commencement of this Part.

5. The provisions of this Part, so far as they protect the individual, are in addition to, and not in derogation of, any rights and freedoms of the individual under a law of the Commonwealth or of a State or Territory.

6. If an offence against a law of the Australian Capital Territory is punishable by imprisonment for a period exceeding 12 months and the investigating official concerned is a member or special member of the Australian Federal Police, this Part applies to that offence as if:
(a) references to Commonwealth offences included references to that offence; and
(b) references to a law of the Commonwealth included references to a law of that Territory.

23AA How this Part applies to the Antarctic Territories

(1) This Part applies in relation to a person as if he or she were arrested on arrival in a State or Territory if:
   (a) the person was arrested within the Australian Antarctic Territory or the Territory of Heard Island and McDonald Islands; and
   (b) the person was brought, while under arrest, to the State or Territory; and
   (c) this Part applies in the State or Territory.

(2) This Part applies in relation to a person as if he or she first became a protected suspect on arrival in a State or Territory if:
   (a) the person was a protected suspect within the Australian Antarctic Territory or the Territory of Heard Island and McDonald Islands; and
   (b) the person travelled, while a protected suspect, to the State or Territory; and
   (c) this Part applies in the State or Territory.

(3) This Part does not otherwise apply within the Australian Antarctic Territory or the Territory of Heard Island and McDonald Islands.

23B Definitions

(1) In this Part:

   *Aboriginal legal aid organisation* means an organisation that provides legal assistance to Aboriginal persons and Torres Strait Islanders, being an organisation identified in the regulations for the purposes of this definition.

   *arrested*: a person is arrested if the person is arrested for a Commonwealth offence and the person’s arrest has not ceased under subsection (3) or (4).

   *Commonwealth offence* means:
   (a) an offence against a law of the Commonwealth, other than an offence that is a service offence for the purposes of the *Defence Force Discipline Act 1982*; or
   (b) a State offence that has a federal aspect.

   *inform*, in relation to an investigating official informing a person who is under arrest or a protected suspect, means notify the person:
   (a) in a language in which the person is able to communicate with reasonable fluency; and
   (b) in a manner that the official has reasonable grounds to believe is a manner that the person can understand having regard to any apparent disability the person has.

   *investigating official* means:
   (a) a member or special member of the Australian Federal Police; or
   (b) a member of the police force of a State or Territory; or
   (c) a person who holds an office the functions of which include the investigation of Commonwealth offences and who is empowered by a law
of the Commonwealth because of the holding of that office to make arrests in respect of such offences.

*investigation period* means the investigation period prescribed by section 23C or 23CA, as the case requires.

*protected suspect* has the meaning given by subsection (2).

*question* has the meaning given by subsection (6).

*tape recording* means audio recording, video recording or recording by other electronic means.

*under arrest*: a person is under arrest if the person has been arrested for a Commonwealth offence and the person’s arrest has not ceased under subsection (3) or (4).

(2) A person is a *protected suspect* if:

(a) the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence; and

(b) the person has not been arrested for the offence; and

(c) one or more of the following applies in relation to the person:

(i) the official believes that there is sufficient evidence to establish that the person has committed the offence;

(ii) the official would not allow the person to leave if the person wished to do so;

(iii) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so; and

(d) none of the following applies in relation to the person:

(i) the official is performing functions in relation to persons or goods entering Australia, and the official does not believe that the person has committed a Commonwealth offence;

(ii) the official is performing functions in relation to persons or goods leaving Australia, and the official does not believe that the person has committed a Commonwealth offence;

(iii) the official is exercising a power under a law of the Commonwealth to detain and search the person;

(iv) the official is exercising a power under a law of the Commonwealth to require the person to provide information or to answer questions; and

(e) the person has not ceased to be a suspect under subsection (4).

(3) A person ceases, for the purposes of this Part, to be arrested for a Commonwealth offence if the person is remanded in respect of that offence by one of the following:

(a) a magistrate;

(b) a justice of the peace;

(c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested;

otherwise than under paragraph 83(3)(b), (4)(b), (8)(a), (8)(b), subsection 83(12), paragraph 83(14)(a), or subparagraph 84(4)(a)(ii) or (6)(a)(i) of the *Service and Execution of Process Act 1992*. 

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(4) A person ceases, for the purposes of this Part, to be arrested or a protected suspect if:

(a) an investigating official believes on reasonable grounds that the person is voluntarily taking part in covert investigations; and

(b) those covert investigations are being conducted by the official for the purpose of investigating whether another person has been involved in the commission of an offence or suspected offence (whether a Commonwealth offence or not).

(5) Subsection (4) does not prevent the person from being re-arrested or again becoming a protected suspect.

(6) In this Part, a reference to questioning a person:

(a) is a reference to questioning the person, or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any Commonwealth offence (including an offence for which the person is not under arrest); and

(b) does not include a reference to carrying out a forensic procedure on the person under Part ID.

Division 2—Powers of detention

Note: The powers in this Division only apply in relation to people under arrest. They do not apply in relation to protected suspects.

23C Period of arrest if arrested for non-terrorism offence

(1) If a person is arrested for a Commonwealth offence (other than a terrorism offence), the following provisions apply.

(2) The person may be detained for the purpose of investigating either or both of the following:

(a) whether the person committed the offence;

(b) whether the person committed another Commonwealth offence that an investigating official reasonably suspects the person to have committed; but must not be detained for that purpose, or for purposes that include that purpose, after the end of the investigation period prescribed by this section.

(3) The person must be:

(a) released (whether unconditionally or on bail) within the investigation period; or

(b) brought before a judicial officer within that period or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.

Note: For judicial officer, see subsection (9).

(4) For the purposes of this section, but subject to subsections (6) and (7), the investigation period begins when the person is arrested, and ends at a time thereafter that is reasonable, having regard to all the circumstances, but does not extend beyond:

(a) if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander—2 hours; or

(b) in any other case—4 hours; after the arrest, unless the period is extended under section 23D.
(5) In ascertaining any period of time for the purposes of this section, regard shall be had to the number and complexity of matters being investigated.

(6) If the person has been arrested more than once within any period of 48 hours, the investigation period for each arrest other than the first is reduced by so much of any of the following periods as occurred within that 48 hours:
   (a) any earlier investigation period or periods under this section;
   (b) any earlier investigation period or periods under section 23CA.

(6A) However, in relation to each first arrest, disregard subsection (6) for any later arrest if:
   (a) the later arrest is for a Commonwealth offence:
      (i) that was committed after the end of the person’s period of detention under this Part for the first arrest; or
      (ii) that arose in different circumstances to those in which any Commonwealth offence to which the first arrest relates arose, and for which new evidence has been found since the first arrest; and
   (b) the person’s questioning associated with the later arrest does not relate to:
      (i) a Commonwealth offence to which the first arrest relates; or
      (ii) the circumstances in which such an offence was committed.

(7) In ascertaining any period of time for the purposes of subsection (4) or (6), the following times are to be disregarded:
   (a) the time (if any) that is reasonably required to convey the person from the place at which the person is arrested to the nearest premises at which the investigating official has access to facilities for complying with this Part;
   (b) any time during which the questioning of the person is suspended or delayed to allow the person, or someone else on the person’s behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter or other person as provided by this Part;
   (c) any time during which the questioning of the person is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place;
   (d) any time during which the questioning of the person is suspended or delayed to allow the person to receive medical attention;
   (e) any time during which the questioning of the person is suspended or delayed because of the person’s intoxication;
   (f) any time during which the questioning of the person is suspended or delayed to allow for an identification parade to be arranged and conducted;
   (fa) any time during which the questioning of the person is suspended or delayed in order to allow the making of an application under section 3ZQB or the carrying out of a prescribed procedure within the meaning of Division 4A of Part IAA;
   (g) the time (if any) that is reasonably required in connection with making and disposing of an application under section 23D, 23WU or 23XB;
   (ga) any time during which the constable is informing the person of matters specified in section 23WJ;
   (h) any reasonable time during which the questioning of the person is suspended or delayed to allow the person to rest or recuperate;
   (i) any time during which a forensic procedure is being carried out on the person by order of a magistrate under Division 5 of Part ID;
(j) any time during which the questioning of the person is suspended or delayed, if section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section.

(8) In any proceedings, the burden lies on the prosecution to prove that:
   (a) the person was brought before a judicial officer as soon as practicable; or
   (b) any particular time was covered by a provision of subsection (7).

(9) In this section:

   judicial officer means any of the following:
   (a) a magistrate;
   (b) a justice of the peace;
   (c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

23CA Period of arrest if arrested for terrorism offence

(1) If a person is arrested for a terrorism offence, the following provisions apply.

(2) The person may be detained for the purpose of investigating either or both of the following:
   (a) whether the person committed the offence;
   (b) whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed; but must not be detained for that purpose, or for purposes that include that purpose, after the end of the investigation period prescribed by this section.

(3) The person must be:
   (a) released (whether unconditionally or on bail) within the investigation period; or
   (b) brought before a judicial officer within that period or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.

Note: For judicial officer, see subsection (10).

(4) For the purposes of this section, but subject to subsections (6) and (8), the investigation period begins when the person is arrested, and ends at a time thereafter that is reasonable, having regard to all the circumstances, but does not extend beyond:
   (a) if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander—2 hours; or
   (b) in any other case—4 hours; after the arrest, unless the period is extended under section 23DA.

(5) In ascertaining any period of time for the purposes of this section, regard shall be had to the number and complexity of matters being investigated.

(6) If the person has been arrested more than once within any period of 48 hours, the investigation period for each arrest other than the first is reduced by so much of any of the following periods as occurred within that 48 hours:
   (a) any earlier investigation period or periods under this section;
   (b) any earlier investigation period or periods under section 23C.
(7) However, in relation to each first arrest, disregard subsection (6) for any later arrest if:

(a) the later arrest is for a Commonwealth offence:
   (i) that was committed after the end of the person’s period of detention under this Part for the first arrest; or
   (ii) that arose in different circumstances to those in which any Commonwealth offence to which the first arrest relates arose, and for which new evidence has been found since the first arrest; and

(b) the person’s questioning associated with the later arrest does not relate to:
   (i) a Commonwealth offence to which the first arrest relates; or
   (ii) the circumstances in which such an offence was committed.

(8) In ascertaining any period of time for the purposes of subsection (4) or (6), the following times are to be disregarded:

(a) the time (if any) that is reasonably required to convey the person from the place at which the person is arrested to the nearest premises at which the investigating official has access to facilities for complying with this Part;

(b) any time during which the questioning of the person is suspended or delayed to allow the person, or someone else on the person’s behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter or other person as provided by this Part;

(c) any time during which the questioning of the person is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place;

(d) any time during which the questioning of the person is suspended or delayed to allow the person to receive medical attention;

(e) any time during which the questioning of the person is suspended or delayed because of the person’s intoxication;

(f) any time during which the questioning of the person is suspended or delayed to allow for an identification parade to be arranged and conducted;

(g) any time during which the questioning of the person is suspended or delayed in order to allow the making of an application under section 3ZQB or the carrying out of a prescribed procedure within the meaning of Division 4A of Part IAA;

(h) the time (if any) that is reasonably required in connection with making and disposing of an application under section 23CB, 23DA, 23WU or 23XB;

(i) any time during which the constable is informing the person of matters specified in section 23WJ;

(j) any reasonable time during which the questioning of the person is suspended or delayed to allow the person to rest or recuperate;

(k) any time during which a forensic procedure is being carried out on the person by order of a magistrate under Division 5 of Part I1D;

(l) any time during which the questioning of the person is suspended or delayed, if section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section;

(m) any reasonable time that:
   (i) is a time during which the questioning of the person is reasonably suspended or delayed; and
   (ii) is within a period specified under section 23CB.

(9) In any proceedings, the burden lies on the prosecution to prove that:
(a) the person was brought before a judicial officer as soon as practicable; or
(b) any particular time was covered by a provision of subsection (8).

(10) In this section:

judicial officer means any of the following:
(a) a magistrate;
(b) a justice of the peace;
(c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

23CB Specifying time during which suspension or delay of questioning may be disregarded

(1) This section applies if the person mentioned in paragraph 23CA (8) (m) is detained under subsection 23CA (2) for the purpose of investigating whether the person committed a terrorism offence.

Note: The person may be detained under subsection 23CA (2) for the purpose of investigating whether the person committed a terrorism offence, whether the person was arrested for that terrorism offence or a different terrorism offence.

Application for specification of period

(2) At or before the end of the investigation period, an investigating official may apply for a period to be specified for the purpose of subparagraph 23CA (8) (m) (ii).

(3) The application must be made to:
(a) a magistrate; or
(b) if it cannot be made at a time when a magistrate is available—a justice of the peace employed in a court of a State or Territory or a bail justice; or
(c) if it cannot be made when any of the foregoing is available—any justice of the peace.

(4) The application may be made:
(a) in person before the magistrate, justice of the peace or bail justice; or
(b) in writing; or
(c) by telephone, telex, fax or other electronic means.

However, before making the application by means described in paragraph (c), the investigating official must inform the person that the person, or his or her legal representative, may make representations to the magistrate, justice of the peace or bail justice about the application.

(5) The application must include statements of all of the following:
(a) whether it appears to the investigating official that the person is under 18;
(b) whether it appears to the investigating official that the person is an Aboriginal person or a Torres Strait Islander;
(c) the reasons why the investigating official believes the period should be specified, which may, for example, be or include one or more of the following:
   (i) the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia);
(ii) the need to allow authorities in or outside Australia (other than authorities in an organisation of which the investigating official is part) time to collect information relevant to the investigation on the request of the investigating official;

(iii) the fact that the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the investigating official’s time zone;

(iv) the fact that translation is necessary to allow the investigating official to seek information from a place outside Australia and/or be provided with such information in a language that the official can readily understand;

(d) the period that the investigating official believes should be specified.

(6) The person, or his or her legal representative, may make representations about the application.

Decision about specifying period

(7) The magistrate, justice of the peace or bail justice may, by signed instrument, specify a period starting at the time the instrument is signed, if satisfied that:

(a) it is appropriate to do so, having regard to:
   (i) the application; and
   (ii) the representations (if any) made by the person, or his or her legal representative, about the application; and
   (iii) any other relevant matters; and

(b) the offence is a terrorism offence; and

(c) detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and

(d) the investigation into the offence is being conducted properly and without delay; and

(c) the person, or his or her legal representative, has been given the opportunity to make representations about the application.

Instrument specifying period

(8) The instrument must:

(a) specify the period as a number (which may be less than one) of hours; and

(b) set out the day and time when it was signed; and

(c) set out the reasons for specifying the period.

(9) The magistrate, justice of the peace or bail justice must:

(a) give the investigating official a copy of the instrument as soon as practicable after signing it; and

(b) if the instrument was made as a result of an application made by means described in paragraph (4) (c)—inform the investigating official of the matters included in the instrument.

Evidentiary provisions if application was made by telephone, fax etc.

(10) As soon as practicable after being informed of those matters, the investigating official must:
(a) complete a form of the instrument and write on it the name of the
magistrate, justice of the peace or bail justice and the particulars given by
him or her; and
(b) forward it to the magistrate, justice of the peace or bail justice.

(11) If the form of the instrument completed by the investigating official does not, in
all material respects, accord with the terms of the instrument signed by the
magistrate, justice of the peace or bail justice, the specification of the period is
taken to have had no effect.

(12) In any proceedings, if the instrument signed by the magistrate, justice of the
peace or bail justice is not produced in evidence, the burden lies on the
prosecution to prove that the period was specified.

23D Extension of investigation period if arrested for non-terrorism offence

(1) If a person is under arrest for a serious offence (other than a terrorism offence),
an investigating official may, at or before the end of the investigation period,
apply for an extension of the investigation period.

(2) The application must be made to:
(a) a magistrate; or
(b) if it cannot be made at a time when a magistrate is available—a justice of
the peace employed in a court of a State or Territory or a bail justice; or
(c) if it cannot be made when any of the foregoing is available—any justice of
the peace.

The magistrate, justice of the peace or bail justice to whom the application is
made is the judicial officer for the purposes of this section and section 23E.

(3) The application may be made before the judicial officer, or in writing, or as
prescribed by section 23E, and the person or his or her legal representative may
make representations to the judicial officer about the application.

(4) Subject to subsection (5), the judicial officer may extend the investigation period,
by signed written authority, if satisfied that:
(a) the offence is a serious offence; and
(b) further detention of the person is necessary to preserve or obtain evidence
or to complete the investigation into the offence or into another serious
offence; and
(c) the investigation into the offence is being conducted properly and without
delay; and
(d) the person, or his or her legal representative, has been given the
opportunity to make representations about the application.

(4A) The authority must set out:
(a) the day and time when the extension was granted; and
(b) the reasons for granting the extension; and
(c) the terms of the extension.

(4B) The judicial officer must give the investigating official a copy of the authority as
soon as practicable after signing the authority.

(5) The investigation period may be extended for a period not exceeding 8 hours,
and must not be extended more than once.
(6) In this section:

*serious offence* means a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months.

### 23DA Extension of investigation period if arrested for terrorism offence

(1) If a person is under arrest for a terrorism offence, an investigating official may, at or before the end of the investigation period, apply for an extension of the investigation period.

(2) The application must be made to:

   (a) a magistrate; or
   
   (b) if it cannot be made at a time when a magistrate is available—a justice of the peace employed in a court of a State or Territory or a bail justice; or
   
   (c) if it cannot be made when any of the foregoing is available—any justice of the peace.

   The magistrate, justice of the peace or bail justice to whom the application is made is the *judicial officer* for the purposes of this section and section 23E.

(3) The application may be made before the judicial officer, or in writing, or as prescribed by section 23E, and the person or his or her legal representative may make representations to the judicial officer about the application.

(4) Subject to subsection (7), the judicial officer may extend the investigation period, by signed written authority, if satisfied that:

   (a) the offence is a terrorism offence; and
   
   (b) further detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and
   
   (c) the investigation into the offence is being conducted properly and without delay; and
   
   (d) the person, or his or her legal representative, has been given the opportunity to make representations about the application.

(5) The authority must set out:

   (a) the day and time when the extension was granted; and
   
   (b) the reasons for granting the extension; and
   
   (c) the terms of the extension.

(6) The judicial officer must give the investigating official a copy of the authority as soon as practicable after signing the authority.

(7) The investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours.

### 23E Applications by telephone etc.

(1) An application under section 23D or 23DA for extension of the investigation period may be made by telephone, telex, fax or other electronic means in accordance with this section.

(2) Before making the application, the investigating official must inform the person under arrest that he or she, or his or her legal representative, may make representations to the judicial officer about the application.
(3) If the judicial officer extends the investigation period, he or she must inform the investigating official of the matters set out in the authority under subsection 23D (4A) or 23DA (5) (as the case requires).

(4) As soon as practicable after being informed of those matters, the investigating official must:
   (a) complete a form of authority and write on it the name of the judicial officer and the particulars given by the judicial officer; and
   (b) forward it to the judicial officer.

(5) If the form of authority completed by the investigating official does not, in all material respects, accord with the terms of the authority signed by the judicial officer, the authority granted by the judicial officer is taken to have had no effect.

(6) In any proceedings, if the authority signed by the judicial officer is not produced in evidence, the burden lies on the prosecution to prove that the authority was granted.
Division 3—Obligations of investigating officials

Note: These obligations apply in relation to protected suspects as well as to people under arrest.

23F Cautioning persons who are under arrest or protected suspects

(1) Subject to subsection (3), if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.

(2) The investigating official must inform the person of the caution in accordance with subsection (1), but need only do so in writing if that is the most appropriate means of informing the person.

(3) Subsections (1) and (2) do not apply so far as another law of the Commonwealth requires the person to answer questions put by, or do things required by, the investigating official.

23G Right to communicate with friend, relative and legal practitioner

(1) Subject to section 23L, if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, inform the person that he or she may:

(a) communicate, or attempt to communicate, with a friend or relative to inform that person of his or her whereabouts; and

(b) communicate, or attempt to communicate, with a legal practitioner of the person’s choice and arrange, or attempt to arrange, for a legal practitioner of the person’s choice to be present during the questioning;

and the investigating official must defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication and, if the person has arranged for a legal practitioner to be present, to allow the legal practitioner to attend the questioning.

(2) Subject to section 23L, if a person is under arrest or a protected suspect and wishes to communicate with a friend, relative or legal practitioner, the investigating official must:

(a) as soon as practicable, give the person reasonable facilities to enable the person to do so; and

(b) in the case of a communication with a legal practitioner—allow the legal practitioner or a clerk of the legal practitioner to communicate with the person in circumstances in which, as far as practicable, the communication will not be overheard.

(3) Subject to section 23L, if a person is under arrest or a protected suspect and arranges for a legal practitioner to be present during the questioning, the investigating official must:

(a) allow the person to consult with the legal practitioner in private and provide reasonable facilities for that consultation; and

(b) allow the legal practitioner to be present during the questioning and to give advice to the person, but only while the legal practitioner does not unreasonably interfere with the questioning.
23H Aboriginal persons and Torres Strait Islanders

(1) Subject to section 23L, if the investigating official in charge of investigating a Commonwealth offence believes on reasonable grounds that a person who is under arrest, or who is a protected suspect, and whom it is intended to question about the offence is an Aboriginal person or a Torres Strait Islander, then, unless the official is aware that the person has arranged for a legal practitioner to be present during the questioning, the official must:

(a) immediately inform the person that a representative of an Aboriginal legal aid organisation will be notified that the person is under arrest or a protected suspect (as the case requires); and

(b) notify such a representative accordingly.

(2) Subject to subsection (7) and section 23L, if an investigating official:

(a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is an Aboriginal person or a Torres Strait Islander; or

(b) believes on reasonable grounds that a person who is under arrest or a protected suspect is an Aboriginal person or a Torres Strait Islander;

the official must not question the person unless:

(c) an interview friend is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard; or

(d) the person has expressly and voluntarily waived his or her right to have such a person present.

(2A) The person suspected, or under arrest, may choose his or her own interview friend unless:

(a) he or she expressly and voluntarily waives this right; or

(b) he or she fails to exercise this right within a reasonable period; or

(c) the interview friend chosen does not arrive within 2 hours of the person’s first opportunity to contact an interview friend.

(2B) If an interview friend is not chosen under subsection (2A), the investigating official must choose one of the following to be the person’s interview friend:

(a) a representative of an Aboriginal legal aid organisation;

(b) a person whose name is included in the relevant list maintained under subsection 23J (1).

(3) An interview friend may be excluded from the questioning if he or she unreasonably interferes with it.

(4) In any proceedings, the burden lies on the prosecution to prove that an Aboriginal person or Torres Strait Islander has waived the right referred to in subsection (2) or (2A), and the burden is not discharged unless the court is satisfied that the person voluntarily waived that right, and did so with full knowledge and understanding of what he or she was doing.

(5) In any proceedings, the burden lies on the prosecution to prove that, at the relevant time, a person who is under arrest or a protected suspect had, to the knowledge of the investigating official concerned, made an arrangement of the kind referred to in subsection (1).
(6) The rights conferred by this section are in addition to those conferred by section 23G but, to the extent (if any) that compliance with this section results in compliance with section 23G, the requirements of section 23G are satisfied.

(7) If the person is under 18, subsection (2) does not apply and section 23K applies.

(8) An investigating official is not required to comply with subsection (1), (2) or (2B) in respect of a person if the official believes on reasonable grounds that, having regard to the person’s level of education and understanding, the person is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally.

(9) In this section:

interview friend, in relation to a person to whom subsection (2) applies, means:

(a) a relative or other person chosen by the person; or
(b) a legal practitioner acting for the person; or
(c) a representative of an Aboriginal legal aid organisation; or
(d) a person whose name is included in the relevant list maintained under subsection 23J (1).

23J Lists of interview friends and interpreters

(1) The Minister must, so far as is reasonably practicable, establish and update at such intervals as the Minister thinks appropriate, a list, in relation to a region where there are likely to be persons under arrest and under investigation for Commonwealth offences, of the names of persons (not being constables) who:

(a) are suitable to help Aboriginal persons or Torres Strait Islanders under arrest and under investigation for Commonwealth offences; and
(b) are willing to give such help in that region.

(2) In establishing and maintaining a list in relation to a region, the Minister or his or her delegate must, from time to time, consult with any Aboriginal legal aid organisation providing legal assistance to Aboriginal persons or Torres Strait Islanders in that region.

(3) The Minister must, so far as is reasonably practicable, establish and update at such intervals as the Minister thinks appropriate, a list, in relation to such a region, of the names of persons who are able and willing to act as interpreters for Aboriginal persons or Torres Strait Islanders who:

(a) because of inadequate knowledge of the English language, or a physical disability, are unable to communicate orally with reasonable fluency in that language; and
(b) are under arrest and under investigation in that region for Commonwealth offences.

(4) The list of names referred to in subsection (3) must, so far as is reasonably practicable, specify the languages that each person on the list is able to understand and converse in.

(5) The Minister may, in writing, delegate to an officer of the Department all or any of the powers of the Minister under this section.
23K Persons under 18

(1) Subject to section 23L, if an investigating official:
   (a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is under 18; or
   (b) believes on reasonable grounds that a person who is under arrest or a protected suspect is under 18;
   the official must not question the person unless an interview friend is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard.

(2) An interview friend may be excluded from the questioning if he or she unreasonably interferes with it.

(3) In this section:
   
   **interview friend**, in relation to a person to whom subsection (1) applies, means:
   (a) a parent or guardian of the person or a legal practitioner acting for the person; or
   (b) if none of the previously mentioned persons is available—a relative or friend of the person who is acceptable to the person; or
   (c) if the person is an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available—a person whose name is included in the relevant list maintained under subsection 23J(1); or
   (d) if no person covered by paragraph (a), (b) or (c) is available—an independent person.

(4) The rights conferred by this section are in addition to those conferred by section 23G but, so far as compliance with this section results in compliance with section 23G, the requirements of section 23G are satisfied.

23L Exceptions

(1) Subject to subsections (2) and (4), if a requirement imposed on an investigating official by this Part is expressed as being subject to this section, the requirement does not apply if, and for so long as, the official believes on reasonable grounds that:
   (a) compliance with the requirement is likely to result in:
      (i) an accomplice of the person taking steps to avoid apprehension; or
      (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
   (b) if the requirement relates to the deferral of questioning—the questioning is so urgent, having regard to the safety of other people, that it should not be delayed by compliance with that requirement.

(2) If the requirement relates to things done by or in relation to a legal practitioner, subsection (1) only applies:
   (a) in exceptional circumstances; and
   (b) if:
      (i) an officer of a police force of the rank of Superintendent or higher; or
(ii) the holder of an office prescribed for the purposes of this section, other than an office in a police force; has authorised the application of subsection (1) and has made a record of the investigating official’s grounds for belief.

(3) If the application of subsection (1) is so authorised:
   (a) the record of the investigating official’s grounds for belief must be made as soon as practicable; and
   (b) the investigating official must comply with the requirement as soon as possible after subsection (1) ceases to apply.

(4) If the application of subsection (1) results in:
   (a) preventing or delaying the person from communicating with a legal practitioner of his or her choice; or
   (b) preventing or delaying a legal practitioner of the person’s choice from attending at any questioning;
   the investigating official must offer the services of another legal practitioner and, if the person accepts, make the necessary arrangements.

23M Providing information relating to persons who are under arrest or protected suspects

(1) An investigating official must inform a person (the first person) who is under arrest or a protected suspect of any request for information as to his or her whereabouts by any of his or her relatives, friends or legal representatives.

(2) The investigating official must then provide that information to the other person unless:
   (a) the first person does not agree to the provision of that information; or
   (b) the investigating official believes on reasonable grounds that the other person is not the first person’s relative, friend or legal representative.

(3) This section has effect subject to section 23L.

23N Right to interpreter

Where an investigating official believes on reasonable grounds that a person who is under arrest or a protected suspect is unable, because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in that language, the official must, before starting to question the person, arrange for the presence of an interpreter and defer the questioning or investigation until the interpreter is present.

23P Right of non-Australian nationals to communicate with consular office

(1) Subject to section 23L, if a person who is under arrest or a protected suspect is not an Australian citizen, an investigating official must, as soon as practicable:
   (a) inform the person that if he or she requests that the consular office of:
      (i) the country of which he or she is a citizen; or
      (ii) the country to which he or she claims a special connection;
      be notified that he or she is under arrest or a protected suspect (as the case requires), that consular office will be notified accordingly; and
   (b) if the person so requests—notify that consular office accordingly; and
(c) inform the person that he or she may communicate with, or attempt to
communicate with, that consular office; and
(d) give the person reasonable facilities to do so; and
(e) forward any written communication from the person to that consular office;
and
(f) allow the person a reasonable time to, or to attempt to, communicate with
that consular office.

(2) Without limiting subsection (1), an investigating official must not start to
question the person unless paragraphs (1) (c), (d) and (f) have been complied
with.

23Q Treatment of persons under arrest

A person who is under arrest or a protected suspect must be treated with
humanity and with respect for human dignity, and must not be subjected to cruel,
inhuman or degrading treatment.

23S Right to remain silent etc. not affected

Nothing in this Part affects:
(a) the right of a person to refuse to answer questions or to participate in an
investigation except where required to do so by or under an Act; or
(b) any burden on the prosecution to prove the voluntariness of an admission
or confession made by a person; or
(ba) any burden on the prosecution to prove that an admission or confession
was made in such circumstances as to make it unlikely that the truth of the
admission or confession was adversely affected; or
(c) the discretion of a court to exclude unfairly obtained evidence; or
(d) the discretion of a court to exclude illegally or improperly obtained
evidence.

23T Acts authorised under other laws

Nothing in this Part prevents an investigating official from asking or causing a
person to do a particular thing that the official is authorised to ask or cause the
person to do under:
(a) another law of the Commonwealth; or
(b) a provision of a law of the Australian Capital Territory.

23U Tape recording of information required to be given to person under arrest

(1) If a person is under arrest or a protected suspect, an investigating official who is
required by this Part to give the person certain information (including a caution)
must tape record, if practicable, the giving of that information and the person’s
responses (if any).

(2) In any proceedings, the burden lies on the prosecution to prove whether it was
practicable to tape record the giving of that information and the person’s
responses (if any).
23V Tape recording of confessions and admissions

(1) If a person who is being questioned as a suspect (whether under arrest or not) makes a confession or admission to an investigating official, the confession or admission is inadmissible as evidence against the person in proceedings for any Commonwealth offence unless:

(a) if the confession or admission was made in circumstances where it was reasonably practicable to tape record the confession or admission—the questioning of the person and anything said by the person during that questioning was tape recorded; or

(b) in any other case:

(i) when questioning the person, or as soon as practicable afterwards, a record in writing was made, either in English or in another language used by the person during questioning, of the things said by or to the person during questioning; and

(ii) as soon as practicable after the record was made, it was read to the person in the language used by him or her during questioning and a copy of the record was made available to the person; and

(iii) the person was given the opportunity to interrupt the reading at any time for the purpose of drawing attention to any error or omission that he or she claimed had been made in or from the record and, at the end of the reading, the person was given the opportunity to state whether he or she claimed that there were any errors in or omissions from the record in addition to any to which he or she had drawn attention in the course of the reading; and

(iv) a tape recording was made of the reading referred to in subparagraph (ii) and of everything said by or to the person as a result of compliance with subparagraph (iii), and the requirements of subsection (2) were observed in respect of that recording; and

(v) before the reading referred to in subparagraph (ii), an explanation, in accordance with the form in the Schedule, was given to the person of the procedure that would be followed for the purposes of compliance with that subparagraph and subparagraphs (iii) and (iv).

(2) If the questioning, confession or admission, or the confirmation of a confession or admission, of a person is recorded as required under this section, the investigating official must, without charge:

(a) if the recording is an audio recording only or a video recording only—make the recording or a copy of it available to the person or his or her legal representative within 7 days after the making of the recording; and

(b) if both an audio recording and a video recording were made—make the audio recording or a copy of it available to the person or his or her legal representative within 7 days after the making of the recording, and inform the person or his or her legal representative that an opportunity will be provided, on request, for viewing the video recording; and

(c) if a transcript of the tape recording is prepared—make a copy of the transcript available to the person or his or her legal representative within 7 days after the preparation of the transcript.

(3) Where a confession or admission is made to an investigating official who was, at the time when it was made, engaged in covert investigations under the orders of a superior, this section applies as if the acts required by paragraph (1) (b) and subsection (2) to be performed were required to be performed by the official at a
time when they could reasonably be performed without prejudice to the covert investigations.

(4) Despite any arrangement made under the *Commonwealth Places (Application of Laws) Act 1970*, this section applies to any offence under a law applied by that Act if the investigating official is a member or special member of the Australian Federal Police.

(5) A court may admit evidence to which this section applies even if the requirements of this section have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, 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.

(6) A court may admit evidence to which this section applies even if a provision of subsection (2) has not been complied with if, having regard to the reasons for the non-compliance and any other relevant matters, the court is satisfied that it was not practicable to comply with that provision.

(6A) To avoid doubt, subsection (6) does not limit subsection (5).

(7) If a judge permits evidence to be given before a jury under subsection (5) or (6), the judge must inform the jury of the non-compliance with the requirements of this section, or of the absence of sufficient evidence of compliance with those requirements, and give the jury such warning about the evidence as he or she thinks appropriate in the circumstances.

### 23W Proof of belief

In any proceedings, the burden lies on the prosecution to prove that an investigating official had a belief on reasonable grounds as to a matter referred to in this Part.
**Crimes Act 1900 (ACT)**

**Part 10  Criminal investigation**

*Note for pt 10*

The *Legislation Act 2001*, s 171 deals with the application of client legal privilege.

**Division 10.1  Preliminary**

185  **Definitions for pt 10**

In this part:

*assisting officer*, in relation to a warrant, means—

(a) a police officer assisting in executing the warrant; or

(b) a person who is not a police officer, but who has been authorised by the relevant executing officer to assist in executing the warrant.

*Commonwealth Crimes Act* means the *Crimes Act 1914* (Cwlth).

*conveyance* includes an aircraft, vehicle or vessel.

*evidential material* means a thing relevant to an offence, including a thing in electronic form.

*executing officer*, in relation to a warrant, means—

(a) the police officer named in the warrant by the issuing officer as being responsible for executing the warrant; or

(b) if that police officer does not intend to be present at the execution of the warrant—another police officer whose name has been written in the warrant by the police officer named under paragraph (a); or

(c) another police officer whose name has been written in the warrant by the police officer named in the warrant under paragraph (b).

*frisk search* means—

(a) a search of a person conducted by quickly running the hands over the person’s outer garments; and

(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

*issuing officer*, in relation to a warrant to search premises or a person or a warrant for arrest under this part, means—

(a) a judge, the registrar or a deputy registrar of the Supreme Court; or

(b) a magistrate; or
(c) if authorised by the Chief Magistrate to issue such search warrants or
arrest warrants (as the case may be)—the registrar or a deputy
registrar of the Magistrates Court.

**offence** means an offence against a territory law.

**ordinary search** means a search of a person or of articles in the possession
of a person that may include—

(a) requiring the person to remove his or her overcoat, coat or jacket and
any gloves, shoes, socks and hat; and

(b) an examination of those items.

**police station** includes—

(a) a police station of the Territory; and

(b) a building occupied by the Australian Federal Police.

**premises** includes a place and a conveyance.

**recently used conveyance**, in relation to a search of a person, means a
conveyance that the person had operated or occupied at any time within 24
hours before the search commenced.

**seizable item** means anything that would present a danger to a person or
that could be used to assist a person to escape from lawful custody.

**serious offence** means an offence punishable by imprisonment for longer
than 12 months.

**strip search** means a search of a person or of articles in the possession of a
person that may include—

(a) requiring the person to remove all of his or her garments; and

(b) an examination of the person’s body (but not of the person’s body
cavities) and of those garments.

**tainted property**—see the *Confiscation of Criminal Assets Act 2003*,
section 10.

**target material**—see the *Confiscation of Criminal Assets Act 2003*, section
195.

**thing relevant to an offence** means—

(a) anything in relation to which the offence has been committed or is
suspected on reasonable grounds to have been committed; or

(b) anything suspected on reasonable grounds to provide evidence of the
commission of the offence; or

(c) anything suspected on reasonable grounds to be intended to be used
for the purpose of committing the offence.

**warrant** means a warrant under this part.

**warrant premises** means premises in relation to which a warrant is in
force.
Application of Commonwealth Crimes Act, pt 1C

(1) The Commonwealth Crimes Act, part 1C (Investigation of Commonwealth offences) and the schedule (Form of explanation under section 23V) apply to offences not punishable by imprisonment, or punishable by imprisonment for 12 months or less, in the same way as they apply to offences punishable by imprisonment for longer than 12 months.

Division 10.2 Preventative action

Police powers of entry

A police officer may enter premises, and may take the action that is necessary and reasonable to prevent the commission or repetition of an offence or of a breach of the peace or to protect life or property—

(a) when invited onto the premises by a person who is or is reasonably believed to be a resident of the premises for the purpose of giving assistance to a person on the premises who has suffered, or is in imminent danger of suffering, physical injury at the hands of some other person; or

(b) under a warrant issued under section 189; or

(c) in circumstances of seriousness and urgency, in accordance with section 190.

Issue of warrant

(1) If a magistrate is satisfied, by information on oath, that—

(a) there are reasonable grounds to suspect that a person on premises has suffered, or is in imminent danger of, physical injury at the hands of another person and needs assistance to prevent, or deal with, the injury; and

(b) a police officer has been refused permission to enter the premises for the purpose of giving assistance to the firstmentioned person;

the magistrate may issue a warrant in writing authorising a police officer, with the assistance that is necessary and reasonable and by the force that is necessary and reasonable—

(c) to enter the premises specified in the warrant at any time within 24 hours after the issue of the warrant; and

(d) subject to any conditions specified in the warrant, to take the action that is necessary to prevent the commission or repetition of an offence or of a breach of the peace or to protect life or property.

(2) The police officer applying for a warrant shall give the further information about the grounds on which the warrant is sought, either orally on oath or by affidavit, that the magistrate requires.
190 Entry in emergencies

A police officer may enter premises where the officer believes on reasonable grounds that—

(a) an offence or a breach of the peace is being or is likely to be committed, or a person has suffered physical injury or there is imminent danger of injury to a person or damage to property; and

(b) it is necessary to enter the premises immediately for the purpose of preventing the commission or repetition of an offence or a breach of the peace or to protect life or property.

191 Seizure of firearms—warrants and emergencies

(1) If a police officer enters premises under section 188 (Police powers of entry), section 189 (Issue of warrant) or section 190 (Entry in emergencies), the police officer may seize any firearm, any ammunition for a firearm and any licence to possess or use a firearm—

(a) in or on those premises; or

(b) in or on a motor vehicle under the control of a person who ordinarily lives on those premises or is apparently connected with the circumstances giving rise to the entry of the police officer onto the premises;

if the police officer has reasonable grounds for believing that the seizure is necessary to prevent the commission or repetition of an offence or of a breach of the peace or to protect life or property.

(2) A firearm, ammunition or licence may be seized by a police officer under subsection (1)—

(a) despite the fact that the owner of the firearm, ammunition or licence is unknown; or

(b) irrespective of whether the owner of the firearm, ammunition or licence is connected with the circumstances giving rise to the entry of the police officer onto the premises.

(3) A police officer who is authorised under subsection (1) to seize a firearm, ammunition or licence in or on premises or in or on a motor vehicle may search the premises or the motor vehicle for any firearm, ammunition or licence and use the force that is reasonably necessary for the purpose.

(4) A firearm, ammunition or licence seized under subsection (1) must be returned to the licensee at the end of 60 days after the seizure if, before the end of that period—

(a) a prosecution for an offence arising out of circumstances in which a police officer has entered premises under section 188 (Police powers of entry), section 189 (Issue of warrant) or section 190 (Entry in emergencies) has not been instituted; or
(b) an application for a protection order that is a domestic violence order (other than an emergency order) under the Domestic Violence and Protection Orders Act 2008 has not been made.

(5) However, a firearm, ammunition or licence seized under subsection (1) must not be returned if the registrar would otherwise be entitled under the Firearms Act 1996 to be in possession of the firearm, ammunition or licence.

(6) A word or expression used in the Firearms Act 1996 has the same meaning in this section.

192 Seizure of firearms—protection orders

(1) In enforcing an order under the Domestic Violence and Protection Orders Act 2008, section 40 (5) (Firearms and interim orders), section 57 (5) (Firearms and final orders) or section 80 (2) (Firearms and emergency orders), a police officer may—

(a) enter premises where the respondent named in the order is reasonably believed to be living or staying; and

(b) seize any firearm, any ammunition and any licence to possess or use a firearm—

(i) in or on the premises; or

(ii) in or on a motor vehicle under the control of someone who ordinarily lives on the premises or is apparently connected with the circumstances giving rise to the entry of the police officer onto the premises.

(2) A firearm, ammunition or licence may be seized by a police officer under subsection (1)—

(a) despite the fact that the owner of the firearm, ammunition or licence is unknown; or

(b) irrespective of whether the owner of the firearm, ammunition or licence is connected with the circumstances giving rise to the entry of the police officer onto the premises.

(3) A police officer who is authorised under subsection (1) to seize a firearm, ammunition or licence in or on premises or in or on a motor vehicle may search the premises or the motor vehicle for any firearm, ammunition or licence and use the force that is reasonably necessary for the purpose.

(4) Subsection (3) does not authorise a search at any time during the period commencing at 9 pm on a day and ending at 6 am on the following day unless the police officer is satisfied that—

(a) it would not be practicable to conduct the search at another time; or

(b) it is necessary to do so to prevent the concealment, loss or destruction of the firearm, ammunition or licence.

(5) If—
(a) a firearm, ammunition or licence has been seized under subsection (1) for the purpose of enforcing an order mentioned in that subsection; and

(b) the licence has not been cancelled or suspended under the Domestic Violence and Protection Orders Act 2008, section 40, section 57 or section 80;

the firearm, ammunition or licence shall be returned to the licensee if—

(c) the licensee produces to the registrar of firearms a certificate of the registrar of the Magistrates Court to the effect that the order is no longer in force; and

(d) the registrar of firearms is not aware of any other court orders in force requiring the seizure of the firearm, ammunition or licence; and

(e) the registrar of firearms is not otherwise entitled under the Firearms Act 1996 to be in possession of the firearm, ammunition or licence.

(6) If a firearm is seized under subsection (1) and is not returned to the licensee in accordance with subsection (5), for the Firearms Act 1996, section 262, the firearm shall be taken to have been seized by a police officer in accordance with that Act.

(7) An expression that is used in this section and in the Firearms Act 1996 has, in this section, the same meaning as in that Act.

193 Power to conduct search of person for knife

(1) Subject to subsection (2), if a police officer suspects on reasonable grounds that a person who is in a public place or school has a knife in his or her possession, the police officer may—

(a) conduct a frisk search or an ordinary search of the person; and

(b) seize any knife found as a result of the search.

(2) A police officer may conduct a search of a person under subsection (1) only if the police officer—

(a) provides evidence to the person that he or she is a police officer, unless the police officer is in uniform; and

(b) informs the person of the reason for the search.

(3) As soon as practicable after a search has been conducted under subsection (1), the police officer who conducted the search shall record the time, location and nature of the search.

Division 10.3 Search warrants

194 When search warrants can be issued

(1) An issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for
suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises.

(2) An issuing officer may issue a warrant authorising an ordinary search or a frisk search of a person if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that the person possesses, or will within the next 72 hours possess, any evidential material.

(3) If the person applying for the warrant suspects that, in executing the warrant, it will be necessary to use firearms, the person shall state that suspicion, and the grounds for that suspicion, in the information.

(4) If the person applying for the warrant is a police officer and has, at any time previously, applied for a warrant relating to the same person or premises, the person shall state in the information particulars of those applications and their outcome.

(5) A warrant shall include statements of the following matters:

(a) the offence to which the warrant relates;

(b) a description of the warrant premises, or the name or description of the person to whom it relates;

(c) the kinds of evidential material that are to be searched for under the warrant;

(d) the name of the police officer who is to be responsible for executing the warrant (unless he or she inserts in the warrant the name of another police officer);

(e) the period, not exceeding 7 days, that the warrant remains in force;

(f) subject to subsection (9), the times when the search is authorised.

(6) For a warrant in relation to premises, the warrant shall state—

(a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in subsection (5) (c)) found at the premises in the course of the search that the executing officer or an assisting officer believes on reasonable grounds to be—

(i) evidential material in relation to an offence to which the warrant relates; or

(ii) a thing relevant to another offence that is a serious offence; or

(iii) target material or tainted property;

Note Target material and tainted property are relevant to the Confiscation of Criminal Assets Act 2003.

if the executing officer or an assisting officer believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence; and
(b) whether the warrant authorises an ordinary search or a frisk search of a person who is at or near the premises when the warrant is executed if the executing officer or an assisting officer suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession.

(7) For a warrant to search a person, the warrant shall state—

(a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in subsection (5) (c)) found, in the course of the search, on or in the possession of the person or in a recently used conveyance, being a thing that the executing officer or an assisting officer believes on reasonable grounds to be—

(i) evidential material in relation to an offence to which the warrant relates; or

(ii) a thing relevant to another offence that is a serious offence; or

(iii) target material or tainted property;

Note Target material and tainted property are relevant to the Confiscation of Criminal Assets Act 2003.

if the executing officer or an assisting officer believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence; and

(b) the kind of search of a person that the warrant authorises.

(8) Subsection (5) (e) does not prevent the issue of successive warrants in relation to the same premises or person.

(9) A warrant shall not be expressed to authorise a search at any time during the period commencing at 9 pm on a day and ending at 6 am on the following day unless the issuing officer is satisfied that—

(a) it would not be practicable to conduct the search at another time; or

(b) it is necessary to do so to prevent the concealment, loss or destruction of evidence relating to the offence.

(10) If the application for the warrant is made under section 205, this section applies as if—

(a) subsections (1) and (2) referred to 48 hours rather than 72 hours; and

(b) subsection (5) (e) referred to 48 hours rather than 7 days.

195 The things that are authorised by search warrant

(1) A warrant in force for the search of premises authorises the executing officer or an assisting officer—

(a) to enter the warrant premises and, if the premises are a conveyance, to enter the conveyance, wherever it is; and
(b) to search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes; and

(c) to search the premises for the kinds of evidential material specified in the warrant, and to seize things of that kind found at the premises; and

(d) to seize other things found at the premises in the course of the search that the executing officer or an assisting officer believes on reasonable grounds to be—
   
   (i) evidential material in relation to an offence to which the warrant relates; or
   
   (ii) evidential material in relation to any serious offence; or

   (iii) target material or tainted property;

*Note* Target material and tainted property are relevant to the *Confiscation of Criminal Assets Act 2003*.

if the executing officer or an assisting officer believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and

(e) to seize other things found at the premises in the course of the search that the executing officer or an assisting officer believes on reasonable grounds to be seizable items; and

(f) if the warrant so allows—to conduct an ordinary search or a frisk search of a person at or near the premises if the executing officer or an assisting officer suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession.

(2) A warrant in force for the search of a person authorises the executing officer or an assisting officer—

(a) to search the person as specified in the warrant, things found in the possession of the person and any recently used conveyance for things of the kind specified in the warrant; and

(b) to—
   
   (i) seize things of that kind; or
   
   (ii) record fingerprints from things; or
   
   (iii) to take forensic samples from things;

   found in the course of the search; and

(c) to seize other things found in the course of the search on, or in the possession of, the person or in the conveyance that the executing officer or an assisting officer believes on reasonable grounds to be—

   (i) evidential material in relation to an offence to which the warrant relates; or

   (ii) a thing relevant to any serious offence; or
(iii) target material or tainted property;

Note Target material and tainted property are relevant to the Confiscation of Criminal Assets Act 2003.

if the executing officer or an assisting officer believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and

(d) to seize other things found in the course of the search that the executing officer or an assisting officer believes on reasonable grounds to be seizable items.

(3) If the warrant states that it may be executed only during particular hours, the warrant shall not be executed outside those hours.

(4) If the warrant authorises an ordinary search or a frisk search of a person, a search of the person different to that so authorised shall not be done under the warrant.

(5) If things are seized under a warrant, the warrant authorises the executing officer to make the things available to officers of other agencies if it is necessary to do so for the purpose of investigating or prosecuting an offence to which the things relate.

196 Availability of assistance and use of force in executing warrant

In executing a warrant—

(a) the executing officer may obtain the assistance that is necessary and reasonable in the circumstances; and

(b) the executing officer, or a police officer assisting in executing the warrant, may use the force against persons and things that is necessary and reasonable in the circumstances; and

(c) an assisting officer may use the force against things that is necessary and reasonable in the circumstances.

197 Details of warrant to be given to occupier etc

(1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the executing officer or an assisting officer shall make available to that person a copy of the warrant.

(2) If a warrant in relation to a person is being executed, the executing officer or an assisting officer shall make available to that person a copy of the warrant.

(3) If a person is searched under a warrant in relation to premises, the executing officer or an assisting officer shall show the person a copy of the warrant.

(4) The executing officer shall identify himself or herself to the person at the premises or the person being searched.
(5) The copy of the warrant referred to in subsections (1) and (2) need not include the signature of the issuing officer or the seal of the relevant court.

198 Specific powers available to police officers executing warrant

(1) In executing a warrant in relation to premises, the executing officer or an assisting officer may—
   (a) for a purpose incidental to the execution of the warrant; or
   (b) if the occupier of the premises consents in writing;
   take photographs (including video recordings) of the premises or of things at the premises.

(2) If a warrant in relation to premises is being executed, the executing officer and the assisting officers may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the premises—
   (a) for not more than 1 hour; or
   (b) for a longer period if the occupier of the premises consents in writing.

(3) If—
   (a) the execution of a warrant is stopped by an order of a court; and
   (b) the order is later revoked or reversed on appeal; and
   (c) the warrant is still in force;
   the execution of the warrant may be completed.

199 Use of equipment to examine or process things

(1) The executing officer or an assisting officer may bring to warrant premises any equipment reasonably necessary for the examination or processing of things found at the premises, to determine whether they are things that may be seized under the warrant.

(2) If—
   (a) it is not practicable to examine or process them at the warrant premises; or
   (b) the occupier of the premises (or his or her representative) consents in writing;
   the things may be moved to another place for examination or processing to determine whether they are things that may be seized under a warrant.

(3) If things are moved to another place for the purpose of examination or processing under subsection (2), the executing officer shall, if practicable—
   (a) inform the occupier of the address of the place and the time when the examination or processing will be carried out; and
(b) allow the occupier (or his or her representative) to be present during the examination or processing.

(4) The executing officer or an assisting officer may operate equipment already at warrant premises to carry out the examination or processing of a thing found at the premises to determine whether it is a thing that may be seized under the warrant if the officer believes on reasonable grounds that—
(a) the equipment is suitable for the examination or processing; and
(b) the examination or processing can be carried out without damage to the equipment or the thing.

200 Use of electronic equipment at premises

(1) The executing officer or an assisting officer may operate electronic equipment at warrant premises to see whether evidential material is accessible by doing so if the officer believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.

(2) If the executing officer or an assisting officer, after operating the equipment, finds that evidential material is accessible by doing so, the officer may—
(a) seize the equipment and any disk, tape or other associated device; or
(b) if the material can, by using facilities at the premises, be put in documentary form—operate the facilities to put the material in that form and seize the documents so produced; or
(c) if the material can be transferred to a disk, tape or other storage device that—
   (i) is brought to the premises; or
   (ii) is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises;
   operate the equipment or other facilities to copy the material to the storage device and take the storage device from the premises.

(3) Equipment may only be seized under subsection (2) (a) if—
(a) it is not practicable to put the material in documentary form under subsection (2) (b) or to copy the material under subsection (2) (c); or
(b) possession by the occupier of the equipment could constitute an offence.

(4) If the executing officer or an assisting officer believes on reasonable grounds that—
(a) evidential material may be accessible by operating electronic equipment at the premises; and
(b) expert assistance is required to operate the equipment; and
(c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;

he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.

(5) The executing officer or an assisting officer shall give notice to the occupier of the premises of his or her intention to secure the equipment and of the fact that the equipment may be secured for up to 24 hours.

(6) The equipment may be secured—

(a) for a period not exceeding 24 hours; or

(b) until the equipment has been operated by the expert;

whichever happens first.

(7) If the executing officer or assisting officer believes on reasonable grounds that expert assistance will not be available within 24 hours, he or she may apply to the issuing officer for an extension of that period.

(8) The executing officer or assisting officer shall give notice to the occupier of the premises—

(a) that the executing officer or assisting officer intends to apply for an extension under subsection (7); and

(b) that the occupier is entitled to be heard in relation to the application.

(9) The occupier is entitled to be heard in relation to an application under subsection (7).

(10) This division applies to the issuing of an extension on an application under subsection (7) in the same way as it applies to the issue of a warrant, with necessary changes.

**201 Compensation for damage to electronic equipment**

(1) If—

(a) damage is caused to equipment as a result of it being operated under section 199 or 200; and

(b) the damage resulted from—

(i) insufficient care being exercised in selecting the person who was to operate the equipment; or

(ii) insufficient care being exercised by the person operating the equipment;

compensation for the damage is payable to the owner of the equipment.

(2) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises or the occupier’s employees or agents, if they were available at the time, had provided any warning or guidance as to the appropriate operation of the equipment in the circumstances.
202 Copies of seized things to be provided

(1) If a police officer seizes from warrant premises—

(a) a document, film, computer file or other thing that can be readily copied; or

(b) a storage device the information in which can be readily copied;

the officer shall, if requested to do so by the occupier of the premises (or another person apparently representing the occupier), give a copy of the thing or the information to the occupier or that person as soon as practicable after the seizure.

(2) Subsection (1) does not apply if—

(a) the seized item was seized under section 200 (2) (b) or (c); or

(b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence.

203 Occupier entitled to be present during search

(1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the person is, subject to the Commonwealth Crimes Act, part 1C entitled to observe the search being conducted.

(2) The right to observe the search being conducted ceases if the person impedes the search.

(3) This section does not prevent 2 or more areas of the premises being searched at the same time.

204 Receipts for things seized under warrant

(1) If a thing is seized under a warrant or moved under section 199 (2), the executing officer or an assisting officer shall provide a receipt for the thing.

(2) If 2 or more things are seized or moved, they may be covered by a single receipt.

205 Warrants by telephone or other electronic means

(1) A police officer may make an application to an issuing officer for a warrant by telephone, telex, fax or other electronic means—

(a) in an urgent case; or

(b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.

(2) The issuing officer may require communication by voice to the extent that is practicable in the circumstances.

(3) An application under this section shall include all information required to be provided in an ordinary application for a warrant, but the application may, if necessary, be made before the information is sworn.
(4) If an application is made to an issuing officer under this section and the issuing officer, after considering the information and having received and considered the further information (if any) that the issuing officer required, is satisfied that—

(a) a warrant in the terms of the application should be issued urgently; or

(b) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant;

the issuing officer may complete and sign the same form of warrant that would be issued under section 194.

(5) If the issuing officer decides to issue the warrant, the issuing officer is to inform the applicant, by telephone, telex, fax or other electronic means, of the terms of the warrant, the day and the time when it was signed.

(6) The applicant shall then complete a form of warrant in terms substantially corresponding to those given by the issuing officer, stating on the form the name of the issuing officer, the day and the time when the warrant was signed.

(7) The applicant shall, not later than the day after the day of expiry of the warrant or the day after the day when the warrant was executed, whichever is the earlier, give or transmit to the issuing officer the form of warrant completed by the applicant and, if the information referred to in subsection (3) was not sworn, that information duly sworn.

(8) The issuing officer is to attach to the documents provided under subsection (7) the form of warrant completed by the issuing officer.

(9) If—

(a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a warrant issued under this section was duly authorised; and

(b) the form of warrant signed by the issuing officer is not produced in evidence;

the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

206 Restrictions on personal searches

A warrant may not authorise a strip search or a search of a person’s body cavities.

Division 10.4 Powers to stop and search

207 Stopping, searching and detaining people

(1) This section applies if a police officer suspects, on reasonable grounds, that—
(a) a person is carrying, or otherwise has in his or her possession, a thing (the relevant thing) relevant to a serious offence or a thing stolen or otherwise unlawfully obtained; and

(b) it is necessary to exercise a power under subsection (2) to prevent the thing from being concealed, lost or destroyed; and

(c) it is necessary to exercise the power without the authority of a search warrant because the circumstances are serious and urgent.

(2) If this section applies, the police officer may—

(a) stop and detain the person; and

(b) conduct a frisk search or ordinary search of the person for the relevant thing; and

(c) seize the thing if the officer finds it.

(3) If, in the course of searching for the relevant thing, the police officer finds any evidential material, the officer may seize the material if the officer suspects, on reasonable grounds, that—

(a) it is necessary to seize it to prevent its concealment, loss or destruction; and

(b) it is necessary to seize it without the authority of a search warrant because the circumstances are serious and urgent.

(4) A frisk search under this section may only be carried out by a person of the same sex as the person being searched.

(5) As soon as possible after exercising a power under subsection (2), the police officer must make a written record of—

(a) the date, time and place of exercising the power; and

(b) details of its exercise; and

(c) any details of the person known to the police officer; and

(d) the grounds for suspecting the relevant matter mentioned in subsection (1).

(6) The police officer must exercise his or her powers under this section subject to section 208.

208 How a police officer exercises a power under s 207

In exercising a power under section 207 in relation to a person, a police officer must not detain the person for longer than is necessary and reasonable to conduct a frisk search or ordinary search of the person.

209 Stopping, searching and detaining conveyances

(1) This section applies if a police officer suspects, on reasonable grounds, that—

(a) a thing relevant to a serious offence or a thing stolen or otherwise unlawfully obtained, is in or on a conveyance; and
(b) it is necessary to exercise a power under subsection (2) to prevent the thing from being concealed, lost or destroyed; and
(c) it is necessary to exercise the power without the authority of a search warrant because the circumstances are serious and urgent.

(2) If this section applies, the police officer may—
(a) stop and detain the conveyance; and
(b) search the conveyance and any container in or on the conveyance, for the relevant thing; and
(c) seize the thing if he or she finds it there.

(3) If, in the course of searching for the relevant thing, the police officer finds any evidential material, the police officer may seize the material if he or she suspects, on reasonable grounds, that—
(a) it is necessary to seize it to prevent its concealment, loss or destruction; and
(b) it is necessary to seize it without the authority of a search warrant because the circumstances are serious and urgent.

(4) The police officer shall exercise his or her powers under this section subject to section 210.

210 How a police officer exercises a power under s 209

In exercising a power under section 209 in relation to a conveyance, a police officer—
(a) may use the assistance that is necessary; and
(b) shall search the conveyance in a public place or in some other place where members of the public have ready access; and
(c) shall not detain the conveyance for longer than is necessary and reasonable to search it and any container found in or on the conveyance; and
(d) may use the force that is necessary and reasonable in the circumstances, but shall not damage the conveyance or any container found in or on the conveyance by forcing open a part of the conveyance or container unless—
   (i) any person apparently in charge of the conveyance has been given a reasonable opportunity to open that part or container; or
   (ii) it is not possible to give any such person that opportunity.
Division 10.5  
Arrest and related matters

211  
Requirement to provide name etc

(1)  
If—

(a) a police officer has reason to believe that an offence has been or may have been committed; and

(b) believes on reasonable grounds that a person may be able to assist him or her in inquiries in relation to that offence; and

(c) the name or address (or both) of that person is unknown to the officer;

the officer—

(d) may request the person to provide his or her name or address (or both) to the officer; and

(e) if making such a request—shall inform the person of the reason for the request.

(2)  
If a police officer—

(a) makes a request of a person under subsection (1); and

(b) informs the person of the reason for the request; and

(c) complies with subsection (3) if the person makes a request under that subsection;

the person shall not, without reasonable excuse—

(d) fail to comply with the request; or

(e) give a name or address that is false in a material particular.

(3)  
If a police officer who makes a request of a person under subsection (1) is requested by the person to provide to the person—

(a) his or her name or the address of his or her place of duty; or

(b) his or her name and that address; or

(c) if he or she is not in uniform and it is practicable for the police officer to provide the evidence—evidence that he or she is a police officer;

the police officer shall not—

(d) fail to comply with the request; or

(e) give a name or address that is false in a material particular.

(4)  
As soon as possible after making such a request, the police officer shall make a written record of the grounds for his or her belief.

Maximum penalty: $500.
212 Power of arrest without warrant by police officers

(1) A police officer may, without warrant, arrest a person for an offence if the police officer suspects on reasonable grounds that—

(a) the person has committed or is committing the offence; and

(b) proceedings by summons against the person would not achieve 1 or more of the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;

(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;

(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(v) preventing the fabrication of evidence in respect of the offence;

(vi) preserving the safety or welfare of the person.

(2) A police officer may, without warrant, arrest a person for a domestic violence offence if the police officer suspects on reasonable grounds that the person has committed or is committing the offence.

(3) If—

(a) a person has been arrested under subsection (1) or (2) in connection with an offence; and

(b) before the person is charged with the offence, the police officer in charge of the investigation into the offence does not have, or ceases to have, reasonable grounds to suspect that—

(i) the person committed the offence; or

(ii) for a person arrested under subsection (1)—holding the person in custody is necessary to achieve any of the purposes referred to in subsection (1) (b);

the person shall forthwith be released from custody in respect of the offence.

(4) A police officer may, without warrant, arrest a person whom he or she suspects on reasonable grounds has escaped from lawful custody to which the person is still liable in respect of an offence.

(5) In this section:

domestic violence offence—an offence that a person is suspected of committing is a domestic violence offence if the conduct making up the offence is domestic violence under the Domestic Violence and Protection Orders Act 2008.
213  **Arrest without warrant in possession**

(1)  This section applies if—

(a)  a warrant has been issued for the arrest of a person; and

(b)  a police officer encounters the person or is otherwise in a position to arrest the person but is not carrying the warrant at the time.

(2)  If this section applies, the police officer may—

(a)  arrest the person; and

(b)  for a warrant for the arrest of a person for the commission of an offence—cause the person (and any property found in the person’s possession) to be brought before a magistrate to be dealt with according to law.

(3)  In this section:

   *warrant* means an arrest warrant or a warrant of commitment issued under a law of the Territory, the Commonwealth, a State or another Territory.

214  **Arrest of prisoner unlawfully at large**

(1)  A police officer may, without warrant, arrest a person whom the police officer suspects on reasonable grounds to be a prisoner unlawfully at large.

(2)  The police officer shall, as soon as practicable after the arrest, cause the person to be brought before a magistrate.

(3)  If the magistrate is satisfied that the person is a prisoner unlawfully at large, the magistrate may issue a warrant—

(a)  authorising a police officer or corrections officer to take the person to a correctional centre or other place of detention stated in the warrant; and

(b)  directing that the person, having been conveyed to that place in accordance with the warrant, be detained there to undergo the term of imprisonment or other detention that the person is required by law to undergo.

(4)  In this section:

   *prisoner unlawfully at large* means a person who is at large (otherwise than because the person has escaped from lawful custody) at a time when the person is required by law to be detained under a law of the Territory, a State, or another Territory.

217  **Arrest without warrant for offences committed outside ACT**

(1)  This section applies to an offence against the law of a State or another Territory consisting of an act or omission which, if it occurred in the ACT, would constitute a serious offence.

(2)  A police officer may, without warrant, at any hour of the day or night, arrest a person whom he or she suspects on reasonable grounds to have committed an offence to which this section applies.
(3) If a police officer arrests a person under subsection (2), the officer shall cause the person to be brought before a magistrate as soon as is practicable.

(4) If a person is brought before a magistrate under subsection (3), the magistrate may—

(a) discharge the person; or

(b) commit the person to custody, or admit the person to bail, pending—

   (i) the execution under a law of the Commonwealth of a warrant for the person’s arrest; or

   (ii) the person’s discharge or release under subsection (7).

(5) A police officer may exercise any power under this division in relation to a person arrested under this section as if the person had been arrested and was being held in custody in relation to the commission of an offence against a territory law.

(6) If a person is committed to custody under this section and a warrant for the person’s apprehension is subsequently presented for execution, he or she shall be delivered in accordance with the terms of the warrant to the custody of the person executing it.

(7) If—

(a) a person is admitted to bail under this section; and

(b) before the person has complied with conditions of that bail, a warrant for his or her arrest is executed under a law of the Commonwealth;

the person is to be taken, at the time the warrant is executed, to be released from that bail and to have complied with the bail conditions, other than any condition with which the person had (before that time) failed to comply without reasonable excuse.

(8) If—

(a) a person has been committed to custody or admitted to bail under this section; and

(b) a warrant for the arrest of the person is not executed within 7 days after the person is committed to custody or admitted to bail;

a magistrate may, by order, discharge the person from custody or release the person from bail.

(9) In this section:

warrant means a warrant issued under a law of the Territory, the Commonwealth, a State or another Territory, and includes a provisional warrant.
218  **Power of arrest without warrant by other persons**

(1) A person who is not a police officer may, without warrant, arrest another person if he or she believes on reasonable grounds that the other person is committing or has just committed an offence.

(2) A person who arrests another person under subsection (1) shall, as soon as practicable after the arrest, arrange for the other person, and any property found on the other person, to be delivered into the custody of a police officer.

219  **Warrants for arrest**

(1) An issuing officer shall not issue a warrant for the arrest of a person for an offence as a result of an information laid before the officer unless—

(a) the information is on oath; and

(b) subject to subsection (3), the informant has given the issuing officer an affidavit setting out the reasons why the warrant is sought, including the following reasons:

(i) the reasons why it is believed that the person committed the offence;

(ii) the reasons why it is claimed that proceedings by summons would not achieve 1 or more of the purposes set out in section 212 (1) (b);

(c) if the issuing officer has requested further information about the reasons for which the issue of the warrant is sought—that information has been provided to the officer; and

(d) the issuing officer is satisfied that there are reasonable grounds for the issue of the warrant.

(2) If the issuing officer issues a warrant, he or she shall write on the affidavit which of the reasons specified in the affidavit, and any other reasons, the officer has relied on as justifying the issue of the warrant.

(3) Subsection (1) (b) does not apply if the issuing officer is informed that the warrant is sought for the purpose of making a request for the extradition of a person from a foreign country.

(4) This section does not apply to the issue of a warrant under the *Bail Act 1992*, section 49 (1) (Failure to answer bail).

220  **Power to enter premises to arrest offender**

(1) Subject to subsection (3), if—

(a) an officer has, under a warrant, power to arrest the person for an offence; and

(b) the officer believes on reasonable grounds that the person is on any premises;
the police officer may enter the premises, using the force that is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

(2) Subject to subsection (3), if—

(a) an officer has the power under section 212 to arrest the person without warrant for an offence; and
(b) the offence is a relevant offence; and
(c) the police officer believes on reasonable grounds that the person is on any premises;

the police officer may enter the premises, using the force that is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

(3) A police officer shall not enter a dwelling house under subsection (1) or (2) at any time during the period commencing at 9 pm on a day and ending at 6 am on the following day unless the executing officer believes on reasonable grounds that—

(a) it would not be practicable to arrest the person, either at the dwelling house or elsewhere, at another time; or
(b) it is necessary to do so to prevent the concealment, loss or destruction of evidence relating to the offence.

(4) In this section:

dwelling house includes a conveyance, and a room in a hotel, motel, boarding house or club, where people ordinarily sleep at night.

relevant offence means—

(a) a serious offence; or
(b) an offence against any of the following:

(i) section 380 (Possession of offensive weapons and disabling substances);

(ii) section 381 (Possession of offensive weapons and disabling substances with intent);

(iii) the Criminal Code, section 321 (Minor theft);

(iv) the Road Transport (Alcohol and Drugs) Act 1977, section 19 (Prescribed blood alcohol concentration exceeded).

221 Use of force in making arrest

(1) A person shall not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

(2) Without limiting the operation of subsection (1), a police officer shall not, in the course of arresting a person for an offence do anything that is
likely to cause the death of, or grievous bodily harm to, the person, unless—

(a) the officer believes on reasonable grounds that it is necessary to do so to protect life or to prevent serious injury to the officer or another person; and

(b) if the person is attempting to escape arrest by fleeing—the person has, if practicable, been called on to surrender and the officer believes on reasonable grounds that the person cannot be apprehended in any other way.

**222 Persons to be informed of grounds of arrest**

(1) A person who arrests another person for an offence shall inform the other person, at the time of the arrest, of the offence for which the other person is being arrested.

(2) It is sufficient if the other person is informed of the substance of the offence, and it is not necessary that this be done in language of a precise or technical nature.

(3) Subsection (1) does not apply to the arrest of the other person if—

(a) the other person should, in the circumstances, know the substance of the offence for which he or she is being arrested; or

(b) the other person’s actions make it impracticable for the person making the arrest to inform the other person of the offence for which he or she is being arrested.

**223 Power to conduct frisk search of arrested person**

(1) A police officer who arrests a person for an offence, or who is present at such an arrest, may, if the police officer suspects on reasonable grounds that it is prudent to do so to ascertain whether the person is carrying any seizable items—

(a) conduct a frisk search of the person at or soon after the time of arrest; and

(b) seize any seizable items found as a result of the search.

(2) The police officer may arrange for another police officer to conduct the frisk search if, having regard to section 240 (Conduct of ordinary searches and frisk searches), the officer considers that it would be more appropriate for the other officer to conduct the frisk search.

(3) The other police officer is authorised—

(a) to conduct the frisk search; and

(b) to seize any seizable items found as a result of the search.

**224 Power to conduct ordinary search of arrested person**

(1) If a police officer suspects on reasonable grounds that a person who has been arrested is carrying—
(a) evidential material in relation to any offence; or
(b) a seizable item;
the police officer may conduct an ordinary search of the person at or soon after the time of arrest, and seize any such thing found as a result of the search.

(2) The police officer may arrange for another police officer to conduct the ordinary search if, having regard to section 240 (Conduct of ordinary searches and frisk searches), the officer considers that it would be more appropriate for the other officer to conduct the frisk search.

(3) The other police officer is authorised—
(a) to conduct the ordinary search; and
(b) to seize anything mentioned in subsection (1) found as a result of the search.

225 Power to conduct search of arrested person’s premises

A police officer 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 that the police officer believes on reasonable grounds to be—
(a) evidential material in relation to any offence; or
(b) seizable items.

226 Power to conduct search at police station

(1) If—
(a) a person has been brought to a police station following arrest for an offence; and
(b) an ordinary search of the person has not been conducted;
a police officer may conduct an ordinary search of the person.

(2) If—
(a) a person is in lawful custody in a police station; and
(b) a police officer—
(i) of the rank of sergeant or higher; or
(ii) who is for the time being in charge of the police station;
suspects on reasonable grounds that it is prudent to do so to ascertain whether the person is carrying any evidential material in relation to any offence or seizable items;
the police officer may cause a frisk search or an ordinary search of the person to be conducted.

(3) If a person is searched under this section and as a result of the search is found to be carrying—
(a) evidential material in relation to any offence; or
(b) a seizable item;
the police officer conducting the search may seize that thing.

(4) If a person is searched under this section, the police officer who conducts or causes the search to be conducted shall make a record of the reasons for the search and of the type of search.

227 Power to conduct strip search

(1) Subject to this section, if a person arrested for an offence is brought to a police station, a police officer may conduct a strip search of the person.

(2) A strip search may be conducted if—
(a) a police officer suspects on reasonable grounds that the person has in his or her possession—
   (i) evidential material in relation to that or another offence; or
   (ii) a seizable item; or
(b) the police officer suspects on reasonable grounds that a visual inspection of the person’s body will provide evidence of the person’s involvement in an offence;
and—
(c) the police officer suspects on reasonable grounds that it is necessary to conduct a strip search of the person to recover that thing or to discover that evidence; and
(d) a police officer of the rank of superintendent or higher has approved the conduct of the search.

(3) Subject to section 228, a strip search may also be conducted if the person consents in writing.

(4) Subject to section 228, a strip search may be conducted in the presence of a medical practitioner who may assist in the search.

(5) The approval may be obtained by telephone, telex, fax or other electronic means.

(6) A police officer who gives or refuses to give an approval under subsection (2) (d) shall make a record of the decision and of the reasons for the decision.

(7) The force that is necessary and reasonable in the circumstances may be used to conduct a strip search under subsection (2).

(8) Any item of a kind referred to in subsection (2) (a) that is found during a strip search may be seized.

228 Rules for conduct of strip search

(1) A strip search—
(a) shall be conducted in a private area; and
(b) subject to subsection (6), shall be conducted by a police officer who is of the same sex as the person being searched; and
(c) subject to subsections (3) and (4), shall not be conducted in the presence or view of a person who is of the opposite sex to the person being searched; and
(d) shall not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search; and
(e) shall not be conducted on a person who is under 10; and
(f) if the person being searched is at least 10 but under 18, or is incapable of managing his or her affairs—
   (i) may only be conducted if the person has been arrested and charged or if a court orders that it be conducted; and
   (ii) shall be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the person, in the presence of another person (other than a police officer) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person; and
(g) shall not involve a search of a person’s body cavities; and
(h) shall not involve the removal of more garments than the police officer conducting the search believes on reasonable grounds to be necessary to determine whether the person has in his or her possession the item searched for or to establish the person’s involvement in the offence; and
(i) shall not involve more visual inspection than the police officer believes on reasonable grounds to be necessary to establish the person’s involvement in the offence.

(2) In deciding whether to make an order referred to in subsection (1) (f), the court shall have regard to—
   (a) the seriousness of the offence; and
   (b) the age or any disability of the person; and
   (c) any other matters the court thinks fit.
(3) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if a medical practitioner of the same sex as the person being searched is not available within a reasonable time.
(4) Subsection (1) (c) does not apply to a parent, guardian or personal representative of the person being searched if the person being searched has no objection to the person being present.
(5) If any of a person’s garments are seized as a result of a strip search, the person shall be provided with adequate clothing.

(6) If a strip search of a person is to be conducted and no police officer of the same sex as that person is available to conduct the search, any other person—
   (a) of the same sex as the person to be searched; and
   (b) who has been requested to conduct the search by a police officer; may conduct the search.

(7) No action or proceeding, civil or criminal, lies against a person who conducts a strip search under a request under subsection (6) in respect of a strip search that would have been lawful if conducted by a police officer.

229 Safekeeping of things seized

(1) A police officer who seizes a thing as a result of searching a person in lawful custody under this division shall—
   (a) make a record of the thing seized, including a description of it and the date when it was seized; and
   (b) give the thing seized and the record of it to the police officer for the time being in charge of the police station where the person was searched.

(2) A police officer for the time being in charge of a police station is responsible for the safekeeping of any thing seized as a result of a search of a person in lawful custody under this part conducted at that place.

(3) A police officer who has responsibility for the safekeeping of a thing under subsection (2) shall, on release of the person from whom it was seized, take reasonable steps to return the thing to that person or to the owner of the thing if that person is not entitled to possession, unless the thing affords evidence in relation to an offence.

(4) If a thing is not returned to the person from whom it was seized or the owner under subsection (3), the police officer responsible for the safekeeping of the thing shall—
   (a) make a note on the record made under subsection (1) (a) indicating the thing has been retained; and
   (b) take reasonable steps to give a copy of that record to the person from whom the thing was seized.

230 Taking fingerprints, recordings, samples of handwriting or photographs

(1) In this section and in sections 231 and 232:

   identification material, in relation to a person, means prints of the person’s hands, fingers, feet or toes, recordings of the person’s voice, samples of the person’s handwriting or photographs (including video
recordings) of the person, but does not include tape recordings made under the Commonwealth Crimes Act, section 23U or 23V.

(2) A police officer shall not—

(a) take identification material from a person who is in lawful custody in respect of an offence except in accordance with this section; or

(b) require any other person to submit to the taking of identification material, but nothing in this paragraph prevents such a person consenting to the taking of identification material.

(3) If a person is in lawful custody for an offence, a police officer of the rank of sergeant or higher, or for the time being in charge of a police station, may take identification material from the person, or cause identification material from the person to be taken, if any 1 or more of the following paragraphs apply:

(a) the identification material is prints of the person’s fingers or photographs of the person;

(b) the person consents in writing;

(c) the police officer believes on reasonable grounds that it is necessary to do so to—

   (i) establish who the person is; or

   (ii) identify the person as the person who committed the offence; or

   (iii) provide evidence of, or relating to, the offence;

(d) the police officer suspects on reasonable grounds that the person has committed another offence and the identification material is to be 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.

(4) A police officer may use the force that is necessary and reasonable in the circumstances to take identification material from a person under this section.

(5) Subject to this section, a police officer shall not take identification material from a suspect who—

(a) is incapable of managing his or her affairs; and

(b) has not been arrested and charged;

unless a court orders that the material be taken.

(6) In deciding whether to make such an order, the court shall have regard to—

(a) the seriousness of the offence; and

(b) the age or any disability of the person; and

(c) any other matters as the court thinks fit.
(7) The taking of identification material from a person who is incapable of managing his or her affairs shall be done in the presence of—
(a) a parent or guardian of the person; or
(b) if the parent or guardian of the person is not acceptable to the person—another person (other than a police officer) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person.

(8) Despite this section, identification material may be taken from a person who—
(a) is not a suspect; and
(b) is incapable of managing his or her affairs;
if a court orders that the material be taken.

(9) In deciding whether to make an order, the court shall have regard to the matters set out in subsection (6).

(10) Despite this section, identification material may be taken from a person who—
(a) is at least 18; and
(b) is capable of managing his or her affairs; and
(c) is not a suspect;
if the person consents in writing.

(11) A police officer may only take identification material from a person under 18 in accordance with the Children and Young People Act 1999, section 84 (Identifying material).

231 Destruction of identification material

(1) If—
(a) identification material is taken under section 230; and
(b) a period of 12 months has elapsed since the material was taken; and
(c) proceedings in respect of an offence to which the identification material relates have not been instituted or have been discontinued;
the material shall be destroyed as soon as practicable.

(2) If identification material has been taken from a person under section 230 and—
(a) the person is found to have committed an offence to which the identification material relates, but no conviction is recorded; or
(b) the person is acquitted of such an offence and—
   (i) no appeal is lodged against the acquittal; or
   (ii) an appeal is lodged against the acquittal and the acquittal is confirmed or the appeal is withdrawn;
the identification material shall be destroyed as soon as practicable, unless an investigation or proceedings in relation to another offence to which the identification material relates is pending.

(3) On application by a police officer, a magistrate may, if satisfied that there are special reasons for doing so in relation to particular identification material, extend—

(a) the period of 12 months referred to in subsection (1); or

(b) that period as previously extended under this subsection.

232 Offence of refusing to allow identification material to be taken

(1) If a person is convicted of an offence, the judge or magistrate presiding at the proceedings where the person was convicted may order—

(a) the person to attend a police station; or

(b) that a police officer be permitted to attend on the person in a place of detention;

within 1 month after the conviction to allow impressions of the person’s fingerprints or a photograph of the person to be taken in accordance with the order.

(2) A person shall not, without reasonable excuse, fail to allow impressions or a photograph to be taken under an order under subsection (1).

Maximum penalty: $10 000, imprisonment for 12 months or both.

233 Identification parades—general

(1) This section applies to identification parades held in relation to offences.

(2) Subject to subsection (3) and to section 234, an identification parade—

(a) may be held if the suspect agrees; or

(b) shall be held if—

(i) the suspect has requested that an identification parade be held; and

(ii) it is reasonable in the circumstances to do so.

(3) An identification parade shall not be held unless the suspect has been informed that—

(a) he or she is entitled to refuse to take part in the parade; and

(b) if he or she refuses to take part in the parade without reasonable excuse, evidence of that refusal and of any identification of the suspect by a witness as a result of having seen a photograph or of having seen the suspect otherwise than during an identification parade may be given in any subsequent proceedings in relation to an offence; and
(c) in addition to any requirement under section 234, a legal representative or other person of the suspect’s choice may be present while the person is deciding whether to take part in the parade, and during the holding of the parade, if arrangements for that person to be present can be made within a reasonable time.

(4) The giving of the information referred to in subsection (3) shall be recorded by a video recording or an audio recording.

(5) An identification parade shall be arranged and conducted in a way that will not unfairly prejudice the suspect.

(6) Without limiting the intent of subsection (5), an identification parade shall be arranged and conducted in accordance with the following rules:

(a) the parade shall consist of at least 9 persons;

(b) each of the persons who is not the suspect shall—

(i) resemble the suspect in age, height and general appearance; and

(ii) not have features that will be visible during the parade that are markedly different from those of the suspect as described by the witness before viewing the parade;

(c) unless it is impracticable for another police officer to arrange or conduct the parade, no police officer who has taken part in the investigation relating to the offence may take part in the arrangements for, or the conduct of, the parade;

(d) no person in the parade is to be dressed in a way that would obviously distinguish him or her from the other participants;

(e) if it is practicable to do so, numbers should be placed next to each participant to allow the witness to make an identification by indicating the number of the person identified;

(f) the parade may take place so that the witness can view the parade without being seen if the witness requests that it take place in that way and—

(i) a legal representative or other person of the suspect’s choice is present with the witness; or

(ii) the parade is recorded by a video recording;

(g) nothing is to be done that suggests or is likely to suggest to a witness which member of the parade is the suspect;

(h) if the witness so requests—members of the parade may be required to speak, move or adopt a specified posture but, if this happens, the witness shall be reminded that the members of the parade have been chosen on the basis of physical appearance only;

(i) the suspect may select where he or she wishes to stand in the parade;

(j) if more than 1 witness is to view the parade—

(i) each witness shall view the parade alone; and
(ii) the witnesses are not to communicate with each other at a time after arrangements for the parade have commenced and before each of them has viewed the parade; and

(iii) the suspect may change places in the parade after each viewing;

(k) each witness shall be told that—

(i) the suspect may not be in the parade; and

(ii) if he or she is unable to identify the suspect with reasonable certainty he or she shall say so;

(l) the parade shall be recorded by a video recording if it is practicable to do so and, if that is done, a copy of the video recording shall be made available to the suspect or his or her legal representative as soon as it is practicable to do so;

(m) if the parade is not recorded by a video recording—

(i) the parade shall be photographed in colour; and

(ii) a print of a photograph of the parade that is at least 250mm x 200mm in size shall be made available to the suspect or his or her legal representative; and

(iii) the police officer in charge of the parade shall take all reasonable steps to record everything said and done at the parade and shall make a copy of the record available to the suspect or his or her legal representative;

(n) the suspect may have present during the holding of the parade a legal representative or other person of his or her choice if arrangements for that person to be present can be made within a reasonable time.

(7) The following questions are to be decided according to the common law:

(a) whether or not evidence of a suspect having refused to take part in an identification parade is admissible;

(b) if evidence of the refusal is admissible—what inferences (if any) may be drawn by a court or jury from the refusal;

(c) whether, after such a refusal, evidence of alternative methods of identification is admissible.

(8) If a witness is, under the supervision of a police officer, to attempt to identify a suspect otherwise than during an identification parade, the police officer shall ensure that the attempted identification is done in a way that is fair to the suspect.

234 Identification parades for suspects under 18 etc

(1) An identification parade shall not be held for a suspect who is under 10.
(2) An identification parade must not be held for a suspect who is incapable of managing his or her affairs unless a court orders that it be held.

(3) An identification parade must not be held for a suspect who—
   (a) is at least 10 but under 18; and
   (b) is capable of managing his or her affairs;

unless 1 of the following paragraphs applies:

(c) the suspect agrees to or requests in writing the holding of the parade and a parent or guardian of the suspect agrees in writing to the holding of the parade or, if the parent or guardian is not acceptable to the suspect, another person (other than a police officer) who is capable of representing the interests of the suspect and who, as far as is practicable in the circumstances, is acceptable to the suspect agrees in writing to the holding of the parade;

(d) if—
   (i) 1 of those persons agrees in writing to the holding of the parade but the other does not; and
   (ii) a court orders that the parade be held.

(4) In deciding whether to make an order under subsection (2) or (3), the court shall have regard to—
   (a) the seriousness of the offence; and
   (b) the age or any disability of the person; and
   (c) any other matters as the court thinks fit.

(5) An identification parade for a suspect who is under 18 or who is incapable of managing his or her affairs shall be held in the presence of—
   (a) a parent or guardian of the suspect; or
   (b) if the parent or guardian is not acceptable to the suspect—another person (other than a police officer) who is capable of representing the interests of the suspect and who, as far as is practicable in the circumstances, is acceptable to the suspect.

Identification by means of photographs

(1) If a suspect is in custody in respect of an offence or is otherwise available to take part in an identification parade, a police officer investigating the offence shall not show photographs, or composite pictures or pictures of a similar kind, to a witness for the purpose of establishing, or obtaining evidence of, the identity of the suspect unless—
   (a) the suspect has refused to take part in an identification parade; or
   (b) the holding of an identification parade would be—
      (i) unfair to the suspect; or
(ii) unreasonable in the circumstances.

(2) If a police officer investigating an offence shows photographs or pictures to a witness for the purpose of establishing, or obtaining evidence of, the identity of a suspect, whether or not the suspect is in custody, the following rules apply:

(a) the police officer shall show to the witness photographs or pictures of at least 9 different persons;

(b) each photograph or picture of a person who is not the suspect shall be of a person who—

(i) resembles the suspect in age and general appearance; and

(ii) does not have features visible in the photograph or picture that are markedly different from those of the suspect as described by the witness before viewing the photographs or pictures;

(c) the police officer shall not, in doing so, act unfairly towards the suspect or suggest to the witness that a particular photograph or picture is the photograph or picture of the suspect or of a person who is being sought by the police in respect of an offence;

(d) if practicable, the photograph or picture of the suspect shall have been taken or made after he or she was arrested or was considered as a suspect;

(e) the witness shall be told that a photograph or picture of the suspect may not be amongst those being seen by the witness;

(f) the police officer shall keep, or cause to be kept, a record identifying each photograph or picture that is shown to the witness;

(g) the police officer shall notify the suspect or his or her legal representative in writing that a copy of the record is available for the suspect;

(h) the police officer shall retain the photographs or pictures shown, and shall allow the suspect or his or her legal representative, on application, an opportunity to inspect the photographs or pictures.

(3) If—

(a) a photograph or picture of a person who is suspected in relation to the commission of an offence is shown to a witness; and

(b) the photograph was taken or the picture made after the suspect was arrested or was considered to be a suspect; and

(c) proceedings in relation to the offence referred to in paragraph (a) or another offence arising out of the same course of conduct for which the photograph was taken or picture made are brought against the suspect before a jury; and

(d) the photograph or picture is admitted into evidence;
the jury shall be informed that the photograph was taken or the picture made after the suspect was arrested or was considered as a suspect.

(4) If a suspect is in custody in respect of an offence, a police officer investigating the offence shall not show a composite picture or a picture of a similar kind to a witness for the purpose of assisting the witness to describe the features of the suspect.

(5) If, after a police officer investigating an offence has shown to a witness a composite picture or a picture of a similar kind for the purpose referred to in subsection (4)—

(a) a suspect comes into custody in respect of the offence; and

(b) an identification parade is to be held in relation to the suspect;

the police officer in charge of the investigation of the offence may, unless doing so would be unfair to the suspect or be unreasonable in the circumstances, request the witness to attend the identification parade and make the necessary arrangements for the witness to attend.

(6) If, after the witness has been shown a composite picture or a picture of a similar kind for the purpose referred to in subsection (4), a person is charged with the offence, the police officer in charge of investigating the offence shall, on application by that person or his or her legal representative, provide him or her with particulars of any such picture shown to the witness and the comments (if any) of the witness about the picture.

(7) If a suspect is in custody in respect of an offence and a police officer investigating the offence wishes to investigate the possibility that a person other than the suspect committed the offence, subsection (4) does not prevent a police officer from taking action referred to in that subsection for the purpose of assisting a witness to describe the features of a person other than the suspect.

236 Identification procedures if more than 1 suspect

A police officer shall undertake a separate identification process for each of 2 or more suspects if—

(a) the officer is attempting to ascertain—

(i) which of the suspects committed an offence; or

(ii) if the suspects may have been jointly involved in the offence—the identities of the suspects; and

(b) for that purpose, the officer intends to conduct an identification parade or to identify a person by showing a photograph or a picture of a suspect to a person.

237 Descriptions

(1) If a description of a suspect is given to a police officer in relation to an offence, the police officer shall ensure that a record of the description is
made and that the record is retained until any proceedings in respect of the offence are completed.

(2) Subject to subsection (4), a police officer shall, if requested to do so by a person who has been charged with an offence, provide the person with the name of every person who, to the knowledge of the police officer, claims to have seen, at or about the time of the commission of the offence, a person who is suspected of being involved in its commission.

(3) If—
(a) a record of a description of a person is made under subsection (1); and
(b) the person is charged with an offence to which the description relates;

a police officer must notify the person or his or her legal representative in writing that a copy of the record, and of any other record of a description that the police officer knows about of a person who is suspected of being involved in the commission of the offence, is available for the person.

(4) If the police officer suspects on reasonable grounds that providing the name of a person under subsection (2) could—
(a) place the person in danger; or
(b) expose the person to harassment or unreasonable interference;

the police officer is not required to provide the name of the person.

238 Examination

(1) In this section:

examination means an examination of the body of the person charged and includes the taking of samples of the person’s blood, saliva or hair.

(2) An examination of a person under this section may be conducted if—
(a) the person consents; or
(b) an order is made under subsection (3).

(3) If a person (the person charged) is in lawful custody on a charge of committing an offence and a magistrate is satisfied, on the balance of probabilities, that the offence—

(a) is of such a nature; and
(b) has been committed under such circumstances;

that there are reasonable grounds for believing that an examination of the person charged will afford evidence as to the commission of the offence, the magistrate may order an examination of the person.

(4) If the person charged is not present at the time that the order is made, a copy of the order shall be given to the person.
(5) If an order is made under subsection (3) or a person charged consents to an examination, a police officer may request a medical practitioner to carry out the examination and, if the medical practitioner agrees to carry it out, shall give the medical practitioner a copy of the order.

(6) A medical practitioner carrying out an examination may be assisted by 1 or more persons acting under the direction of the medical practitioner.

(7) An examination of the person charged—

(a) shall be carried out in circumstances affording reasonable privacy to the person; and

(b) for an examination which includes the external examination of the genital or anal area, the buttocks, or, for a female, the breasts—shall not be carried out in the presence or in view of a person of the opposite sex to the person being examined; and

(c) shall not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the examination; and

(d) shall not involve the removal of more clothing than is necessary for carrying out the examination; and

(e) shall not involve more visual inspection than is necessary for carrying out the examination.

(8) Subsection (7) does not prevent an examination being carried out by a medical practitioner of the opposite sex to the person being examined.

(9) A medical practitioner carrying out an examination under this section, an assistant of the medical practitioner or a police officer, may use reasonable force to enable the examination to be carried out including the prevention of loss, destruction or contamination of a sample.

(10) Samples taken from a person charged with an offence shall be destroyed as soon as practicable after the conclusion of the proceedings relating to the offence and the exhaustion of any right of appeal.

(11) No action or proceeding, civil or criminal, lies against—

(a) a person who conducts, or assists in conducting, an examination under this section (including such a person who uses reasonable force as provided in subsection (9)); or

(b) a police officer who uses reasonable force as provided in that subsection.

(12) This section does not apply to a person to whom the Children and Young People Act 1999, section 84 (Identifying material) applies.

**Division 10.6  General**

239 **Assisting officers—search and arrest of persons**

An assisting officer who is not a police officer is not authorised by this part to assist in searching or arresting a person.
240 Conduct of ordinary searches and frisk searches

An ordinary search or a frisk search of a person under this part shall, if practicable, be conducted by a person of the same sex as the person being searched.

241 Announcement before entry

(1) Subject to subsection (3), a police officer shall, before any person enters premises under a warrant, for the purpose of executing an order mentioned in section 192 (1) or to arrest a person—

(a) announce that he or she is authorised to enter the premises; and

(b) give any person at the premises an opportunity to allow entry to the premises.

(2) A police officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure—

(a) the safety of a person (including a police officer); or

(b) that the effective execution of the warrant, order or arrest is not frustrated.

(3) This section does not apply to an entry made under section 190.

242 Offence of making false statements in warrants

A person shall not make, in an application for a warrant, a statement that the person knows to be false or misleading in a material particular.

Maximum penalty: imprisonment for 2 years.

243 Offences relating to telephone warrants

A person shall not—

(a) state in a document that purports to be a form of warrant under section 205 the name of an issuing officer unless that officer issued the warrant; or

(b) state on a form of warrant under that section a matter that, to the person’s knowledge, departs in a material particular from the form authorised by the issuing officer; or

(c) purport to execute, or present to a person, a document that purports to be a form of warrant under that section that the person knows—

(i) has not been approved by an issuing officer under that section; or

(ii) to depart in a material particular from the terms authorised by an issuing officer under that section; or
(d) give to an issuing officer a form of warrant under that section that is not the form of warrant that the person purported to execute.

Maximum penalty: imprisonment for 2 years.

244 Return of seized knife or thing

(1) If a knife is seized under section 193, the person from whom it was seized or, if that person is under 16 years of age, his or her parent or guardian is entitled to have the knife returned if—

(a) a prosecution for an offence against section 382 in respect of that knife has not been commenced before the end of 60 days after the seizure; or

(b) a prosecution for an offence against section 382 in respect of that knife has been commenced before the end of 60 days after the seizure and the prosecution (and any appeal to a court in relation to that prosecution) has been completed without the knife having been forfeited under section 248.

(2) Subject to any contrary order of a court, if a police officer seizes a thing under division 10.2, 10.3 or 10.4, the police officer shall return it if—

(a) the reason for its seizure no longer exists or it is decided that it is not to be used in evidence; or

(b) if the thing was seized under section 207 (Stopping, searching and detaining people) or section 209 (Stopping, searching and detaining conveyances)—

(i) the reason for its seizure no longer exists or it is decided that it is not to be used in evidence; or

(ii) the period of 60 days after its seizure ends;

whichever first occurs;

unless the thing is forfeited or forfeitable to the Territory or is the subject of a dispute as to ownership.

(3) If a thing is seized under section 207 (Stopping, searching and detaining people) or section 209 (Stopping, searching and detaining conveyances), at the end of the 60 days specified in subsection (1) the police officer shall take reasonable steps to return the thing to the person from whom it was seized or to the owner if that person is not entitled to possess it unless—

(a) proceedings in respect of which the thing may afford evidence were instituted before the end of the 60 days and have not been completed (including an appeal to a court in relation to those proceedings); or

(b) the police officer may retain the thing because of an order under section 245; or
(c) the police officer is otherwise authorised (by a law, or an order of a court, of the Commonwealth or of the Territory) to retain, destroy or dispose of the thing.

245 Magistrates Court may permit thing to be retained

(1) If a thing is seized under section 207 (Stopping, searching and detaining people) or section 209 (Stopping, searching and detaining conveyances), and—

(a) before the end of 60 days after the seizure; or

(b) before the end of a period previously specified in an order of a court under this section;

proceedings in respect of which the thing may afford evidence have not commenced, the police officer may apply to the Magistrates Court for an order that he or she may retain the thing for a further period.

(2) If the court is satisfied that it is necessary for the police officer to continue to retain the thing—

(a) for the purposes of an investigation as to whether an offence has been committed; or

(b) to enable evidence of an offence to be secured for the purposes of a prosecution;

the court may order that the police officer may retain the thing for a period specified in the order.

(3) Before making the application, the police officer shall—

(a) take reasonable steps to discover who has an interest in the retention of the thing; and

(b) if it is practicable to do so, notify each person who the police officer believes to have such an interest of the proposed application.

247 Laws relating to taking forensic samples not affected

Nothing in this part is intended to limit or exclude the operation of a territory law relating to the taking of forensic samples (excluding identification material as defined in section 230).

248 Forfeiture of knife

(1) A knife seized under section 193 (Power to conduct search of person for knife) is forfeited to the Territory if the person from whom the knife was seized is convicted or found guilty of an offence against section 382 (Possession of knife in public place or school) in relation to the knife.

(2) If there are reasonable grounds for believing that the person who was in possession of a knife forfeited under subsection (1) was the owner of the knife, it may be destroyed or disposed of in the way the commissioner of police directs.
(3) If there are reasonable grounds for believing that the person who was in possession of a knife forfeited under subsection (1) was not the owner of the knife, it may be destroyed or disposed of in the way the commissioner of police directs if—

(a) 6 months have elapsed since the person was found guilty of an offence against section 382 in relation to the knife; and

(b) reasonable attempts have been made to ascertain the whereabouts of the owner of the knife.

249 Seizure of forfeited articles

(1) A member of the police force may, without warrant, seize any article that is forfeited, or that he or she has reasonable grounds for believing is forfeited, under any law in force in the ACT and take that article before the Magistrates Court.

(2) If any article is brought before the court under subsection (1), the court may, subject to the giving of the notice (if any) to the person (if any) that the court directs, order that the article be condemned or delivered to the person that the court is satisfied is entitled to the article.

(3) If a prosecution is pending in relation to an article, the court shall not make an order under subsection (2) in relation to the article until the prosecution is determined.

(4) All articles condemned under subsection (2) as forfeited shall be transferred to the public trustee to be dealt with under section 250.

250 Disposal of forfeited articles by public trustee

(1) The public trustee must sell or otherwise dispose of an article transferred to the public trustee under section 249 (4).

(2) The public trustee must—

(a) apply the proceeds of the sale or disposition in payment of the public trustee’s remuneration, and other costs, charges and expenses, in relation to the sale or disposition; and

(b) pay the remainder of the proceeds to the confiscated assets trust fund under the Confiscation of Criminal Assets Act 2003.

(3) However, the Minister may, in a particular case, direct that the article be dealt with in accordance with the direction (including in accordance with a law stated in the direction).

(4) The public trustee must comply with the Minister’s direction.

(5) The regulations may make provision in relation to public trustee’s remuneration, and other costs, charges and expenses, under subsection (2) (a).
Drugs of Dependence Act 1989

Division 11.3  Search, seizure and analysis

182 Definitions for div 11.3

In this division:

chapter 6 substance means any of the following within the meaning of the Criminal Code, chapter 6:

(a) a controlled drug;

(b) a controlled plant;

(c) a controlled precursor.

place includes vacant land, premises, a vehicle, a vessel or an aircraft.

184 Search and seizure

(1) A police officer may search a person or the clothing that is being worn by, or property in the immediate control of, a person and may seize any thing that he or she suspects on reasonable grounds to be connected with an offence that is found in the course of the search, if, and only if, the search and seizure is made by the police officer—

(a) after obtaining the consent of the person to the search in accordance with section 185; or

(b) in accordance with section 186 on taking the person into lawful custody in relation to an offence; or

(c) under a warrant issued under section 187; or

(d) in circumstances of seriousness and urgency, in accordance with section 188; or

(e) under an order made by a court; or

(f) otherwise under a provision of a law in force in the ACT.

(2) A police officer may enter any place, and may search for and seize any thing that he or she suspects on reasonable grounds to be connected with an offence that is found on or in the place if, and only if, the search and seizure is made by the police officer—

(a) after obtaining the consent of the occupier of the place to the entry in accordance with section 185; or

(b) under a warrant issued under section 187; or

(c) in circumstances of seriousness and urgency, in accordance with section 188; or

(d) under an order made by a court; or

(e) otherwise under a provision of a law in force in the ACT.
185  Consent to search

(1) Before obtaining the consent of a person for section 184 a police officer shall inform the person that he or she may refuse to give his or her consent.

(2) A police officer who obtains the consent of a person for section 184 shall ask the person to sign an acknowledgment—

(a) that the person has been informed that he or she may refuse to give his or her consent; and

(b) that the person has given his or her consent; and

(c) of the date and time when the person gave his or her consent.

(3) If it is material, in any proceedings, for a court to be satisfied of the consent of a person for section 184 and an acknowledgment in accordance with subsection (2) has not been produced in evidence, the court shall presume, unless the contrary is proved, that the person did not give the consent, but that presumption is rebuttable.

186  Searches of arrested persons

(1) A police officer may, on lawfully taking a person into custody in relation to an offence, search the person or the clothing that he or she is wearing and any property under his or her immediate control, if the police officer suspects on reasonable grounds that it is necessary to do so—

(a) for the purpose of ascertaining whether there is on the person or in his or her clothing or in that property a thing connected with the offence; or

(b) for the purpose of preventing the concealment, loss or destruction of evidence of, or relating to, the offence.

(2) A police officer may seize any thing that he or she suspects on reasonable grounds is a thing connected with an offence found as a result of a search in accordance with subsection (1).

187  Search warrants

(1) In this section:

issuing officer means—

(a) a judge, the registrar or a deputy registrar of the Supreme Court; or

(b) a magistrate; or

(c) the registrar, or a deputy registrar, of the Magistrates Court authorised, in writing, by the Chief Magistrate to be an issuing officer for this section.

private place does not include a place ordinarily private that is for the time being—

(a) used for a public purpose; or
(b) a place of common resort; or
(c) open to the public, on the payment of money or otherwise.

(2) If an information on oath is laid before an issuing officer alleging that there are reasonable grounds for suspecting that, on the day when, or a day within 28 days after the date when, the information is laid, there is or will be a thing or things of a particular kind connected with a particular offence on, or in the clothing that is being worn by, or in any property in the apparent control of, a particular person and the information sets out those grounds, the issuing officer may issue a search warrant authorising each police officer named in the warrant, with the assistance, and by the force, that is necessary and reasonable—

(a) to enter any place the police officer believes on reasonable grounds to be occupied by the person; and

(b) to search the person, or the clothing that is being worn by, or property in the apparent control of, the person; and

(c) to seize any such clothing or property that the police officer believes on reasonable grounds to be connected with the offence.

(3) If an information on oath is laid before an issuing officer alleging that there are reasonable grounds for suspecting that, on the day when, or a day within 28 days after the date when, the information is laid, there is or will be at or in any place a thing or things of a particular kind connected with a particular offence, and the information sets out those grounds, the issuing officer may issue a search warrant authorising each police officer named in the warrant, with the assistance, and by the force, that is necessary and reasonable to—

(a) enter any place named or described in the warrant; and

(b) search the place for things of that kind; and

(c) if the place is a private place—to search any person found at or in the place, or any person whom he or she reasonably believes to be about to enter or to have recently left the place, and the clothing that the person is wearing, or property in the apparent control of the person, if the police officer believes there are reasonable grounds for suspecting that things of that kind may be on the person or in the clothing that the person is wearing or in property in the apparent control of the person; and

(d) to seize any thing of that kind found as a result of any entry or search referred to in paragraph (a), (b) or (c) that he or she believes on reasonable grounds to be connected with that offence.

(4) An issuing officer shall not issue a warrant under this section unless—

(a) the informant or some other person has given to the issuing officer, either orally or by affidavit, the further information (if any) the issuing officer requires about the grounds on which the issue of the warrant is being sought; and
(b) the issuing officer is satisfied that there are reasonable grounds for issuing the warrant.

(5) An issuing officer may issue a warrant under subsection (2) or (3) subject to conditions limiting the powers set out in the relevant subsection.

(6) A warrant issued under this section shall state or set out—

(a) the purpose for which the warrant is issued, including a reference to the nature of the offence in relation to which the entry and search are authorised; and

(b) whether the entry or search is authorised to be made at any time of the day or night or during specified hours of the day or night; and

(c) a description of the kind of things authorised to be seized; and

(d) any conditions to which the warrant is subject; and

(e) if the warrant is issued under subsection (2)—a way of identifying each person specified in the warrant by—

(i) name; or

(ii) description; or

(iii) a photograph of the person attached to the warrant; and

(f) a date, not later than 28 days after the date of issue of the warrant, when the warrant will cease to have effect.

(7) If, in the course of searching in accordance with a warrant issued under this section for things connected with a particular offence, being things of a kind specified in the warrant, a police officer finds any thing that he or she believes on reasonable grounds to be connected with the offence although not of a kind specified in the warrant, or to be connected with any other offence, and he or she believes on reasonable grounds that it is necessary to seize that thing to prevent its concealment, loss, destruction or use in committing, continuing or repeating either offence the warrant shall be deemed to authorise him or her to seize that thing.

188 Searches in emergencies

(1) A police officer may only exercise a power under this section if the police officer believes, on reasonable grounds—

(a) that it is necessary to do so to prevent the concealment, loss or destruction of any thing connected with an offence; and

(b) that the circumstances are of such seriousness and urgency as to require the immediate exercise of the power without the authority of a warrant issued under section 187 or of an order of a court.

(2) A police officer may—

(a) search a person or the clothing that is being worn by, and property in the apparent control of, a person suspected by the police officer to be carrying any thing connected with an offence; or
(b) enter any place at or in which the police officer believes on reasonable grounds that any thing connected with an offence is situated; and

c) seize any such thing that he or she finds in the course of that search, or at or in the place.

(3) A police officer who believes on reasonable grounds that a person is, without lawful authority or reasonable excuse, carrying any thing connected with an offence may, for this section, detain that person.

(4) A police officer who believes on reasonable grounds that any thing connected with an offence is on or in a vehicle, vessel or aircraft may, for this section, stop that vehicle, vessel or aircraft.

189 Clothing and body searches

(1) If a police officer is authorised under this division to search the clothing that a person is wearing, the police officer may remove, or require the person to remove, any clothing that the person is wearing.

(2) A person shall not be searched under this division except by a police officer of the same sex.

(3) However, if a transgender or intersex person is searched, the person may require that the search be conducted by either a male or a female.

Note 1 For the meaning of transgender person see Legislation Act, s 169A.

Note 2 For the meaning of intersex person, see Legislation Act, s 169B.

(4) If the transgender or intersex person requires that the search be conducted by a male, the person is taken, for this section, to be male.

(5) If the transgender or intersex person requires that the search be conducted by a female, the person is taken, for this section, to be female.

(6) Nothing in this division authorises a police officer to conduct an internal body search.

190 Forfeiture of drugs and substances

(1) If a police officer believes, on reasonable grounds, that a substance seized under this division is, or contains, a drug of dependence, prohibited substance or chapter 6 substance in relation to which an offence has been committed, the substance seized is forfeited to the Territory.

(2) If a police officer believes, on reasonable grounds, that a substance seized under this division, other than a substance referred to in subsection (1), is, or contains, a drug of dependence, prohibited substance or chapter 6 substance, that substance is forfeited to the Territory at the end of 30 days from the date of its seizure.

(3) Subsection (2) does not apply if—

(a) within 30 days after the date of the seizure the chief police officer has received written notice from a person that the person claims the relevant substance; and
(b) the chief police officer is satisfied that the claimant is entitled to the lawful possession of that substance.

(4) If subsection (2) applies, the chief health officer shall dispose of the substance referred to in that subsection as soon as possible after the end of 30 days from the date of its seizure.

191 Analysis

If a substance is forfeited to the Territory under section 190 (1), the person who seized the substance shall cause it to be given to an analyst.

193 Notification by defendants—analyst’s evidence

After service of a copy of an analyst’s certificate on a defendant in proceedings for an offence, the defendant may, within 5 days, notify the director of public prosecutions in writing whether the defendant intends to call the analyst who issued the certificate to give evidence in the proceeding.