

1994

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN
CAPITAL TERRITORY**

CRIMES (AMENDMENT) BILL (NO. ³4) 1994

EXPLANATORY MEMORANDUM

Circulated by authority of

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3
CRIMES (AMENDMENT) BILL (No. 4) 1994

OUTLINE

General Outline

The purpose of the Bill is to amend Part X of the *Crimes Act 1900* so that it includes extensive new provisions relating to search warrants and powers of arrest.

The amendments reflect, to a large extent, the new Commonwealth *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* which itself was based on the recommendations of the Review of Commonwealth Criminal Law (the Gibbs Review) and the Australian Law Reform Commission Report of 1975 on Criminal Investigation. For the purposes of the ACT, however, the amendments also reflect the needs of the local situation and of the principle of community policing.

The Bill provides specific powers and safeguards in relation to the investigation of ACT offences. Provision is made for obtaining and executing search warrants, including telephone warrants, stopping and searching conveyances, arrest and related matters such as personal searches, taking and destroying fingerprints, holding identification parades and other identification procedures.

The Bill provides the ACT with its own legislative authority for the issue of search warrants and spells out details of the manner in which these powers may be exercised. Before the Commonwealth Act and this Bill, much of this detail was dealt with under common law or in police instructions, general orders and practice and hence generally unavailable to the public. This is incompatible with modern concepts of open administration and access to justice. The Bill is designed, therefore, to make public the powers of police and the rights of individuals in these important areas.

Some sections of Part X have been repealed. Any forms which may be required have been developed administratively (by the Commonwealth) in consultation with the Law Council of Australia.

Outline of Divisions

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

Division 1A - Preventative action - This Division is composed of the current sections 349A to 349D.

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

Division 3 - Stopping and searching conveyances - This Division deals with the power of a police officer to stop and search, without warrant, a vehicle in emergency situations. It replaces the existing emergency powers contained in sections 10A and 10B of the Commonwealth Crimes Act which were repealed by section 5 of the new Commonwealth Act. It also replaces the search provisions at section 16 *Police Act 1927* which is repealed by clause 10.

Division 4 - Arrest and related matters - This Division re-enacts powers of arrest without warrant by police and citizens currently at section 352 of the Crimes Act. It also provides for additional conditions on the issue of warrants for arrest. It confers power subject to stringent safeguards to conduct searches of persons, including strip searches, upon or after arrest and regulates the conduct of identification parades, the taking and destruction of fingerprints and other identifying material. Until agreement has been reached by the Standing Committee of Attorneys General on the taking of forensic samples, it incorporates some provision for doing so.

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

privilege is expressly preserved.

Part XA - This Part is inserted to replace current Division 2 (sections 358A to 358E) and is called 'Investigation of Extra-Territorial Offences'.

FINANCIAL IMPACT

The amendments are not expected to have any financial impact on Government expenditure. There may be some overall benefit accruing to courts in terms of reduction of trial times by virtue of reduced contests over evidence.

NOTES ON CLAUSES

Clause 1 - Short Title

This clause is formal. It provides for the short title of the Bill and cites the *Crimes Act 1900* as the "Principal Act".

Clause 2 - Commencement

This clause provides that the Act will commence on notification in the Gazette.

Clause 3 - Principal Act

This clause cites the *Crimes Act 1900* as the "Principal Act".

Clause 4 - Substitution

This clause substitutes the current Division 1 Part X with new "Division 1 - Preliminary". This Division defines various terms used and sets out the relationship between the amendments and other laws of the Commonwealth and the Territory.

Division 1 - Preliminary

Proposed section 349AA - Interpretation

Subsection 349AA is the definition section. The principal words defined include:

'assisting officer' in relation to a warrant as not only a police officer who is assisting in the execution of the warrant but also a person who is not a police officer who has been authorised by the executing officer to assist. However, under section 349ZY a person, who is not a police officer as defined in section 349AA, must not take part in searching, or arresting, a person. The person assisting could for example be a computer expert assisting the police to search for evidential material accessible through a computer.

'evidential material' is a thing relevant to any offence and includes information in an electronic form. Other provisions (such as section 349F) provide how 'evidential material' may be seized, copied, examined and otherwise dealt with by the police.

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

'premises' includes a place and a conveyance, and 'conveyance' includes an aircraft, vehicle, or vessel.

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

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

Proposed section 349AB - Application of Part

This section provides that the amendments do not affect special provisions in other Territory legislation such as the *Drugs of Dependence Act 1989*, *Weapons Act 1991* and various environmental laws which confer powers on inspectors and police. Furthermore, the powers conferred by this Bill can be exercised by police to investigate offences under other Territory Acts notwithstanding the existence of similar powers under those other Acts. It is proposed to examine the powers conferred by these enactments to ensure their consistency with the provisions of the Bill.

Clause 4 also introduces a new "Division 1A - Preventative action". Sections 349A to 349D - currently in Part X of the Crimes Act and mainly used in cases of domestic violence - have been preserved in this new Division.

Clause 5 - Insertion

This clause comprises the substantial amendments being made to the Principal Act.

Division 2 - Search warrants

Proposed section 349E - Issue of search warrants

Subsection 349E(1) A warrant to search premises can be issued if the issuing officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be, within the next 72 hours any evidential material at the premises. The 72 hour limit permits a warrant to be obtained in advance where intelligence suggests that evidential material is to be taken to premises. The same proviso is contained in the Commonwealth provision currently used (section 10).

Subsection 349E(2) A warrant to search a person may be granted if the issuing officer is satisfied by information on oath that there are reasonable grounds for suspecting that the person has, or will within the next 72 hours have, any evidential material in his or her possession. Any such search must be limited to a frisk or ordinary search.

Subsection 349E(3) provides that if the police officer applying for the warrant suspects that, in executing the warrant, it will be necessary to use firearms, the grounds for the suspicion must be stated in the information. This subsection is intended to alert the issuing officer to the possibility of violence. This is considered particularly desirable where it is proposed that tactical response units, special weapons squads and the like will be used.

Subsection 349E(4) requires a police officer to inform the issuing officer if he/she has applied for a warrant in relation to that particular person or premises previously and to state the outcome of those applications. This is designed to guard against forum shopping.

Subsection 349E(5) sets out the matters which must be specified in a warrant. These matters include: the offence to which the warrant relates, a description of the premises, or the name or description of the person to be searched, the kind of evidential material that is to be searched for, the name of the executing officer, the period for which the warrant remains in force (not longer than 7 days) and when the warrant may be executed. This last provision is intended to prevent the unnecessary execution of warrants on homes at night. As an added protection a presumption has been inserted against a search warrant issuing which authorises a search after 9pm and before 6 am (at proposed subsection (9)).

Subsection 349E(6) sets out the additional matters which the issuing officer is to specify in a warrant that relates to premises. These include non-discretionary matters such as the fact that the warrant authorises the seizure of things, other than the evidential material for which it is

specifically issued, which are found and that relate to the warrant offence or another indictable offence where seizure is necessary to prevent concealment, loss or destruction or use of the thing in the commission of an offence. It also requires an express statement as to whether the warrant authorises a frisk or ordinary search of persons at, or near, the premises. This is designed to ensure the issuing officer considers the appropriateness of authorising the search of people. For example, where the premises are used by a large number of members of the public, it would usually not be appropriate.

Subsection 349E(7) concerns warrants that relate to the search of a person. In the same terms as subsection 349E(6), it requires the issuing officer to specify whether the warrant authorises the seizure of things other than the evidentiary material for which it is specifically issued. In addition to this, it requires the issuing officer to state whether a frisk or ordinary search is authorised. A 'frisk search' is a quick running of the hands over the garments whereas an 'ordinary search' may involve the removal of limited outer garments.

Subsection 349E(8) ensures that the 7 day limit on the duration of a warrant does not prevent the issue of further warrants for the same person or premises.

Subsection 349E(9) provides that an issuing officer shall not issue a search warrant which authorises a search after 9 pm and before 6 am unless the issuing officer is satisfied it is necessary to do so for certain specified reasons. This provision was not included in the Commonwealth Act.

Subsection 349E(10) provides that if the application for a warrant is made by telephone the period in which it is believed that the evidential material will be on the premises or person is reduced from 72 to 48 hours and the duration of the warrant must be not more than 48 hours and not 7 days as for warrants obtained in person. If such a warrant is not executed within 48 hours a warrant must be applied for in person unless the police can satisfy the issuing officer of such circumstances of urgency as to authorise the issue of a further telephone warrant.

Proposed section 349F - The things that are authorised by search warrant

These provisions were based on the recommendations of the Gibbs Review. Subsection 349F(1) sets out the activities authorised by a warrant to search premises. A warrant authorises entry and search. It authorises seizure of seizable items and evidential material in relation to the warrant offence or any other indictable offence where this is necessary to preserve the evidence. The warrant also authorises the

searching for and recording of fingerprints and other forensic samples found at the premises. If a warrant to search premises specifically authorises the frisk or ordinary search of a person at, or near, the premises - the executing officer or police officer assisting is empowered to search such a person suspected of having evidential material or seizable items in his or her possession.

Subsection 349F(2) provides that a warrant to search a person is authority subject to the terms of the warrant to conduct a frisk or ordinary search of the person as well as the search of any conveyance used by the person in the last 24 hours for the kind of things specified in the warrant, to seize things found, record finger prints found in the course of the search and to take forensic samples. Subsection 349F(2) also authorises the seizure of other things found during the search believed on reasonable grounds to be connected with either the warrant offence or, subject to conditions, another indictable offence. The subsection also permits the seizure of weapons found during the search if that is necessary to prevent risk of injury to persons in the vicinity. The power to record fingerprints and samples under this section does not include the taking of fingerprints or samples from the body of a person but only from clothing or items found on the premises themselves.

Subsections 349F(3) and (4) oblige those executing the warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed, and as to the type of personal search stipulated.

Subsection 349F(5) authorises the executing police officer to make things seized under the warrant available to other agencies where it is necessary for the purposes of the investigation or prosecution of an offence to which the things relate. Police do not always have the expertise to properly analyse the things seized. In other cases police may seize items relevant to an offence appropriately dealt with by another agency. This was not addressed by the Gibbs Review but was inserted in the Commonwealth Act to remove any doubt about the authority and reflects current practice.

Proposed section 349G - Availability of assistance and use of force in executing warrant

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

Proposed section 349H - Details of warrant to be given to occupier etc.

This section provides that if a warrant in relation to premises or a warrant in relation to a person is being executed, a copy of the warrant must be made available to the occupier of the premises or the person being searched as the case may be. In either case the person responsible for the execution of the warrant must identify himself or herself. Because it is not possible to predict whether any persons at or near warrant premises need to be searched, a person being searched under a warrant in relation to premises need only be shown a copy of the warrant. In order to prevent forgery or other wrongful use of the warrant copy, subsection 349H(5) provides that the copy need not include the signature of the issuing officer or the seal of the Court. This provision has been included at the specific request of the ACT Chief Magistrate.

Proposed section 349J - Specific powers available to police officers executing warrant

Subsection 349J(1) permits the taking of photographs (including video tapes) of the premises or of things at the premises in certain circumstances.

Subsection 349J(2) allows for a limited interruption in the execution of a warrant. The police officers executing the warrant may, if the warrant is still in force, complete its execution after ceasing and leaving the premises for not longer than one hour, or longer if the occupier consents in writing.

Subsection 349J(3) provides that where the execution of a warrant is stopped by order of a court which is later revoked, or reversed on appeal, its execution may be completed provided the warrant is still in force.

Proposed section 349K - Use of equipment to examine or process things

Subsection 349K(1) empowers the executing officer or police officer assisting to bring to the warrant premises any equipment reasonably necessary for the examination, or processing, of things found at the premises to determine whether they are liable to seizure.

Subsection 349K(2) provides that, if it is not practicable to examine or process things at the warrant premises, or if the occupier of the premises agrees in writing, things at the premises may be moved to another place so that the examination or processing can be carried out. For example a substance believed to be narcotics may be taken to a laboratory for analysis - it would not be practicable to analyse it at most

premises. Under section 349ZZD items found not to be evidence of an offence must, unless forfeited, be returned.

Subsection 349K(3) provides that when anything is taken from premises to be examined or processed the occupier must, if practicable, be informed of the address, time and place of the examination and be allowed to attend the examination. This is linked to subsections 349K(1) and (2) and applies where it is reasonably necessary to examine or process the things in order to determine whether they are things that may be seized under the warrant. The requirement is safeguarded by section 349M which relates to compensation payable for damage to equipment during processing of information.

Subsection 349K(4) enables police to operate equipment already at the warrant premises to carry out the examination or processing to determine whether the thing is liable to seizure. This is especially useful for scanning audio or video recordings and the like if the executing officer or police officer believes on reasonable grounds that the equipment is suitable and if the examination can be carried out without damage to the equipment or the thing.

Proposed section 349L - Use of electronic equipment at premises

Subsection 349L(1) provides that the executing officer or an assisting officer (who under section 349AA may be a person who is not a police officer but is authorised by the executing officer to assist, for example a computer expert) may operate equipment at the premises to see whether evidential material is accessible if he or she believes that the equipment may be operated without damaging it. The provision departs from the Gibbs Review by referring to evidential material which is accessible rather than stored, given that satellite and cable technology is such that now information may be obtained from the equipment which is not actually stored (for example, a computer terminal).

Subsection 349L(2) provides that, if evidential material is accessible, a specified officer may seize the equipment or any disk, tape or other associated device, or operate the equipment to obtain a print out and seize documents produced, or copy the records to another storage device and remove it from the premises.

Subsection 349L(3) is intended to encourage the seizure of printouts or duplicate discs wherever possible - as opposed to seizing the equipment. It provides that a police officer may seize equipment under subsection (2) only if it is not practicable to put the material into documentary form or copy them to a storage device or if possession by the occupier of the equipment could constitute an offence. Where original material is seized section 349N requires the police to provide a copy of the thing or information to the occupier unless its possession constitutes an offence.

Subsection 349L(4) provides that the executing officer or police officer assisting may secure the equipment by locking it up or guarding it if he or she believes on reasonable grounds that the evidential material may be accessible by operating the equipment at the premises but expert assistance is needed to operate the equipment and the evidential material may be destroyed or otherwise interfered with if the equipment is not secured in the meantime. This is necessary to ensure that where the equipment is more sophisticated than expected and cannot be accessed or moved, then the opportunity to obtain expert assistance and to preserve evidential material is not lost. Material accessible on a computer can of course be removed with a swift keystroke from an operator. It is possible to pre-program the equipment to erase the evidence in this way. This was not included in the Gibbs Review provision, but is necessary for it to be effective.

Subsection 349L(5) requires the giving of notice to the occupier in cases where equipment may be secured for a period not exceeding 24 hours.

Subsection 349L(6) allows the equipment to be secured for either 24 hours or such lesser period when expert assistance is obtained to operate the equipment for the purposes of the Act.

Subsection 349L(7) allows the executing officer or an assisting officer to apply to the issuing officer for an extension of the time needed for securing the equipment if he or she believes on reasonable grounds that the expert assistance will not be available within that period. The application must satisfy the criteria in subsection 349L(4).

Under subsection 349L(8) the occupier must be given notice and informed that he or she has a right to be heard in relation to the application.

Subsection 349L(9) provides the occupier with a right to be heard in relation to an application under 349L(7).

Subsection 349L(10) provides that the application for an extension must be made in the same manner as an application for the issue of a search warrant.

Proposed section 349M - Compensation

This section provides that if damage is caused to equipment as a result of it being operated as mentioned in sections 349K or 349L and the damage resulted from insufficient care being exercised either in selecting the person to operate the equipment or by the person operating it, compensation is payable to the owner.

In determining the amount of damages payable regard is to be had to whether the occupier had provided any warning or guidance to the operation of the equipment. This is to minimise compensation in cases where there has been a deliberate programming of software to destroy or cause damage if not accessed in a particular manner or where the occupier failed to mitigate damage by providing warning or guidance. The inclusion of these provisions was recommended by the Gibbs Review.

Proposed section 349N - Copies of seized things to be provided

Subsection 349N(1) requires a police officer, on request, to give a copy of a thing or information seized that can be readily copied. This does not apply if no original material was seized under subsection 349L(2) or if possession of the thing seized could constitute an offence.

Proposed section 349P - Occupier entitled to be present during search

Proposed section 349P provides that an occupier or a representative of the occupier may choose to observe the searching of the premises providing the person does not impede the conduct of the search in any way. This has been included to minimise, as far as possible, the potential for actual or alleged planting of material on the premises by the police.

For practical reasons, this right is not intended to have priority over the important safeguards and obligations of Part 1C of the Commonwealth *Crimes Act 1914* when they apply to the person at the same time as section 349P. (In the Territory Part 1C of the Commonwealth *Crimes Act 1914* applies to indictable but not summary offences). If the person has been arrested and is being interviewed in relation to the alleged offence at the same time as the search, Part 1C should operate without being affected by the right to observe the search. Part 1C authorises the police to conduct interviews for a specified time period (usually a maximum of 4 hours) and contains safeguards concerning electronic recording and legal representation in relation to the interview. There are circumstances where there are good police operational reasons for the search to be conducted at the same time as the interview. For example, where the operation is being co-ordinated with searches of other premises at the same time and it eliminates the chance of collusion among co-offenders. In other cases, time may be of the essence in terms of proceeding to other stages of the investigation.

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

size or where there is an opportunity for the destruction or concealment of evidentiary material.

Proposed section 349O - Receipts for things seized under warrant

Proposed section 349Q provides that receipts are to be issued to occupiers for things seized. Under this provision it will be possible for the items to be listed on the same receipt. It is not envisaged that police would be required to identify absolutely every item individually where those items can be adequately identified by a class description.

Proposed section 349R - Warrants by telephone or other electronic means

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

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

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

Proposed section 349S - Restrictions on personal searches

Search warrants cannot authorise either a strip search or a search of a person's body cavities. Strip searches in a post arrest situation are dealt with in proposed sections 349ZM and 3ZN.

Division 3 - Stopping and searching conveyances

Proposed section 349T - Searches without warrant in emergency situations

Sections 349T and 349U empower police to conduct a search of a conveyance in an emergency. Until now ACT police have used section 16 of the *Police Act 1927* and sections 10A and 10B of the *Commonwealth Crimes Act 1914*.

Section 349T applies where a police officer suspects on reasonable grounds that a thing relevant to an indictable offence against any Territory law is in an aircraft, vessel or vehicle. The police officer must also suspect that it is necessary to seize the thing to prevent concealment, loss or destruction and that it is necessary to act without the authority of a search warrant because the circumstances are so serious and urgent. Under such circumstances a police officer may stop, detain and search the conveyance, and seize the thing.

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

Subsection 349T(4) provides that the police officer must exercise his or her powers subject to section 349U which provides various safeguards.

Proposed section 349U - How a police officer exercises power under section 349T

When a police officer exercises powers under section 349T he or she may use such assistance as is necessary, must search the conveyance in a public place or place to which the public have ready access and must not detain the conveyance for longer than is necessary.

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

Division 4 - Arrest and related matters

Proposed section 349V - Requirement to furnish name etc.

This section empowers a police officer to ask the name and/or address of a person where these are not known to the police officer and he or she believes that the person may be able to assist in inquiries in relation to an offence that the police officer has reason to believe has been or may have been committed. It varies from the provision recommended by the Gibbs Review by not applying to offences that the police officer has reason to believe are likely to be committed. It also varies from the Commonwealth Act in that it applies to summary as well as to indictable offences. This adapts the section to community policing situations. An extra protection is added at subsection 349V(4), to balance this expanded power.

Subsection 349V(2) creates, subject to certain conditions precedent, an offence of failing to provide or falsifying the information requested. The maximum penalty is \$500. The conditions are that the police officer informs the person of the reason for the request and compliance by the police officer with proposed subsection 349V(3).

Subsection 349V(3) requires that when requested the police officer must inform the person of his or her own name and/or place of duty, and if in plain clothes, provide identification. There is a penalty of \$500 if the police officer does not comply with the request. These safeguards were recommended by the Australian Law Reform Commission Report and the Gibbs Review.

As an extra protection for the individual in the local situation is subsection 349V(4) which provides that a police officer who demands a name and/or address from a person is required to record as soon as practicable the grounds for his or her belief that the person could assist with inquiries into an offence. This was a recommendation of the ACT Criminal Law Consultative Committee.

Proposed section 349W - Power of arrest without warrant by police officers

This section re-enacts the existing powers of arrest without warrant conferred on police officers which are contained in subsections 352(2) and 352(2A) of the Crimes Act and are repealed by clause 6 of this Bill. The provision details the circumstances where a person may be arrested without warrant. These relate to varying specified situations where proceeding by summons would not be effective.

Subsection 349W(1) provides that a police officer may, without warrant, arrest a person for an offence if the police officer believes on reasonable grounds firstly that the person has committed or is committing the offence and secondly that proceedings by summons against the person would not achieve one or more of a number of specific purposes. Those purposes are, ensuring the person's appearance in court, preventing a repetition or continuation of the offence or the commission of another offence, preventing the concealment, loss or destruction of evidence, preventing interference with witnesses, preventing the fabrication of evidence or preserving the safety or welfare of the person.

Subsection 349W(2) requires the police officer in charge of the investigation who ceases to believe that a person arrested but not charged either committed the offence or that custody is necessary to achieve a purpose referred to in subsection (1) to release the person.

Subsection 349W(3) provides that a police officer may, without warrant, arrest a person who he or she believes on reasonable grounds has escaped from lawful custody. It is inappropriate that the restriction relating to proceedings by summons should apply in these circumstances. This reflects the view of the Gibbs Review.

Proposed section 349X - Arrest without warrant in possession

Subsections 352(3) and (4) of the Crimes Act are preserved in this section and provide that there is no requirement that the police officer must have the warrant on his or her person when arresting a person for whom a warrant is in existence.

Proposed Section 349Y - Arrest of prisoner unlawfully at large

This section is in similar terms to the existing section 5B of the ACT *Removal of Prisoners Act 1968*. But whereas that provision covers only a person in custody for an offence against a law of the Territory the new provision (corresponding to the Commonwealth's section 3X) covers persons who were detained under a law of the Territory, a State or another Territory.

The section provides that a police officer may, without warrant, arrest a person who the police officer believes on reasonable grounds to be a prisoner 'unlawfully at large.' This is intended to cover persons who leave some place of detention with permission and who fail to return as required or who is released in error, for example a case of mistaken identity. The arresting police officer must, as soon as practicable, take the person before a Magistrate. If the Magistrate is satisfied that the person is unlawfully at large he or she may issue a warrant authorising that person to be conveyed to prison (or other place of detention) to

undergo the term of imprisonment or other detention that the person is required by law to undergo.

Proposed section 349Z - Power of arrest without warrant of person on bail

This section re-enacts sections 53 and 54 of the *Bail Act 1992*. These sections in the Bail Act are repealed by clause 11. The section empowers a police officer to arrest without warrant a person who has contravened, or is about to contravene, a condition of bail, whether the conditions were imposed in the Territory, a State or another Territory.

Subsection 349Z(2) provides that a person arrested under subsection (1) must be taken before a court as soon as practicable.

Paragraph 349Z(3)(a) provides for a person on whom a bail condition was originally imposed by the Territory, and paragraph 349Z(3)(b) provides for a person on whom a bail condition was imposed by a State or another Territory. In the case of a person in the latter category the court can release the person without effecting the original bail order, or remand the person on bail or in custody pending arrangements under the *Service and Execution of Process Act 1992* for the obtaining of a warrant authorising the transfer of the person to the State or Territory in which the bail condition was imposed.

Proposed section 349ZA - Arrest for breach of bail conditions by person outside the Territory

Currently no ACT legislation provides authority for an ACT police officer to apply for a summons or for a warrant for the apprehension of a person who is in another State or Territory and who has breached a condition of bail imposed in the ACT. This section inserts a provision which allows a warrant and also a summons to issue in relation to a person in another State or Territory where that person has breached a bail condition imposed in the ACT.

Proposed section 349ZB - Arrest without warrant for offences committed outside Territory

This section re-enacts section 352A of the Crimes Act.

Proposed section 349ZC - Power of arrest without warrant by other persons

This section replaces the existing power of arrest without warrant for an offence by any person under section 352 of the Crimes Act referred to as 'citizen's arrest', which is repealed by clause 6. (The Commonwealth amendments have not been followed in their entirety because they

require citizens to know what are indictable offences and whether it would be possible to proceed by summons rather than by arrest and it is considered that an ordinary citizen would not be in a position to know these things.)

Subsection 349ZC(1) provides that 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 committed an offence.

Subsection 349ZC(2) provides that a citizen who arrests another person under subsection (1) must, as soon as practicable after the arrest, arrange for the person, and any property found on that person, to be delivered into the custody of a police officer. This may involve either taking the person to police or calling police. This requirement reflects the views of the Gibbs Review and the current law in the ACT.

Proposed section 349ZD - Warrants for arrest

This provision does not confer a power to issue warrants of arrest; these powers are still conferred by section 42 of the *Magistrates Court Act 1930*. These provisions merely specify additional procedures which must be complied with before a warrant of arrest can be issued for an offence. These procedures were recommended by the Gibbs Review. This section provides that an issuing officer must not issue a warrant for the arrest of a person unless the information is on oath and generally the informant has given the officer an affidavit setting out the reasons why the warrant is sought including the reasons why it is believed that the person committed the offence and why it is claimed that proceedings by summons would not be appropriate. The requirement for the affidavit contained in paragraph 349ZD(1)(b) does not apply where the warrant is required to make an extradition request of any foreign country.

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

Proposed section 349ZE - Power to enter premises to arrest offender

Subsection 349ZE(1) provides that if a police officer has power under a warrant to arrest a person and the police officer believes on reasonable grounds that the person is on any premises he or she may enter the premises, using reasonable force at any time, subject to the conditions in subsection 349ZE(3) being met, for the purpose of searching for, and

arresting, the person.

Subsection 349ZE(2) provides that if a police officer has power under proposed section 349W to arrest a person without warrant for an indictable offence and the police officer believes on reasonable grounds that the person is on any premises he or she may enter the premises using reasonable force at any time, again subject to subsection 349ZE(3) for the purpose of searching for, and arresting, the person. At common law a police officer has power to enter premises to effect an arrest with or without the authority of a warrant. These provisions restrict that power in relation to arrest without warrant to indictable offences.

Subsection 349ZE(3) states the general rule that entry to domestic premises to effect arrest should not be conducted at night. It precludes a police officer entering a dwelling house (as defined) to arrest a person between 9 pm and 6 am on the following day unless the police officer believes on reasonable grounds that it would not be practicable to arrest the person either at the dwelling house or elsewhere, at another time or believes on reasonable grounds that it is necessary to prevent the concealment, loss or destruction of evidence.

Subsection 349ZE(4) provides that "dwelling house" includes a vehicle, a vessel or an aircraft, or a room in a hotel, motel, boarding house or club in which people ordinarily retire for the night.

Proposed section 349ZF - Use of force in making arrest

Subsection 349ZF(1) restates the common law principle that, in making an arrest, a person must not use more force, or subject the arrested person to greater indignity, than is necessary and reasonable to make the arrest or prevent the escape of the arrested person after the arrest.

Subsection 349ZF(2) provides that when arresting a person a police officer must not do anything likely to cause the death of, or grievous bodily harm to, the person unless the police officer believes on reasonable grounds that is necessary to protect life or prevent serious injury to another person, including the police officer. If the person is attempting to escape by fleeing, the police officer must not, as a general rule, act in a way likely to cause serious injury or death unless the person has been called on to surrender and the police officer believes on reasonable grounds that the person cannot be apprehended in any other manner. This provision restates the common law with some of the restrictions superimposed in the manner recommended by the Gibbs Review.

Proposed section 349ZG - Persons to be informed of grounds of arrest

The section provides that a citizen, or police officer, who arrests a

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

Proposed section 349ZH - Power to conduct frisk search of an arrested person

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

'Frisk search' and 'seizable item' are defined in section 349AA and pursuant to section 349ZZ must, if practicable, be conducted by a person of the same sex.

Proposed section 349ZJ - Power to conduct ordinary search of an arrested person

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

'Ordinary search' is defined in section 349AA and means a search of a person, or of articles in the person's possession, that may include requiring the removal of specified outer clothing, gloves, shoes and hat and an examination of those items. Where practicable, such a search must be conducted by a person of the same sex as the person to be searched - section 349ZZ.

Proposed section 349ZK- Power to conduct search of arrested person's premises

This section provides that 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 which the police officer believes to be evidential material of that, or another offence, or a seizable item. While a thing must be in plain view before it can be seized this does not prevent its movement or manipulation to determine whether it is

evidential material or a seizable item. This power is more limited than that available in the United Kingdom under the *Police and Criminal Evidence Act 1984* in that it precludes a full search of the premises. Police would need to obtain a warrant, at least by telephone, before that could be done.

Proposed section 349ZL- Power to conduct ordinary search

In line with the recommendations of the Gibbs Review, subsection (1) provides that if a person who has been arrested for an offence is brought to a police station, a police officer may conduct an ordinary search.

Subsection 349ZL(2) was not in the Commonwealth Act. The Commonwealth Act allows only one ordinary search to be conducted from the time of a person's arrest until police detention ceases. This is partly because the AFP in States would normally hand the person over to the relevant State police force, where that State's custodial procedures would apply. The proposed subsection envisages a further ordinary search when a police officer believes on reasonable grounds that the person may be carrying an item that would present a danger to a person, could be used to assist an escape or is evidential material. The major consideration in including this provision is to ensure that procedures are in place which go as far as possible to prevent deaths in custody.

Proposed section 349ZM - Power to conduct strip search

This section stipulates the conditions under which a strip search may be conducted.

'Strip search' is defined in section 349AA and means a search of a person, or of articles in the person's possession and may include requiring the removal of all the person's clothes and an examination of the person's body and of the garments. However, this provision does not confer power to take any body samples, search body cavities but only to examine the body surface for things such as bruises, scratches and identifying marks.

Section 349S makes it clear that nothing in this Part can authorise a search of a person's body cavities. The law relating to such searches will be addressed in separate legislation which is being developed by the Standing Committee of Attorneys-General. In the meantime the power to take other samples, eg of hair or body fluids is at section 349ZX, and section 349ZZG provides that this Part is not intended to limit or exclude the operation of another law of the Territory in the area.

Subsection 349ZM(2) provides that a strip search may be conducted if a police officer suspects that the person is in possession of evidential material or a seizable item or that a visual inspection of the person's body will provide evidence of the person's involvement in an offence. Before the search may be conducted the police officer must also suspect that it is necessary to conduct a strip search to recover that item, or discover that evidence, and must obtain the approval of police officer of the rank of superintendent or higher.

Subsection 349ZM(3) provides that a strip search may also be conducted if the arrested person consents in writing but this is subject to paragraphs 349ZN(1)(e) and (f) which provide that a child under 10 must not be strip searched and that, except where the person is arrested and charged, a court order is required where the child is at least 10 but not 18 or the person is incapable of managing his or her affairs. In other cases the remaining provisions must be complied with.

Subsection 349ZM(4) provides that the strip search may be conducted in the presence of a medical practitioner who may assist in the search.

Subsections 349ZM(5) and (6) provide that the approval from the senior police officer to conduct a strip search may be obtained by telephone or by electronic means and the officer who gives, or refuses, such approval must make a record of the decision and the reasons for it.

Subsections 349ZM(7) and (8) provide that such force as is necessary and reasonable in the circumstances may be used to conduct a strip search and any items of the kind referred to in subsection 349ZM(2) found may be seized.

Proposed section 349ZN - Rules for conduct of strip search

Subsection 349ZN(1) sets out the procedure to be followed whenever a strip search is conducted as an incident of arrest. A strip search must be conducted in private by a police officer of the same sex as the person being searched and must not involve a search of the person's body cavities. Except in the case of a medical practitioner or a parent, guardian or personal representative (where the person being searched has no objection), a strip search must not be conducted in the presence, or view, of a member of the opposite sex nor in the presence of a person whose presence is not necessary for the purposes of the search.

It also provides that a child under 10 must not be strip searched and that, except where the person is arrested and charged, a court order is required where the child is at least 10 but not 18 or the person is incapable of managing his or her affairs. This is designed to protect the interests of young people and those who are incapable. Parental consent

alone may not always be an adequate safeguard. Additionally, in most jurisdictions a child under 10 is not criminally responsible for an offence. The proposed Model Criminal Code (Chapter 2) recommends that 10 should be the national age of criminal responsibility.

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

Subsection 349ZN(2) requires the court to have regard to the seriousness of the offence, the age or disability of the person, and such other matters as it thinks fit when determining whether a young person or an incapable person should be the subject of a strip search.

Subsection 349ZN(3) provides that a strip search may only be conducted in the presence of a medical practitioner of the opposite sex to the person being searched if a medical practitioner of the same sex is not available within a reasonable time. Subsection 349ZN(4) allows a parent, guardian or personal representative of a different sex to be present where the person being searched has no objection.

Subsection 349ZN(5) provides that if any garments are seized the person must be given adequate clothing.

Subsection 349ZN(6) re-enacts subsection s353A(1) of the Crimes Act (repealed under clause 6) to take account of the fact that a 'police officer' of the same sex may not always be available.

Subsection 349ZN(7) re-enacts subsection s353A(1A) of the Crimes Act (repealed under clause 6) which protects a person requested to attend under subsection 349ZN(6) from civil or criminal liability.

Proposed section 349ZP - Taking fingerprints, recordings, samples of handwriting or photographs

Subsection 349ZP(1) defines 'identification material', for the purposes of this section and proposed sections 349ZQ and 349ZR, as prints of hands, fingers, feet or toes, voice recordings, handwriting samples or photographs (including video recordings) but excluding tape recordings of a person's responses or confessions made during the investigation of offences under sections 23U and 23V in Part IC of the *Crimes Act 1914*.

Subsection 349ZP(2) provides that a police officer must not take identification material from a person who is in lawful custody for an

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

Subsection 349ZP(3) provides that if a person is in lawful custody in respect of an offence, a police officer of the rank of sergeant or higher or who is for the time being in charge of a police station may take identification material from the person if:

- the person consents in writing (except where the person is incapable, in which case subsection 349ZP(5) applies);

- the police officer believes on reasonable grounds that it is necessary to do so in order to establish the identity of the person, or to identify the person as the person who committed the offence, or to provide evidence of the offence; or

- the police officer suspects on reasonable grounds that the person has committed another offence and the material is to be taken for the purpose of identifying the person as committing, or to provide evidence of, the other offence.

Subsection 349ZP(4) provides that a police officer may use reasonable force in the taking of identification material.

Subsection 349ZP(5) provides that identification material cannot be taken from a suspect who is incapable and who has not been arrested and charged unless there is a court order authorising the taking. This is designed to protect the interests of those who are incapable. Parental or guardian consent alone may not always be an adequate safeguard.

Subsection 349ZP(6) requires the court to have regard to the seriousness of the offence, the age or disability of the person, and such other matters as it thinks fit when determining whether an incapable person should have identification material taken from them.

The rights of incapable persons are adequately protected by a requirement in subsection 349ZP(7) that the taking of identification material must only be conducted in the presence of a parent or guardian or personal representative if their presence is acceptable to the person.

Subsection 349ZP(8) provides that in the case of incapable people who are not suspects (victims), the question of whether the identification material should be taken would always be determined by a court. In

those cases they will, in most instances, not be able to provide meaningful input and should have the protection of the court in all circumstances.

Subsection 349ZP(10) deals with adults who are capable of managing their own affairs and who are not suspects. Identification material may be taken from them if the person consents in writing.

Subsection 349ZP(11) preserves the former subsection 353A(4) of the Crimes Act which stipulates that all of the provisions in the section are subject to the *Childrens Services Act 1986*.

Proposed section 349ZQ - Destruction of identification material

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

Unless criminal proceedings have been instituted within 12 months, subsection 349ZQ(1) requires the destruction of identification material unless there is an order to the contrary by a Magistrate made under subsection 349ZQ(3).

Where proceedings have commenced and resulted in either a finding of guilt but no conviction is recorded or an acquittal which is no longer the subject of an appeal and no retrial has been ordered, subsection 349ZQ(2) requires that any identification material must also be destroyed unless an investigation into, or proceedings for, another offence to which the identification material is relevant is pending.

Under subsection 349ZQ(3) a Magistrate can authorise police to retain identification material which would otherwise need to be destroyed if he or she is satisfied that retention is justified by the existence of circumstances which render application of the general rule inappropriate. It is not intended that the threshold of 'special' circumstances be particularly difficult to cross. There will be many serious offences where investigations will be protracted through no fault of police. Nor is it intended that material be destroyed because it was taken in relation to one offence which is not being proceeded with or of which the person was acquitted if charges are pending in relation to a related offence or another offence.

Proposed section 349ZR - Offence of refusing to allow identification material to be taken

This section provides that if a person is convicted of an offence, the Judge or Magistrate presiding at the proceedings may order either that the person attend a police station, or that a police officer go to the

person if in detention, to allow the person's fingerprints or a photograph to be taken. It is an offence for a person, without reasonable excuse, to fail or refuse to allow those fingerprints or a photograph to be taken. The maximum penalty for an offence under this section is \$10,000 or 12 months imprisonment or both. This provision was recommended by the Gibbs Review to cover situations where police would be entitled to retain fingerprints had they been taken during the investigation. This would permit the taking of fingerprints and photographs in cases where a person is convicted after proceedings instituted by summons and avoids a temptation to proceed by way of arrest. This is necessary for the identification of the person in the event that he or she commits another offence at some other time. Identification is necessary for investigative purposes and to ensure that the person is appropriately sentenced for any subsequent offence, (that is, prior convictions are appropriately taken into account).

Proposed section 349ZS - Identification parades - general

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

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

Subsection 349ZS(3) provides that an identification parade must not be held unless the suspect is informed that:

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

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

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

Identification parade procedures in proposed paragraph 3ZS(3)(c) ensure that a suspect, (whether the person is an adult, child or incapable

person) is entitled to have a legal representative (or other person) present while he or she is deciding whether to take part in an identification parade if this can be done in a reasonable time. This is designed to ensure that the suspect is aware of the consequences of not participating in the parade as set down in proposed subsection 349ZS(7)

Subsection 349ZS(4) provides that the giving of this information must be either videotaped or audiotaped.

Subsection 349ZS(5) requires an identification parade to be arranged and conducted fairly so as not to prejudice the suspect.

Subsection 349ZS(6) provides a number of rules for the conduct of an identification parade. At present these rules are generally set out in police standing orders but the most significant are set out in the Bill and are as recommended by the Gibbs Review. These rules are to apply without limiting the intent of subsection 349ZS(5) and include that:

the parade consists of at least 9 persons;

they resemble the suspect in age, height and general appearance;

where practicable, no police officer who has participated in the investigation may take part in arranging, or conducting, the identification parade;

the suspect can select where he or she stands in the parade and may change places after each viewing by a witness;

witnesses view the parade separately and not communicate with each other;

the parade be videotaped, or, if this is not practicable, photographed in colour and all reasonable steps are taken to record everything said and done at the parade;

copies of the videotape or photograph and record be given to the suspect;

the suspect may have a legal representative or other person of his or her choice present.

Subsection 349ZS(7) provides that certain questions are to be decided according to common law in relation to whether evidence of a suspect's refusal to participate in a parade is admissible, what inferences may be drawn if the refusal is admissible and whether evidence of alternative methods of identification is admissible after such refusal.

Subsection 349ZS(8) provides that if a witness under the supervision of a police officer is to attempt to identify a suspect otherwise than during an identification parade, the police officer must ensure that the attempted identification is done in a manner that is fair to the suspect person.

Proposed section 349ZT - Identification parades for suspects under 18 etc

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

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

First, where the person is asked to agree to a request that they participate in the parade. Proposed subsection 349ZT(3) provides that a child suspect who is at least 10 but under 18 cannot agree to participate in an identification parade unless there is also agreement from the parent or guardian (if that person is acceptable to the child) or personal representative. If there is no agreement then a court must determine whether the person should participate in the parade. This provides for input from the child and the protection of the court where agreement cannot be reached. In some circumstances the child's interests may not be adequately protected by the parent, guardian or personal representative, (for example, where there has been abuse of the child).

Secondly, where the person proposes on his or her own initiative to request the police to hold an identification parade (which under proposed paragraph 349ZS(2)(b) the police must hold), in the case of a child suspect the request may only be made if there is also agreement from the parent, guardian (if that person is acceptable to the child) or personal representative. If there is no agreement then a court must determine whether the person should participate in the parade. This is also provided for by proposed subsection 349ZT(1). This also provides for input from the child and the protection of the court where agreement cannot be reached.

Proposed section 349ZU - Identification by means of photographs

Subsection 349ZU(1) prevents the use of photographs if a suspect is in custody, or is otherwise available to take part in an identification parade, unless the suspect has refused to take part in a parade, or the holding of a parade would either be unfair or unreasonable. This

reinforces the position of identification parades as the preferred mode of identification.

Subsection 349ZU(2) sets out a number of other procedural requirements for the use of photographs to ascertain the identity of a suspect who is in custody or is otherwise available if an identification parade is not to be held for the reasons set out in subsection 349ZU(1). These requirements include the number and nature of photographs or pictures to be used, the keeping and provision of copies of records and allowing inspection of photographs and pictures by the suspect or his or her legal representative. It also provides that the suspect or his or her legal representative is informed in writing that a copy of the record identifying each photograph shown to witnesses is available.

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

Subsection 349ZU(3) provides that if a photograph or picture of a suspected person, taken, or made, after arrest or after the person became a suspect, is shown to a witness and proceedings in relation to an offence are brought before a jury and the photograph or picture is admitted into evidence, the jury must be informed of the time when the photograph was taken. This provision is intended to overcome the possible prejudice to an accused person which might arise from the jury concluding that, because police were in possession of a photograph of the accused, the accused was previously known to police.

Subsection 349ZU(4) provides that if a suspect is in custody an investigating police officer must not use a composite (identikit) picture or a picture of a similar kind for the purpose of assisting the witness to describe that suspect.

Subsection 349ZU(5) provides that if a witness has been shown a composite picture and subsequently a suspect is taken into custody for the offence, the police officer should ask the witness to attend an identification parade involving the suspect and make the necessary arrangements if the witness is willing to attend.

Subsection 349ZU(6) provides that if after a witness has been shown a composite picture a person is subsequently charged with the offence, the police officer must, upon request, provide the person charged, or his or her legal representative, with particulars of the picture and any comments by the witness concerning the picture.

Subsection 349ZU(7) provides that if a suspect is in custody and an investigating police officer wishes to investigate the possibility that another person committed the offence, subsection 349ZU(4) does not prevent a police officer showing a witness a composite picture for the purpose of assisting a witness to describe a person other than the suspect.

Proposed section 349ZV - Identification procedures where there is more than one suspect

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

Proposed section 349ZW - Descriptions

Subsection 349ZW(1) requires a description of a suspect given to a police officer to be recorded and retained until any proceedings are completed.

Subsection 349ZW(2) provides that subject to subsection (4) a police officer must, on request, provide a person charged with an offence with the name of every person who is known to claim to have seen a person who is suspected of being involved in the offence.

Subsection 349ZW(3) introduces a requirement that the police officer must notify the person charged in writing that a copy of the record of a description of a person who is suspected of being involved in the commission of the offence is available for collection.

Subsection 349ZW(4) provides that if the police officer suspects on reasonable grounds that providing the name of a person could place the person in danger or expose the person to harassment or unreasonable interference, any description of the suspect may be provided without identifying the person who provided the description.

Proposed section 349ZX - Taking of forensic samples

This section has been adapted from the current subsections 353A(2), (1A) and (4) of the Crimes Act because it incorporates some provision for taking samples. It is to remain in the Act until agreement has been

reached by the Standing Committee of Attorneys General on legislation which provides for the taking of forensic samples. Uniform legislation is expected to be agreed in 1994/5.

Subsection 349ZX(2) has been inserted to protect a medical practitioner from liability when the practitioner has been requested by police to examine a person in custody. Such a protection from liability already exists in the Crimes Act for other persons.

Division 5 - General

Proposed section 349ZY - Assisting officers - search and arrest of persons

This section ensures that an officer who is defined as an assisting officer does not take part in searching or arresting a person.

Proposed section 349ZZ - Conduct of ordinary and frisk searches

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

Proposed section 349ZZA - Announcement before entry

This requirement was not addressed by the Gibbs Review but is based on the recommendations of Judge Staunton following the Brennan inquiry and the inquiry into the Gundy case by the Royal Commission into Aboriginal Deaths in Custody. The section provides that before any person enters premises under a search warrant or for the purposes of arresting a person the police officer must announce that he or she is authorised to enter and give any person at the premises an opportunity to allow entry to the premises unless there are reasonable grounds to believe that immediate entry to the premises is required to ensure the safety of a person or that the effective execution of the search warrant or the arrest is not frustrated.

Subsection 349ZZA(3) excludes entry under section 349C from this requirement.

Proposed section 349ZZB - Offence of making false statements in warrants

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

Proposed section 349ZZC - Offences relating to telephone warrants

This section creates offences arising from the preparation, and execution, of a form of warrant obtained by telephone or other electronic means under section 349R. It is an offence for a person to name a person in a form of warrant as the issuing officer unless that officer issued the warrant, or to knowingly state in a warrant something materially different from that authorised by the issuing officer. It is also an offence to purport to execute an unauthorised or false form of warrant or to give an issuing officer a form of warrant that is not in the form that the person purported to execute. Offences under this section are punishable by imprisonment for up to 2 years. These offences are intended to prevent abuses of telephone search warrants by police and were recommended by the Gibbs Review.

Proposed section 349ZZD - Retention of things which are seized

Subsection 349ZZD(1) provides that subject to a contrary order of the court, where things are seized under Division 2, 3 or 4 of this Part they must be returned if the reason for their seizure ceases to exist or it is decided that the seized items are not to be used in evidence. Additionally, if a police officer seizes a thing in an emergency situation under proposed section 349T, the police officer must return it when the reason for its seizure no longer exists or it is decided that it is not to be used in evidence or 60 days have elapsed since seizure, whichever occurs first. This reflects the fact that seizure in these circumstances is not judicially sanctioned.

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

Subsection 349ZZD(2) provides that, subject to certain exceptions, where goods have been seized by way of emergency search, they must be returned after 60 days. The exceptions, in addition to those set out in subsection 349ZZD(1), are that relevant proceedings have been instituted and are not concluded, a court has ordered to the contrary pursuant to section 349ZZE or there are other lawful grounds to retain, destroy or dispose of the things.

Proposed section 349ZZE - Magistrates Court may permit a thing to be retained

Before the end of 60 days after emergency seizure under section 349T or before the end of a period previously specified in an order of a court, if proceedings in which the thing may be evidence have not commenced,

the police officer may apply for an order to retain the item for a further period. The police are required to notify each person the police officer believes has an interest in an application for an extension of the 60 day period during which the police may retain seized items. The police officer is required to take reasonable steps to discover who has an interest in the retention of the thing.

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

Proposed section 349ZZF - Law relating to legal professional privilege not affected

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

Proposed section 349ZZG - Laws relating to taking forensic samples not affected

This section provides that nothing in the Bill is intended to limit, or exclude another law of the Territory relating to the taking of forensic samples. This ensures that despite some references in the Bill to the taking of forensic samples (excluding taking of identification material as defined in proposed section 349ZP) police investigating offences will be able to avail themselves of any other relevant laws.

Clause 6 - Repeal

This clause repeals some of the existing sections of the Crimes Act relating to arrest and investigation. Section 352 - arrest of persons suspected of having committed or of being about to commit an offence - is replaced by sections 349W and 349ZC. Section 353 - citizens arrest of persons offering stolen property- has not been replaced. Section 353A - power to search and medically examine a person and take fingerprints etc - has been replaced by various sections in this Act.

Clause 7 - Provisions of interpreters in the investigation of summary offences

The clause omits some redundant definitions.

Clause 8 - Division heading

This clause inserts a new Part XA - Investigation of Extra-Territorial Offences - replacing the previous Division 2 of Part X.

Clause 9 - Further amendments

Further amendments to the Principal Act are specified (in Schedule 1).

Clause 10 - Repeal of *Police Act 1927*

This clause repeals the Police Acts specified in Schedule 2.

Clause 11 - Consequential amendments

Schedule 3 specifies the following changes to other legislation:

Sections 53 and 54 of the *Bail Act 1992* have been repealed because they have been incorporated into section 349Z of this Act.

Section 13 of the *Police Act 1927* has been inserted into the *Crimes (Offences Against the Government) Act 1989* as section 17A.