



# Crimes Act 1914

## Act No. 12 of 1914 as amended

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taking into account amendments up to Act No. 127 of 2010

**Volume 1** includes: Table of Contents  
Sections 1–23WLA

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section

**Volume 2** includes: Table of Contents  
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# An Act relating to Offences against the Commonwealth

## Part I—Preliminary

### 1 Short title [see Note 1]

This Act may be cited as the *Crimes Act 1914*.

### 3 Interpretation

(1) In this Act, unless the contrary intention appears:

**Aboriginal person** means a person of the Aboriginal race of Australia.

**ACC** means the Australian Crime Commission.

**associated offence** means:

- (a) in relation to an offence against section 233B of the *Customs Act 1901*—an ancillary offence (within the meaning of the *Criminal Code*) that relates to the offence; or
- (b) in relation to an offence against section 10, 11, 12, 13 or 14 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*—an ancillary offence (within the meaning of the *Criminal Code*) that relates to the offence; or
- (c) in relation to an offence against a law of a State or Territory—an offence:
  - (i) under a provision of a law of that State or Territory that corresponds to a provision of Part 2.4 of the *Criminal Code*; and
  - (ii) that relates to the offence.

**Australian law enforcement officer** means a law enforcement officer other than a member of a police force, or other law enforcement agency, of a foreign country.

**bail authority** means a court or person authorised to grant bail under a law of the Commonwealth, a State or a Territory.

**child:** without limiting who is a child of a person for the purposes of this Act, someone is the **child** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.

**child abuse material** has the same meaning as in Part 10.6 of the *Criminal Code*.

**child pornography material** has the same meaning as in Part 10.6 of the *Criminal Code*.

**Commissioner** means the Commissioner of the Australian Federal Police.

**Commonwealth child sex offence** means:

- (a) an offence against any of the following provisions of the *Criminal Code*:
  - (i) Division 272 (Child sex offences outside Australia);
  - (ii) Division 273 (Offences involving child pornography material or child abuse material outside Australia);
  - (iii) Subdivisions B and C of Division 471 (which create offences relating to use of postal or similar services in connection with child pornography material, child abuse material and sexual activity involving children);
  - (iv) Subdivisions D and F of Division 474 (which create offences relating to use of telecommunications in connection with child pornography material, child abuse material and sexual activity involving children); or
- (b) an offence against section 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to an offence described in paragraph (a) of this definition; or
- (c) an offence against a provision described in paragraph (a) of this definition that is taken to have been committed because of section 11.2, 11.2A or 11.3 of the *Criminal Code*.

Note: Part IE also applies as if offences against certain other provisions in force before the commencement of that Part were Commonwealth child sex offences: see Schedule 2 to the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*.

**Commonwealth offence**, except in Part IC, means an offence against a law of the Commonwealth.

**Commonwealth officer** means a person holding office under, or employed by, the Commonwealth, and includes:

- (a) a person appointed or engaged under the *Public Service Act 1999*;
- (aa) a person permanently or temporarily employed in the Public Service of a Territory or in, or in connection with, the Defence Force, or in the Service of a public authority under the Commonwealth;
- (b) the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police (all within the meaning of the *Australian Federal Police Act 1979*); and
- (c) for the purposes of section 70, a person who, although not holding office under, or employed by, the Commonwealth, a Territory or a public authority under the Commonwealth, performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth; and
- (d) for the purposes of section 70:
  - (i) a person who is an employee of the Australian Postal Corporation;
  - (ii) a person who performs services for or on behalf of the Australian Postal Corporation; and
  - (iii) an employee of a person who performs services for or on behalf of the Australian Postal Corporation.

**constable** means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

**controlled substance** means:

- (a) a controlled drug or border controlled drug within the meaning of Part 9.1 of the *Criminal Code*; or
- (b) a controlled plant or border controlled plant within the meaning of Part 9.1 of the *Criminal Code*; or
- (c) a controlled precursor or border controlled precursor within the meaning of Part 9.1 of the *Criminal Code*.

**conveyance** includes an aircraft, vehicle or vessel.

**data** includes:

- (a) information in any form; and
- (b) any program (or part of a program).

***data storage device*** means a thing containing, or designed to contain, data for use by a computer.

***de facto partner*** has the meaning given by the *Acts Interpretation Act 1901*.

***dentist*** means a dental practitioner within the meaning of the *Health Insurance Act 1973*.

***Deputy Commissioner*** means a Deputy Commissioner of the Australian Federal Police.

***federal aspect***, in relation to an offence against a law of a State or of the Australian Capital Territory, has the meaning given by subsection 3AA(1).

Note: This subsection defines ***State*** to include the Northern Territory.

***federal court*** means the High Court or a court created by the Parliament, other than a court of a Territory.

***have in possession*** includes having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question.

***illicit goods*** means goods the possession of which is a contravention of a law of the Commonwealth, a State or a Territory.

***Integrity Commissioner*** has the same meaning as in the *Law Enforcement Integrity Commissioner Act 2006*.

***law enforcement officer*** means any of the following:

- (a) the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police (all within the meaning of the *Australian Federal Police Act 1979*);
- (b) a member of the police force of a State or Territory;
- (ba) a staff member of ACLEI;
- (c) a member of the staff of the ACC;
- (d) an officer of Customs;

- (e) a member of a police force, or other law enforcement agency, of a foreign country.

**medical practitioner** has the same meaning as in the *Health Insurance Act 1973*.

**member of the staff of the ACC** has the same meaning as in the *Australian Crime Commission Act 2002*.

**narcotic goods** has the same meaning as in the *Customs Act 1901*.

**nurse** means a registered nurse within the meaning of the *Health Insurance Act 1973*.

**Official Trustee** means the Official Trustee in Bankruptcy.

**parent**: without limiting who is a parent of a person for the purposes of this Act, someone (the **adult**) is the **parent** of a person if:

- (a) the adult is legally entitled to, and has, custody of the person; or
- (b) the adult is legally responsible for the day-to-day care, welfare and development of the person and has the person in his or her care.

**property** includes money and every thing, animate or inanimate, capable of being the subject of ownership.

**public authority under the Commonwealth** means any authority or body constituted by or under a law of the Commonwealth or of a Territory.

**quarter** means a period of 3 months ending on 31 January, 30 April, 31 July or 31 October.

**Queen's dominions** includes a British protectorate and a British protected State.

**relative** has a meaning affected by subsection (3).

**senior executive AFP employee** has the same meaning as in the *Australian Federal Police Act 1979*.

**staff member of ACLEI** has the same meaning as in the *Law Enforcement Integrity Commissioner Act 2006*.

**State** includes the Northern Territory.

**State offence** means an offence against a law of a State or the Australian Capital Territory.

**Territory** does not include the Northern Territory.

**terrorism offence** means:

- (a) an offence against Subdivision A of Division 72 of the *Criminal Code*; or
- (b) an offence against Part 5.3 of the *Criminal Code*.

**thing relevant to an indictable offence** means:

- (a) either of the following:
  - (i) anything with respect to which an indictable offence against any law of the Commonwealth or of a Territory has been committed or is suspected, on reasonable grounds, to have been committed;
  - (ii) anything with respect to which a State offence that has a federal aspect, and that is an indictable offence against the law of that State, has been committed or is suspected, on reasonable grounds, to have been committed; or
- (b) anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence; or
- (c) anything as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of committing any such offence.

**thing relevant to a summary offence** means:

- (a) either of the following:
  - (i) anything with respect to which a summary offence against any law of the Commonwealth or of a Territory has been committed or is suspected, on reasonable grounds, to have been committed;
  - (ii) anything with respect to which a State offence that has a federal aspect, and that is a summary or simple offence against the law of that State, has been committed or is suspected, on reasonable grounds, to have been committed; or



- (b) anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence; or
- (c) anything as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of committing any such offence.

**Torres Strait Islander** means a descendent of an indigenous inhabitant of the Torres Strait Islands.

- (2) In this Act, a reference to a fine includes a reference:
  - (a) to a pecuniary penalty other than a pecuniary penalty imposed:
    - (i) under Division 3 of Part XIII of the *Customs Act 1901*; or
    - (ii) by a pecuniary penalty order, a literary proceeds order or an unexplained wealth order made under the *Proceeds of Crime Act 2002*; or
    - (ia) by a pecuniary penalty order made under the *Proceeds of Crime Act 1987*; or
    - (iii) by a superannuation order made under the *Australian Federal Police Act 1979*; or
    - (iv) by a superannuation order made under the *Crimes (Superannuation Benefits) Act 1989*; or
  - (b) to costs or other amounts ordered to be paid by offenders.
- (3) For the purposes of this Act, the relatives of a person are taken to include the following (without limitation):
  - (a) a de facto partner of the person;
  - (b) someone who is the child of the person, or of whom the person is the child, because of the definition of **child** in this section;
  - (c) anyone else who would be a relative of the person if someone mentioned in paragraph (a) or (b) is taken to be a relative of the person.

### 3AA State offences that have a federal aspect

*Object*

- (1A) The object of this section is to identify State offences that have a federal aspect because:
- (a) they potentially fall within Commonwealth legislative power because of the elements of the State offence; or
  - (b) they potentially fall within Commonwealth legislative power because of the circumstances in which the State offence was committed (whether or not those circumstances are expressed to be acts or omissions involved in committing the offence); or
  - (c) the Australian Federal Police investigating them is incidental to the Australian Federal Police investigating an offence against a law of the Commonwealth or a Territory.

*State offences that have a federal aspect*

- (1) For the purposes of this Act, a State offence has a ***federal aspect*** if, and only if:
- (a) both:
    - (i) the State offence is not an ancillary offence; and
    - (ii) assuming that the provision creating the State offence had been enacted by the Parliament of the Commonwealth instead of by the Parliament of the State—the provision would have been a valid law of the Commonwealth; or
  - (b) both:
    - (i) the State offence is an ancillary offence that relates to a particular primary offence; and
    - (ii) assuming that the provision creating the primary offence had been enacted by the Parliament of the Commonwealth instead of by the Parliament of the State—the provision would have been a valid law of the Commonwealth; or
  - (c) assuming that the Parliament of the Commonwealth had enacted a provision that created an offence penalising the specific acts or omissions involved in committing the State offence—that provision would have been a valid law of the Commonwealth; or

- (d) both:
- (i) the Australian Federal Police is investigating a matter relating to a relevant criminal activity that relates to an offence against a law of the Commonwealth or a Territory; and
  - (ii) if the Australian Federal Police is investigating, or were to investigate, a matter relating to a relevant criminal activity that relates to the State offence—that investigation is, or would be, incidental to the investigation mentioned in subparagraph (i).

*Specificity of acts or omissions*

- (2) For the purposes of paragraph (1)(c), the specificity of the acts or omissions involved in committing a State offence is to be determined having regard to the circumstances in which the offence was committed (whether or not those circumstances are expressed to be elements of the offence).

*State offences covered by paragraph (1)(c)*

- (3) A State offence is taken to be covered by paragraph (1)(c) if the conduct constituting the State offence:
- (a) affects the interests of:
    - (i) the Commonwealth; or
    - (ii) an authority of the Commonwealth; or
    - (iii) a constitutional corporation; or
  - (b) was engaged in by a constitutional corporation; or
  - (c) was engaged in in a Commonwealth place; or
  - (d) involved the use of a postal service or other like service; or
  - (e) involved an electronic communication; or
  - (f) involved trade or commerce:
    - (i) between Australia and places outside Australia; or
    - (ii) among the States; or
    - (iii) within a Territory, between a State and a Territory or between 2 Territories; or
  - (g) involved:
    - (i) banking (other than State banking not extending beyond the limits of the State concerned); or

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- (ii) insurance (other than State insurance not extending beyond the limits of the State concerned); or
  - (h) relates to a matter outside Australia; or
  - (i) relates to a matter in respect of which an international agreement to which Australia is a party imposes obligations to which effect could be given by the creation of an offence against the domestic laws of the parties to the agreement; or
  - (j) relates to a matter that affects the relations between Australia and another country or countries or is otherwise a subject of international concern.
- (4) Subsection (3) does not limit paragraph (1)(c).

*Definitions*

- (5) In this section:

***ancillary offence***, in relation to an offence (the ***primary offence***), means:

- (a) an offence of conspiring to commit the primary offence; or
- (b) an offence of aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, the commission of the primary offence; or
- (c) an offence of attempting to commit the primary offence.

***Commonwealth place*** has the same meaning as in the *Commonwealth Places (Application of Laws) Act 1970*.

***conduct*** has the same meaning as in the *Criminal Code*.

***constitutional corporation*** means a corporation to which paragraph 51(xx) of the Constitution applies.

***electronic communication*** means a communication of information:

- (a) whether in the form of text; or
  - (b) whether in the form of data; or
  - (c) whether in the form of speech, music or other sounds; or
  - (d) whether in the form of visual images (animated or otherwise); or
  - (e) whether in any other form; or
  - (f) whether in any combination of forms;
- by means of guided and/or unguided electromagnetic energy.

*engage in conduct* has the same meaning as in the *Criminal Code*.

*State* includes the Australian Capital Territory and the Northern Territory.

*State offence* means an offence against a law of a State.

Note: Subsection 3(1) defines *State* to include the Northern Territory.

### 3A Operation of Act

This Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.

### 3B Arrangements with States, Australian Capital Territory, Northern Territory and Norfolk Island

- (1) The Governor-General may make arrangements with the Governor of a State, the Government of the Australian Capital Territory, the Administrator of the Northern Territory or the Administrator of Norfolk Island for:
  - (a) officers of the State or Territory to exercise powers and perform functions; and
  - (b) facilities and procedures of the State or Territory to be made available;in relation to the carrying out or enforcement under this Act of orders made under this Act or another Act.
- (2) In section 20AB:
  - (a) a reference to a participating State is a reference to a State in relation to which an arrangement is in force under subsection (1) of this section; and
  - (b) a reference to a participating Territory:
    - (i) is a reference to a Territory other than the Australian Capital Territory, the Northern Territory or Norfolk Island; and
    - (ii) if an arrangement is in force under subsection (1) of this section in relation to the Australian Capital Territory—includes a reference to the Australian Capital Territory; and

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- (iii) if an arrangement is in force under subsection (1) of this section in relation to the Northern Territory— includes a reference to the Northern Territory; and
- (iv) if an arrangement is in force under subsection (1) of this section in relation to Norfolk Island—includes a reference to Norfolk Island.

(3) In this section:

*order* includes a sentence.

*State* does not include the Australian Capital Territory or the Northern Territory.

**3BA Application of the *Criminal Code***

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

## **Part IAA—Search, information gathering, arrest and related powers**

### **Division 1—Preliminary**

#### **3C Interpretation**

- (1) In this Part, unless the contrary intention appears:

*constable assisting*, in relation to a warrant, means:

- (a) a person who is a constable and who is assisting in executing the warrant; or
- (b) a person who is not a constable and who has been authorised by the relevant executing officer to assist in executing the warrant.

*data held in a computer* includes:

- (a) data held in any removable data storage device for the time being held in a computer; or
- (b) data held in a data storage device on a computer network of which the computer forms a part.

*emergency situation*, in relation to the execution of a warrant in relation to premises, means a situation that the executing officer or a constable assisting believes, on reasonable grounds, involves a serious and imminent threat to a person's life, health or safety that requires the executing officer and constables assisting to leave the premises.

*evidential material* means a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.

*executing officer*, in relation to a warrant, means:

- (a) the constable named in the warrant by the issuing officer as being responsible for executing the warrant; or
- (b) if that constable does not intend to be present at the execution of the warrant—another constable whose name has been written in the warrant by the constable so named; or

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- (c) another constable whose name has been written in the warrant by the constable last named in the warrant.

**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 magistrate; or
- (b) a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants or warrants for arrest, as the case may be.

**magistrate**, in sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZQZ, has a meaning affected by section 3CA.

**offence** means:

- (a) an offence against a law of the Commonwealth (other than the *Defence Force Discipline Act 1982*); or
- (b) an offence against a law of a Territory; or
- (c) a State offence that has a federal aspect.

**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 and hat; and
- (b) an examination of those items.

**police station** includes:

- (a) a police station of a State or 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:

- (a) that is punishable by imprisonment for 2 years or more; and
- (b) that is one of the following:
  - (i) a Commonwealth offence;
  - (ii) an offence against a law of a State that has a federal aspect;
  - (iii) an offence against a law of a Territory; and
- (c) that is not a serious terrorism offence.

**serious terrorism offence** means:

- (a) a terrorism offence (other than offence against section 102.8, Division 104 or Division 105 of the *Criminal Code*); or
- (b) an offence against a law of a State:
  - (i) that has a federal aspect; and
  - (ii) that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104 or Division 105 of the *Criminal Code*); or
- (c) an offence against a law of a Territory that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104 or Division 105 of the *Criminal Code*).

**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.

**warrant** means a warrant under this Part.

**warrant premises** means premises in relation to which a warrant is in force.

- (2) A person referred to in paragraph (b) of the definition of **constable assisting** in subsection (1) must not take part in searching or arresting a person.

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**3CA Nature of functions of magistrate**

- (1) A function of making an order conferred on a magistrate by section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZQZ is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (2) Without limiting the generality of subsection (1), an order made by a magistrate under section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZQZ has effect only by virtue of this Act and is not to be taken by implication to be made by a court.
- (3) A magistrate performing a function of, or connected with, making an order under section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZQZ has the same protection and immunity as if he or she were performing that function as, or as a member of, a court (being the court of which the magistrate is a member).
- (4) The Governor-General may make arrangements with the Governor of a State, the Chief Minister of the Australian Capital Territory, the Administrator of the Northern Territory or the Administrator of Norfolk Island for the performance, by all or any of the persons who from time to time hold office as magistrates in that State or Territory, of the function of making orders under sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZQZ.

**3D Application of Part**

- (1) This Part is not intended to limit or exclude the operation of another law of the Commonwealth relating to:
  - (a) the search of premises; or
  - (b) arrest and related matters; or
  - (c) the stopping, detaining or searching of conveyances or persons; or
  - (d) the seizure of things; or
  - (e) the requesting of information or documents from persons.
- (2) To avoid any doubt, it is declared that even though another law of the Commonwealth provides power to do one or more of the things referred to in subsection (1), a similar power conferred by this Part may be used despite the existence of the power under the other law.

- (4) This Part is not intended to limit or exclude the operation of a law of a Territory relating to:
- (a) the search of premises; or
  - (b) arrest and related matters; or
  - (c) the stopping, detaining or searching of conveyances or persons; or
  - (d) the seizure of things; or
  - (e) the requesting of information or documents from persons;
- in relation to offences against a law of that Territory.
- (5) This Part does not apply to the exercise by a constable of powers under the *Defence Force Discipline Act 1982*.
- (6) The application of this Part in relation to State offences that have a federal aspect is not intended to limit or exclude the concurrent operation of any law of a State or of the Australian Capital Territory.

Note 1: Subsection 3(1) defines **State** to include the Northern Territory.

Note 2: Section 3AA has the effect that an offence against the law of the Australian Capital Territory is a State offence that has a federal aspect.

## Division 2—Search warrants

### 3E 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 or affirmation, 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 or affirmation, that there are reasonable grounds for suspecting that the person has in his or her possession, or will within the next 72 hours have in his or her possession, 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 must state that suspicion, and the grounds for that suspicion, in the information.
  - (4) If the person applying for the warrant is a member or special member of the Australian Federal Police and has, at any time previously, applied for a warrant relating to the same person or premises the person must state particulars of those applications and their outcome in the information.
  - (5) If an issuing officer issues a warrant, the officer is to state in the warrant:
    - (a) the offence to which the warrant relates; and
    - (b) a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and
    - (c) the kinds of evidential material that are to be searched for under the warrant; and
    - (d) the name of the constable who, unless he or she inserts the name of another constable in the warrant, is to be responsible for executing the warrant; and
    - (e) the time at which the warrant expires (see subsection (5A)); and
    - (f) whether the warrant may be executed at any time or only during particular hours.
-

- (5A) The time stated in the warrant under paragraph 3E(5)(e) as the time at which the warrant expires must be a time that is not later than the end of the seventh day after the day on which the warrant is issued.

Example: If a warrant is issued at 3 pm on a Monday, the expiry time specified must not be later than midnight on Monday in the following week.

- (6) The issuing officer is also to state, in a warrant in relation to premises:
- (a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (5)(c)) found at the premises in the course of the search that the executing officer or a constable assisting 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 an indictable offence; or
    - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act);if the executing officer or a constable assisting 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 a constable assisting suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession.
- (7) The issuing officer is also to state, in a warrant in relation to a person:
- (a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (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 a constable assisting believes on reasonable grounds to be:

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- (i) evidential material in relation to an offence to which the warrant relates; or
    - (ii) a thing relevant to another offence that is an indictable offence; or
    - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act);if the executing officer or a constable assisting 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) Paragraph (5)(e) and subsection (5A) do not prevent the issue of successive warrants in relation to the same premises or person.
- (9) If the application for the warrant is made under section 3R, this section (other than subsection (5A)) applies as if:
- (a) subsections (1) and (2) referred to 48 hours rather than 72 hours; and
  - (b) paragraph (5)(e) required the issuing officer to state in the warrant the period for which the warrant is to remain in force, which must not be more than 48 hours.
- (10) An issuing officer in New South Wales or the Australian Capital Territory may issue a warrant in relation to premises or a person in the Jervis Bay Territory.
- (11) An issuing officer in a State or internal Territory may:
- (a) issue a warrant in relation to premises or a person in that State or Territory; or
  - (b) issue a warrant in relation to premises or a person in an external Territory; or
  - (c) issue a warrant in relation to premises or a person in another State or internal Territory (including the Jervis Bay Territory) if he or she is satisfied that there are special circumstances that make the issue of the warrant appropriate; or
  - (d) issue a warrant in relation to a person wherever the person is in Australia or in an external Territory if he or she is satisfied that it is not possible to predict where the person may be.

### **3F The things that are authorised by a search warrant**

- (1) A warrant that is in force in relation to premises authorises the executing officer or a constable assisting:
  - (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 a constable assisting 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 another offence that is an indictable offence; or
    - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act);if the executing officer or a constable assisting 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 a constable assisting 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 a constable assisting suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession.
- (2) A warrant that is in force in relation to a person authorises the executing officer or a constable assisting:
  - (a) to search the person as specified in the warrant and things found in the possession of the person and any recently used conveyance for things of the kind specified in the warrant; and

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- (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 on or in the possession of the person or in the conveyance in the course of the search that the executing officer or a constable assisting 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 an indictable offence; or
    - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act);if the executing officer or a constable assisting 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 a constable assisting believes on reasonable grounds to be seizable items.
- (3) If the warrant states that it may be executed only during particular hours, the warrant must 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 must not be done under the warrant.

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

In executing a warrant:

- (a) the executing officer may obtain such assistance; and
  - (b) the executing officer, or a person who is a constable and who is assisting in executing the warrant may use such force against persons and things; and
  - (c) a person who is not a constable and who has been authorised to assist in executing the warrant may use such force against things;
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as is necessary and reasonable in the circumstances.

### **3H 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 a constable assisting must 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 a constable assisting must 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 a constable assisting must show the person a copy of the warrant.
- (4) The executing officer must identify himself or herself to the person at the premises or the person being searched, as the case may be.
- (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.

### **3J Specific powers available to constables executing warrant**

- (1) In executing a warrant in relation to premises, the executing officer or a constable assisting 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 constables assisting 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 one hour; or
  - (aa) if there is an emergency situation, for not more than 12 hours or such longer period as allowed by an issuing officer under section 3JA; or

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- (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.

**3JA Extension of time to re-enter premises in emergency situations**

- (1) If:
  - (a) a warrant in relation to premises is being executed; and
  - (b) there is an emergency situation; and
  - (c) the executing officer or a constable assisting believes on reasonable grounds that the executing officer and the constables assisting will not be able to return to the premises within the 12 hour period mentioned in paragraph 3J(2)(aa);he or she may apply to an issuing officer for an extension of that period.
- (2) Before making the application, the executing officer or a constable assisting must, if it is practicable to do so, give notice to the occupier of the premises of his or her intention to apply for an extension.
- (3) If an application mentioned in subsection (1) has been made, an issuing officer may extend the period during which the executing officer and constables assisting may be away from the premises if:
  - (a) the issuing officer is satisfied, by information on oath or affirmation, that there are exceptional circumstances that justify the extension; and
  - (b) the extension would not result in the period ending after the expiry of the warrant.

### **3K Use of equipment to examine or process things**

- (1) The executing officer or constable assisting may bring to the warrant premises any equipment reasonably necessary for the examination or processing of a thing found at the premises in order to determine whether it is a thing that may be seized under the warrant.
  - (2) A thing found at the premises may be moved to another place for examination or processing in order to determine whether it may be seized under a warrant if:
    - (a) both of the following apply:
      - (i) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance;
      - (ii) the executing officer or constable assisting suspects on reasonable grounds that the thing contains or constitutes evidential material; or
    - (b) the occupier of the premises consents in writing.
  - (3) If a thing is moved to another place for the purpose of examination or processing under subsection (2), the executing officer must, if it is practicable to do so:
    - (a) inform the occupier of the address of the place and the time at which 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.
  - (3AA) The executing officer need not comply with paragraph (3)(a) or (b) if he or she believes on reasonable grounds that to do so might:
    - (a) endanger the safety of a person; or
    - (b) prejudice an investigation or prosecution.
  - (3A) The thing may be moved to another place for examination or processing for no longer than 14 days.
  - (3B) An executing officer may apply to an issuing officer for one or more extensions of that time if the executing officer believes on reasonable grounds that the thing cannot be examined or processed within 14 days or that time as previously extended.
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- (3C) The executing officer must give notice of the application to the occupier of the premises, and the occupier is entitled to be heard in relation to the application.
- (3D) A single extension cannot exceed 7 days.
- (4) The executing officer or a constable assisting may operate equipment already at the warrant premises to carry out the examination or processing of a thing found at the premises in order to determine whether it is a thing that may be seized under the warrant if the executing officer or constable 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.

**3L Use of electronic equipment at premises**

- (1) The executing officer or a constable assisting may operate electronic equipment at the warrant premises to access data (including data not held at the premises) if he or she suspects on reasonable grounds that the data constitutes evidential material.

Note: A constable can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance: see section 3LA.

- (1A) If the executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may:
  - (a) copy any or all of the data accessed by operating the electronic equipment to a disk, tape or other associated device brought to the premises; or
  - (b) if the occupier of the premises agrees in writing—copy any or all of the data accessed by operating the electronic equipment to a disk, tape or other associated device at the premises;and take the device from the premises.
- (1B) If:
  - (a) the executing officer or constable assisting takes the device from the premises; and

- (b) the Commissioner is satisfied that the data is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings;  
the Commissioner must arrange for:
  - (c) the removal of the data from any device in the control of the Australian Federal Police; and
  - (d) the destruction of any other reproduction of the data in the control of the Australian Federal Police.
- (2) If the executing officer or a constable assisting, after operating the equipment, finds that evidential material is accessible by doing so, he or she 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.
- (3) A constable may seize equipment under paragraph (2)(a) only if:
  - (a) it is not practicable to copy the data as mentioned in subsection (1A) or to put the material in documentary form as mentioned in paragraph (2)(b); or
  - (b) possession by the occupier of the equipment could constitute an offence.
- (4) If the executing officer or a constable assisting suspects 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 a constable assisting must give notice to the occupier of the premises of his or her intention to secure equipment and of the fact that the equipment may be secured for up to 24 hours.

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- (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 a constable assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to an issuing officer for an extension of that period.
- (8) The executing officer or a constable assisting must give notice to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.
- (9) The provisions of this Division relating to the issue of warrants apply, with such modifications as are necessary, to the issuing of an extension.

**3LAA Use of electronic equipment at other place**

- (1) If electronic equipment found at the warrant premises is moved to another place under subsection 3K(2), the executing officer or a constable assisting may operate the equipment to access data (including data held at another place).
- (2) If the executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may copy any or all of the data accessed by operating the electronic equipment to a disk, tape or other associated device.
- (3) If the Commissioner is satisfied that the data is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings, the Commissioner must arrange for:
  - (a) the removal of the data from any device in the control of the Australian Federal Police; and
  - (b) the destruction of any other reproduction of the data in the control of the Australian Federal Police.

- (4) If the executing officer or a constable assisting, after operating the equipment, finds that evidential material is accessible by doing so, he or she may:
  - (a) seize the equipment and any disk, tape or other associated device; or
  - (b) if the material can be put in documentary form—put the material in that form and seize the documents so produced.
- (5) A constable may seize equipment under paragraph (4)(a) only if:
  - (a) it is not practicable to copy the data as mentioned in subsection (2) or to put the material in documentary form as mentioned in paragraph (4)(b); or
  - (b) possession by the occupier of the equipment could constitute an offence.

**3LA Person with knowledge of a computer or a computer system to assist access etc.**

- (1) A constable may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to do one or more of the following:
  - (a) access data held in, or accessible from, a computer or data storage device that:
    - (i) is on warrant premises; or
    - (ii) has been removed from warrant premises under subsection 3K(2) and is at another place for examination or processing; or
    - (iii) has been seized under this Division and is no longer on the warrant premises;
  - (b) copy data held in, or accessible from, a computer, or data storage device, described in paragraph (a) to another data storage device;
  - (c) convert into documentary form or another form intelligible to a constable:
    - (i) data held in, or accessible from, a computer, or data storage device, described in paragraph (a); or
    - (ii) data held in a data storage device to which the data was copied as described in paragraph (b); or

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- (iii) data held in a data storage device removed from warrant premises under subsection 3L(1A).
- (2) The magistrate may grant the order if the magistrate is satisfied that:
  - (a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer or data storage device; and
  - (b) the specified person is:
    - (i) reasonably suspected of having committed the offence stated in the relevant warrant; or
    - (ii) the owner or lessee of the computer or device; or
    - (iii) an employee of the owner or lessee of the computer or device; or
    - (iv) a person engaged under a contract for services by the owner or lessee of the computer or device; or
    - (v) a person who uses or has used the computer or device; or
    - (vi) a person who is or was a system administrator for the system including the computer or device; and
  - (c) the specified person has relevant knowledge of:
    - (i) the computer or device or a computer network of which the computer or device forms or formed a part; or
    - (ii) measures applied to protect data held in, or accessible from, the computer or device.
- (3) If:
  - (a) the computer or data storage device that is the subject of the order is seized under this Division; and
  - (b) the order was granted on the basis of an application made before the seizure;the order does not have effect on or after the seizure.

Note: An application for another order under this section relating to the computer or data storage device may be made after the seizure. If the other order is made after the computer or device has been removed from the warrant premises, that other order can specify conditions relating to the provision of information or assistance.
- (4) If the computer or data storage device is not on warrant premises, the order must:



- (a) specify the period within which the person must provide the information or assistance; and
  - (b) specify the place at which the person must provide the information or assistance; and
  - (c) specify the conditions (if any) determined by the magistrate as the conditions to which the requirement on the person to provide the information or assistance is subject.
- (5) A person commits an offence if the person fails to comply with the order.

Penalty for contravention of this subsection: Imprisonment for 2 years.

### **3LB Accessing data held on other premises—notification to occupier of that premises**

- (1) If:
- (a) data that is held on premises other than the warrant premises is accessed under subsection 3L(1) or 3LAA(1); and
  - (b) it is practicable to notify the occupier of the other premises that the data has been accessed under a warrant;
- the executing officer must:
- (c) do so as soon as practicable; and
  - (d) if the executing officer has arranged, or intends to arrange, for continued access to the data under subsection 3L(1A) or (2) or 3LAA(2) or (4)—include that information in the notification.
- (2) A notification under subsection (1) must include sufficient information to allow the occupier of the other premises to contact the executing officer.

### **3M Compensation for damage to electronic equipment**

- (1) This section applies if:
- (a) as a result of equipment being operated as mentioned in section 3K, 3L or 3LAA:
    - (i) damage is caused to the equipment; or

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- (ii) damage is caused to data recorded on the equipment or data access to which was obtained from the operation of the equipment; or
  - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
- (b) the damage or corruption occurs because:
  - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
  - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in a court of competent jurisdiction for such reasonable amount of compensation as the court determines.
- (4) 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, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):

*damage*, in relation to data, includes damage by erasure of data or addition of other data.

**3N Copies of seized things to be provided**

- (1) Subject to subsection (2), if a constable seizes, under a warrant relating to 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;
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the constable must, if requested to do so by the occupier of the premises or another person who apparently represents the occupier and who is present when the warrant is executed, give a copy of the thing or the information to that person as soon as practicable after the seizure.

- (2) Subsection (1) does not apply if:
  - (a) the thing that has been seized was seized under subsection 3L(1A) or paragraph 3L(2)(b) or 3LAA(4)(b); or
  - (b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence.

### **3P 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 Part IC, 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.

### **3Q Receipts for things seized under warrant**

- (1) If a thing is seized under a warrant or moved under subsection 3K(2), the executing officer or a constable assisting must provide a receipt for the thing.
- (2) If 2 or more things are seized or moved, they may be covered in the one receipt.

### **3R Warrants by telephone or other electronic means**

- (1) A constable may make an application to an issuing officer for a warrant by telephone, telex, facsimile 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.

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- (2) The issuing officer:
  - (a) may require communication by voice to the extent that it is practicable in the circumstances; and
  - (b) may make a recording of the whole or any part of any such communication by voice.
- (3) An application under this section must 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 such further information (if any) as 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 3E.
- (5) If the issuing officer decides to issue the warrant, the issuing officer is to inform the applicant, by telephone, telex, facsimile or other electronic means, of the terms of the warrant and the day on which and the time at which it was signed.
- (6) The applicant must 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 and the day on which and the time at which the warrant was signed.
- (7) The applicant must, not later than the day after the day of expiry of the warrant or the day after the day on which 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.

### **3S Restrictions on personal searches**

A warrant cannot authorise a strip search or a search of a person's body cavities.

## **Division 3—Stopping and searching conveyances**

### **3T Searches without warrant in emergency situations**

- (1) This section applies if a constable suspects, on reasonable grounds, that:
  - (a) a thing relevant to an indictable offence is in or on a conveyance; and
  - (b) it is necessary to exercise a power under subsection (2) in order 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) The constable may:
  - (a) stop and detain the conveyance; and
  - (b) search the conveyance and any container in or on the conveyance, for the thing; and
  - (c) seize the thing if he or she finds it there.
- (3) If, in the course of searching for the thing, the constable finds another thing relevant to an indictable offence or a thing relevant to a summary offence, the constable may seize that thing if he or she suspects, on reasonable grounds, that:
  - (a) it is necessary to seize it in order 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 constable must exercise his or her powers subject to section 3U.

### **3U How a constable exercises a power under section 3T**

When a constable exercises a power under section 3T in relation to a conveyance, he or she:

- (a) may use such assistance as is necessary; and

- (b) must search the conveyance in a public place or in some other place to which members of the public have ready access; and
- (c) must 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 such force as is necessary and reasonable in the circumstances, but must 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) the person (if any) 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 that person such an opportunity.

## Division 3A—Powers in relation to terrorist acts and terrorism offences

### Subdivision A—Definitions

#### 3UA Definitions

In this Division:

**Commonwealth place** means a Commonwealth place within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*.

**police officer** means:

- (a) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
- (b) a special member (within the meaning of that Act); or
- (c) a member, however described, of a police force of a State or Territory.

**prescribed security zone** means a zone in respect of which a declaration under section 3UJ is in force.

**serious offence related item** means a thing that a police officer conducting a search under section 3UD reasonably suspects:

- (a) may be used in a serious offence; or
- (b) is connected with the preparation for, or the engagement of a person in, a serious offence; or
- (c) is evidence of, or relating to, a serious offence.

**terrorism related item** means a thing that a police officer conducting a search under section 3UD reasonably suspects:

- (a) may be used in a terrorist act; or
- (b) is connected with the preparation for, or the engagement of a person in, a terrorist act; or
- (c) is evidence of, or relating to, a terrorist act.

**terrorist act** has the same meaning as in subsection 100.1(1) of the *Criminal Code*.



*vehicle* includes any means of transport (and, without limitation, includes a vessel and an aircraft).

## **Subdivision B—Powers**

### **3UB Application of Subdivision**

- (1) A police officer may exercise the powers under this Subdivision in relation to a person if:
  - (a) the person is in a Commonwealth place (other than a prescribed security zone) and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act; or
  - (b) the person is in a Commonwealth place in a prescribed security zone.
- (2) This section does not limit the operation of section 3UEA.

### **3UC Requirement to provide name etc.**

- (1) A police officer may request the person to provide the officer with the following details:
  - (a) the person's name;
  - (b) the person's residential address;
  - (c) the person's reason for being in that particular Commonwealth place;
  - (d) evidence of the person's identity.
- (2) If a police officer:
  - (a) makes a request under subsection (1); and
  - (b) informs the person:
    - (i) of the officer's authority to make the request; and
    - (ii) that it may be an offence not to comply with the request;the person commits an offence if:
  - (c) the person fails to comply with the request; or
  - (d) the person gives a name or address that is false in a material particular.

Penalty: 20 penalty units.

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Note: A more serious offence of obstructing a Commonwealth public official may also apply (see section 149.1 of the *Criminal Code*).

- (3) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

### **3UD Stopping and searching**

- (1) A police officer may:
- (a) stop and detain the person for the purpose of conducting a search under paragraph (b); and
  - (b) conduct one of the following searches for a terrorism related item:
    - (i) an ordinary search or a frisk search of the person;
    - (ii) a search of any thing that is, or that the officer suspects on reasonable grounds to be, under the person's immediate control;
    - (iii) a search of any vehicle that is operated or occupied by the person;
    - (iv) a search of any thing that the person has, or that the officer suspects on reasonable grounds that the person has, brought into the Commonwealth place.

*Conditions relating to conduct of search of person*

- (2) A police officer who conducts a search of a person under this section must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search.
- (3) A person must not be detained under this section for longer than is reasonably necessary for a search to be conducted under this section.

*Other conditions relating to conduct of search of person or thing*

- (4) In searching a thing (including a vehicle) under subsection (1), a police officer may use such force as is reasonable and necessary in the circumstances, but must not damage the thing by forcing it, or a part of it, open unless:

- (a) the person has been given a reasonable opportunity to open the thing or part of it; or
- (b) it is not possible to give that opportunity.

### **3UE Seizure of terrorism related items and serious offence related items**

If a police officer:

- (a) conducts a search under section 3UD; and
  - (b) finds, in the course of the search, a thing that is:
    - (i) a terrorism related item; or
    - (ii) a serious offence related item;
- the officer may seize the thing.

### **3UEA Emergency entry to premises without warrant**

- (1) A police officer may enter premises in accordance with this section if the police officer suspects, on reasonable grounds, that:
  - (a) it is necessary to exercise a power under subsection (2) in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
  - (b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.
- (2) The police officer may:
  - (a) search the premises for the thing; and
  - (b) seize the thing if he or she finds it there.
- (3) If, in the course of searching for the thing, the police officer finds another thing that the police officer suspects, on reasonable grounds, to be relevant to an indictable offence or a summary offence, the police officer may secure the premises pending the obtaining of a warrant under Part IAA in relation to the premises.
- (4) Premises must not be secured under subsection (3) for longer than is reasonably necessary to obtain the warrant.
- (5) In the course of searching for the thing, the police officer may also seize any other thing, or do anything to make the premises safe, if the police officer suspects, on reasonable grounds, that it is necessary to do so:

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- (a) in order to protect a person's life, health or safety; and
  - (b) without the authority of a search warrant because the circumstances are serious and urgent.
- (6) In exercising powers under this section:
- (a) the police officer may use such assistance; and
  - (b) the police officer, or a person who is also a police officer and who is assisting the police officer, may use such force against persons and things; and
  - (c) a person (other than a police officer) who is authorised by the police officer to assist the police officer may use such force against things;
- as is necessary and reasonable in the circumstances.

*Notification*

- (7) If one or more police officers have entered premises in accordance with this section, a police officer must, within 24 hours after the entry:
- (a) notify the occupier of the premises that the entry has taken place; or
  - (b) if it is not practicable so to notify the occupier—leave a written notice of the entry at the premises.

**3UF Seizure notices**

*Seizure notice to be served*

- (1) A police officer who is for the time being responsible for a thing seized under section 3UE or 3UEA must, within 7 days after the day on which the thing was seized, serve a seizure notice on:
- (a) the owner of the thing; or
  - (b) if the owner of the thing cannot be identified after reasonable inquiries—the person from whom the thing was seized.
- (2) Subsection (1) does not apply if:
- (a) both:
    - (i) the owner of the thing cannot be identified after reasonable inquiries; and
    - (ii) the thing was not seized from a person; or

- (b) it is not possible to serve the person required to be served under subsection (1).
- (3) A seizure notice must:
  - (a) identify the thing; and
  - (b) state the date on which the thing was seized; and
  - (c) state the ground or grounds on which the thing was seized; and
  - (d) state that, if the owner does not request the return of the thing within 90 days after the date of the notice, the thing is forfeited to the Commonwealth.

*Forfeiture of thing seized*

- (8) A thing is forfeited to the Commonwealth if the owner of the thing does not request its return:
  - (a) before the end of the 90th day after the date of the seizure notice in relation to the thing; or
  - (b) if subsection (2) applied in relation to the thing so that a seizure notice was not served—before the end of the 90th day after the day on which the thing was seized.

**3UH Relationship of Subdivision to other laws**

- (1) The powers conferred, and duties imposed, by this Subdivision on police officers are in addition to, and not in derogation of, any other powers conferred, or duties imposed, by any other law of the Commonwealth or the law of a State or Territory.
- (2) This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or the law of a State or Territory in so far as it is capable of operating concurrently with this Subdivision.

**Subdivision C—Prescribed security zones**

**3UI Applications for declarations**

A police officer may apply to the Minister for a declaration that a Commonwealth place be declared as a prescribed security zone.

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**3UJ Minister may make declarations**

*Declaration*

- (1) The Minister may declare, in writing, a Commonwealth place to be a prescribed security zone if he or she considers that a declaration would assist:
  - (a) in preventing a terrorist act occurring; or
  - (b) in responding to a terrorist act that has occurred.

*Declaration has effect*

- (2) A declaration under this section has effect accordingly.

*Duration of declaration*

- (3) A declaration ceases to have effect at the end of 28 days after it is made, unless the declaration is revoked by the Minister before then.

*Revocation of declaration*

- (4) The Minister must revoke a declaration, in writing, if he or she is satisfied that:
  - (a) in the case of a declaration made on the ground mentioned in paragraph (1)(a)—there is no longer a terrorism threat that justifies the declaration being continued; or
  - (b) in the case of a declaration made on the ground mentioned in paragraph (1)(b)—the declaration is no longer required.

*Gazettal and publication of declaration*

- (5) If a declaration of a Commonwealth place as a prescribed security zone under this section is made or revoked, the Minister must arrange for:
  - (a) a statement to be prepared that:
    - (i) states that the declaration has been made or revoked, as the case may be; and
    - (ii) identifies the prescribed security zone; and
  - (b) the statement to be:
    - (i) broadcast by a television or radio station so as to be capable of being received within the place; and

- (ii) published in the *Gazette*; and
- (iii) published on the internet.

*Effect of failure to publish*

- (6) A failure to comply with subsection (5) does not make the declaration or its revocation ineffective to any extent.

*Declaration or revocation not legislative instruments*

- (7) A declaration or revocation made under this section is not a legislative instrument.

## **Subdivision D—Sunset provision**

### **3UK Sunset provision**

- (1) A police officer must not exercise powers or perform duties under this Division (other than under section 3UF) after the end of 10 years after the day on which the Division commences.
- (2) A declaration under section 3UJ that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time.
- (3) A police officer cannot apply for, and the Minister cannot make, a declaration under section 3UJ after the end of 10 years after the day on which this Division commences.

## Division 4—Arrest and related matters

### 3V Requirement to furnish name etc.

(1) If a constable believes on reasonable grounds that a person whose name or address is, or whose name and address are, unknown to the constable may be able to assist the constable in inquiries in relation to an indictable offence that the constable has reason to believe has been or may have been committed, the constable may request the person to provide his or her name or address, or name and address, to the constable.

(2) If a constable:

- (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 must not:

- (d) refuse or fail to comply with the request; or
- (e) give a name or address that is false in a material particular.

(2A) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

(3) If a constable 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 constable to provide the evidence—evidence that he or she is a constable;

the constable must not:

- (d) refuse or fail to comply with the request; or
- (e) give a name or address that is false in a material particular.

Penalty: 5 penalty units.



### **3W Power of arrest without warrant by constables**

- (1) A constable may, without warrant, arrest a person for an offence if the constable believes 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 one 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) If:
  - (a) a person has been arrested for an offence under subsection (1); and
  - (b) before the person is charged with the offence, the constable in charge of the investigation ceases to believe on reasonable grounds:
    - (i) that the person committed the offence; or
    - (ii) that holding the person in custody is necessary to achieve a purpose referred to in paragraph (1)(b);the person must be released.
- (3) A constable may, without warrant, arrest a person whom he or she believes on reasonable grounds has escaped from lawful custody to which the person is still liable in respect of an offence.

### **3X Arrest of prisoner unlawfully at large**

- (1) A constable may, without warrant, arrest a person whom the constable believes on reasonable grounds to be a prisoner unlawfully at large.

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- (2) The constable must, as soon as practicable, take the person 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 any constable to convey the person to a prison or other place of detention specified 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 provision of a law of the Commonwealth, including Divisions 6 to 9, inclusive, of Part IB.

**3Y Power of arrest without warrant of person on bail**

- (1) A constable may, without warrant, arrest a person who has been released on bail if the constable believes on reasonable grounds that the person has contravened or is about to contravene a condition of a recognisance on which bail was granted to the person in respect of an offence, even though the condition was imposed in a State or Territory other than the one in which the person is.
- (2) Subject to subsection (3), if a constable arrests a person under subsection (1), the constable must cause the person to be brought before a magistrate as soon as is practicable.
- (3) If a constable arrests a person under subsection (1) in the State or Territory in which the condition was imposed, the person is to be dealt with according to relevant laws of that State or Territory applied by section 68 of the *Judiciary Act 1903*.
- (4) When a person arrested under subsection (1) in a State or Territory other than the one in which the condition was imposed is brought before a magistrate in the State or Territory in which the arrest took place, the court may:

- (a) release the person unconditionally; or
  - (b) admit the person to bail on such recognisances as the court thinks fit to appear again before the same court at such time as the court orders; or
  - (c) if the condition was not imposed by the Federal Court of Australia—remand the person in custody for a reasonable time pending the obtaining of a warrant for the apprehension of the person from the State or Territory in which the condition was imposed; or
  - (d) if the condition was imposed by the Federal Court of Australia—remand the person in custody for a reasonable time pending the obtaining of a warrant for the apprehension of the person from that Court.
- (5) A release referred to in paragraph (4)(a) does not affect the operation of the bail order or the conditions of the bail imposed in the other State or Territory.

### **3Z Power of arrest without warrant by other persons**

- (1) A person who is not a constable may, without warrant, arrest another person if he or she believes on reasonable grounds that:
- (a) the other person is committing or has just committed an indictable offence; and
  - (b) proceedings by summons against the other person would not achieve one or more of the purposes referred to in paragraph 3W(1)(b).
- (2) A person who arrests another person under subsection (1) must, 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 constable.

### **3ZA Warrants for arrest**

- (1) An issuing officer must not, under a law of a State or Territory applied by section 68 of the *Judiciary Act 1903*, 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) except where the issuing officer is informed that the warrant is sought for the purpose of making a request for the

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extradition of a person from a foreign country—the informant has given the issuing officer an affidavit setting out the reasons why the warrant is sought, including:

- (i) the reasons why it is believed that the person committed the offence; and
  - (ii) the reasons why it is claimed that proceedings by summons would not achieve one or more of the purposes set out in paragraph 3W(1)(b); and
- (c) if the issuing officer has requested further information concerning 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 an issuing officer issues such a warrant, the officer must write on the affidavit which of the reasons specified in the affidavit, and any other reasons, he or she has relied on as justifying the issue of the warrant.

**3ZB Power to enter premises to arrest offender**

- (1) Subject to subsection (3), if:
- (a) a constable has, under a warrant, power to arrest a person for an offence; and
  - (b) the constable believes on reasonable grounds that the person is on any premises;
- the constable may enter the premises, using such force as 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) a constable may, under section 3W, arrest a person without warrant for an offence; and
  - (b) the offence is an indictable offence; and
  - (c) the constable believes on reasonable grounds that the person is on any premises;
- the constable may enter the premises, using such force as 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 constable must not enter a dwelling house under subsection (1) or (2) at any time during the period commencing at 9 p.m. on a day and ending at 6 a.m. on the following day unless the constable 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 in order to prevent the concealment, loss or destruction of evidence relating to the offence.
- (4) In subsection (3):

*dwelling house* includes a conveyance, and a room in a hotel, motel, boarding house or club, in which people ordinarily retire for the night.

### **3ZC Use of force in making arrest**

- (1) A person must 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 constable must not, in the course of arresting a person for an offence:
- (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or
  - (b) if the person is attempting to escape arrest by fleeing—do such a thing unless:
    - (i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and
    - (ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.

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**3ZD Persons to be informed of grounds of arrest**

- (1) A person who arrests another person for an offence must 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.

**3ZE Power to conduct a frisk search of an arrested person**

A constable who arrests a person for an offence, or who is present at such an arrest, may, if the constable suspects on reasonable grounds that it is prudent to do so in order 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.

**3ZF Power to conduct an ordinary search of an arrested person**

A constable who arrests a person for an offence, or who is present at such an arrest, may, if the constable suspects on reasonable grounds that the person is carrying:

- (a) evidential material in relation to that or another offence; or
- (b) a seizable item;

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.

**3ZG Power to conduct search of arrested person's premises**

A constable who arrests a person at premises for an offence, or who is present at such an arrest, may seize things in plain view at

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those premises that the constable believes on reasonable grounds to be:

- (a) evidential material in relation to that or another offence; or
- (b) seizeable items.

### **3ZH Power to conduct an ordinary search or a strip search**

- (1) If a person who has been arrested for an offence is brought to a police station, a constable may:
  - (a) if an ordinary search of the person has not been conducted—conduct an ordinary search of the person; or
  - (b) subject to this section, conduct a strip search of the person.
- (2) A strip search may be conducted if:
  - (a) a constable suspects on reasonable grounds that the person has in his or her possession:
    - (i) a seizeable item; or
    - (ii) evidential material (other than forensic material as defined in Part ID) in relation to that or another offence; and
  - (b) the constable suspects on reasonable grounds that it is necessary to conduct a strip search of the person in order to recover that item or evidential material; and
  - (c) a constable of the rank of superintendent or higher has approved the conduct of the search.
- (2A) If:
  - (a) in the course of carrying out a strip search, the constable comes to believe on reasonable grounds that the carrying out of a forensic procedure would be likely to produce evidence relating to the offence for which the person has been arrested or any other offence; and
  - (b) Part ID provides for the carrying out of such a forensic procedure;the forensic procedure must not be carried out except in accordance with Part ID.
- (2B) The conducting of a strip search may include taking photographs of evidential material found on the person, whether or not taking photographs is a forensic procedure provided for by Part ID.

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- (3) Subject to section 3ZI, a strip search may also be conducted if the person consents in writing.
- (3A) Subsection (3) does not authorise the conduct of a strip search for the purpose of obtaining forensic material as defined in Part ID. Such a search must not be conducted except in accordance with Part ID.
- (4) Subject to section 3ZI, 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, facsimile or other electronic means.
- (6) A constable who gives or refuses to give an approval for the purposes of paragraph (2)(c) must make a record of the decision and of the reasons for the decision.
- (7) Such force as 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 paragraph (2)(a) that is found during a strip search may be seized.

**3ZI Rules for conduct of strip search**

- (1) A strip search:
  - (a) must be conducted in a private area; and
  - (b) must be conducted by a constable who is of the same sex as the person being searched; and
  - (c) subject to subsections (3) and (4), must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched; and
  - (d) must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search; and
  - (e) must 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 magistrate orders that it be conducted; and



- (ii) must 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 constable) 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) must not involve a search of a person's body cavities; and
  - (h) must not involve the removal of more garments than the constable 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) must not involve more visual inspection than the constable 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 paragraph (1)(f), the magistrate must have regard to:
    - (a) the seriousness of the offence; and
    - (b) the age or any disability of the person; and
    - (c) such other matters as the magistrate 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) Paragraph (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 must be provided with adequate clothing.

### **3ZJ Taking fingerprints, recordings, samples of handwriting or photographs**

- (1) In this section and in sections 3ZK and 3ZL:  
*identification material*, in relation to a person, means prints of the person's hands, fingers, feet or toes, recordings of the person's

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voice, samples of the person's handwriting or photographs (including video recordings) of the person, but does not include tape recordings made for the purposes of section 23U or 23V.

- (2) A constable must 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 in respect of an offence, a constable who is 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, or cause identification material from the person to be taken, if:
  - (a) the person consents in writing; or
  - (b) the constable 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; or
  - (c) the constable 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 constable may use such force as is necessary and reasonable in the circumstances to take identification material from a person under this section.
- (5) Subject to subsection (9), a constable must not take identification material from a person who is under 10.

- (6) Subject to this section, a constable must not take identification material (other than hand prints, finger prints, foot prints or toe prints) from a suspect who:
- (a) is at least 10 but under 18, or is incapable of managing his or her affairs; and
  - (b) has not been arrested and charged;
- unless a magistrate orders that the material be taken.
- (6A) A constable must not take hand prints, finger prints, foot prints or toe prints from a suspect who:
- (a) is at least 10 but under 18, or is incapable of managing his or her affairs; and
  - (b) has not been arrested and charged;
- except in accordance with Part ID.
- (7) In deciding whether to make such an order, the magistrate must have regard to:
- (a) the seriousness of the offence; and
  - (b) the age or any disability of the person; and
  - (c) such other matters as the magistrate thinks fit.
- (8) The taking of identification material from a person who:
- (a) is under 18; or
  - (b) is incapable of managing his or her affairs;
- must be done in the presence of:
- (c) a parent or guardian of the person; or
  - (d) if the parent or guardian of the person is not acceptable to the person, another person (other than a constable) 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.
- (9) Despite this section, identification material may be taken from a person who:
- (a) is not a suspect; and
  - (b) is under 10 or is incapable of managing his or her affairs;
- if a magistrate orders that the material be taken.

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- (10) Despite this section, identification material may be taken from a person who:
- (a) is not a suspect; and
  - (b) is at least 10 but under 18; and
  - (c) is capable of managing his or her affairs;
- if one of the following paragraphs applies:
- (d) the person agrees in writing to the taking of the material and a parent or guardian of the person also agrees in writing or, if a parent or guardian is not acceptable to the person, another person (other than a constable) 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 also agrees in writing;
  - (e) if:
    - (i) one of those persons agrees in writing to the taking of the material but the other does not; and
    - (ii) a magistrate orders that the material be taken.
- (11) In deciding whether to make such an order, the magistrate must have regard to the matters set out in subsection (7).
- (12) 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.

**3ZK Destruction of identification material**

- (1) If:
- (a) identification material has been taken from a person under section 3ZJ; and
  - (b) a period of 12 months has elapsed since the identification material was taken; and
  - (c) proceedings in respect of an offence to which the investigation material relates have not been instituted or have been discontinued;
- the identification material must be destroyed as soon as practicable.

- (2) If identification material has been taken from a person under section 3ZJ 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 must be destroyed as soon as practicable unless an investigation into, or a proceeding against the person for, another offence to which the identification material relates is pending.
- (3) A magistrate may, on application by a constable, extend the period of 12 months referred to in subsection (1) or that period as previously extended under this subsection in relation to particular identification material if the magistrate is satisfied that there are special reasons for doing so.

### **3ZL 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 at which the person was convicted may order:
- (a) the person to attend a police station; or
  - (b) that a constable be permitted to attend on the person in a place of detention;
- within one month after the conviction to allow impressions of the person's fingerprints and/or or a photograph of the person to be taken in accordance with the order.
- (2) A person must not refuse or fail to allow those impressions or a photograph of the person to be taken.
- Penalty: Imprisonment for 12 months.
- (3) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

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- (3A) The judge or magistrate may also make any other orders that are reasonably necessary for ensuring that the impressions of the person's fingerprints and/or a photograph of the person are taken in accordance with the order under subsection (1). For example, the judge or magistrate may order the person to attend a specified police station at a specified time.
- (3B) A person commits an offence if:
- (a) the person is subject to an order under subsection (3A); and
  - (b) the person engages in conduct; and
  - (c) the person's conduct contravenes the order.
- Penalty: Imprisonment for 12 months.
- (3C) In this section:
- engage in conduct* means:
- (a) do an act; or
  - (b) omit to perform an act.
- (4) Nothing in this section derogates from the right to use the provisions of Part ID as authority for the taking of fingerprints from a prescribed offender or a serious offender.
- (5) In subsection (4), *prescribed offender* and *serious offender* have the meanings given in subsection 23WA(1).

**3ZM Identification parades**

- (1) This section applies to identification parades held in relation to offences.
- (2) Subject to subsection (3) and to section 3ZN, an identification parade:
- (a) may be held if the suspect agrees; or
  - (b) must 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.
- (2A) Without limiting the matters that may be taken into account in determining whether it is reasonable in the circumstances to hold an identification parade, the following must be taken into account:

- (a) the kind of offence, and the gravity of the offence, concerned;
  - (b) the likely importance in the circumstances of the evidence of identification;
  - (c) the practicality of holding an identification parade, having regard, among other things:
    - (i) if the suspect fails to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and
    - (ii) in any case—to whether an identification was made at or about the time of the commission of the offence; and
  - (d) the appropriateness of holding an identification parade, having regard, among other things, to the relationship (if any) between the suspect and the person who may make an identification at the identification parade.
- (3) An identification parade must 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:
    - (i) evidence of the refusal may be given in later proceedings relating to an offence, for the purpose of explaining why an identification parade was not held; and
    - (ii) evidence may be given in such proceedings of any identification of the suspect by a witness as a result of having seen a photograph or having seen the suspect otherwise than during an identification parade; and
  - (c) in addition to any requirement under section 3ZN, 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) must be recorded by a video recording or an audio recording.
- (5) An identification parade must be arranged and conducted in a manner that will not unfairly prejudice the suspect.
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- (6) Without limiting the intent of subsection (5), an identification parade must be arranged and conducted in accordance with the following rules:
- (a) the parade must consist of at least 9 persons;
  - (b) each of the persons who is not the suspect must:
    - (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 constable to arrange or conduct the parade, no constable 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 in order 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 such a manner 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 must 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 one witness is to view the parade:
    - (i) each witness must 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 must 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 must say so;
- (l) the parade must be recorded by a video recording if it is practicable to do so and, if that is done, a copy of the video recording must 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 must be photographed in colour; and
  - (ii) a print of a photograph of the parade that is at least 250mm x 200mm in size must be made available to the suspect or his or her legal representative; and
  - (iii) the constable in charge of the parade must take all reasonable steps to record everything said and done at the parade and must 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) Nothing in this Act affects the determination of the following questions:
- (a) whether or not evidence of a suspect having refused to take part in an identification parade is admissible;
  - (b) if evidence of such a 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 constable, to attempt to identify a suspect otherwise than during an identification parade, the constable must ensure that the attempted identification is done in a manner that is fair to the suspect.
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**3ZN Identification parades for suspects under 18 etc.**

- (1) An identification parade must 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 magistrate 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 one 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 constable) 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) one of those persons agrees in writing to the holding of the parade but the other does not; and
    - (ii) a magistrate orders that the parade be held.
- (4) In deciding whether to make such an order, the magistrate must have regard to:
  - (a) the seriousness of the offence; and
  - (b) the age or any disability of the person; and
  - (c) such other matters as the magistrate thinks fit.
- (5) An identification parade for a suspect who is under 18 or is incapable of managing his or her affairs must 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 constable) 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.

### **3ZO 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 constable investigating the offence must 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
  - (aa) the suspect's appearance has changed significantly since the offence was committed; or
  - (b) the holding of an identification parade would be:
    - (i) unfair to the suspect; or
    - (ii) unreasonable in the circumstances.
- (1A) Without limiting the matters that may be taken into account in determining whether it would be unreasonable in the circumstances to hold an identification parade, the following must be taken into account:
  - (a) the kind of offence, and the gravity of the offence, concerned;
  - (b) the likely importance in the circumstances of the evidence of identification;
  - (c) the practicality of holding an identification parade, having regard, among other things:
    - (i) if the suspect fails to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and
    - (ii) in any case—to whether an identification was made at or about the time of the commission of the offence; and
  - (d) the appropriateness of holding an identification parade, having regard, among other things, to the relationship (if any) between the suspect and the person who may make an identification at the identification parade.
- (2) If a constable 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:

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- (a) the constable must 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 must 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;
  - (ba) the photographs or pictures shown to the witness must not suggest that they are photographs or pictures of persons in police custody;
  - (c) the constable must 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 must have been taken or made after he or she was arrested or was considered as a suspect;
  - (e) the witness must be told that a photograph or picture of the suspect may not be amongst those being seen by the witness;
  - (f) the constable must keep, or cause to be kept, a record identifying each photograph or picture that is shown to the witness;
  - (g) the constable must notify the suspect or his or her legal representative in writing that a copy of the record is available for the suspect;
  - (h) the constable must retain the photographs or pictures shown, and must allow the suspect or his or her legal representative, upon 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 must 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 constable investigating the offence must 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 constable 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 constable 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 constable in charge of investigating the offence must, upon 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 concerning the picture.
  - (7) If a suspect is in custody in respect of an offence and a constable investigating the offence wishes to investigate the possibility that a person other than the suspect committed the offence, subsection (4) does not prevent a constable 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.
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### 3ZP Identification procedures where there is more than one suspect

If:

- (a) a constable is attempting to ascertain:
  - (i) which of 2 or more suspects committed an offence; or
  - (ii) the identities of 2 or more suspects who may have been jointly involved in an offence; and
- (b) for that purpose, the constable intends to conduct an identification parade or to identify a person by showing a photograph or a picture of a suspect to a person;

the constable must undertake a separate identification process for each of the suspects.

### 3ZQ Descriptions

- (1) If a description of a suspect is given to a constable in relation to an offence, the constable must 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 constable must, 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 constable, 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 constable 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 constable 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 constable 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 constable is not required to provide the name of the person.

## Division 4A—Determining a person's age

### Subdivision A—Preliminary

#### 3ZQA Definitions

(1) In this Division:

***age determination information*** means a photograph (including an X-ray photograph) or any other record or information relating to a person that is obtained by carrying out a prescribed procedure.

***appropriately qualified***, in relation to the carrying out of a prescribed procedure, means:

- (a) having suitable professional qualifications or experience to carry out the prescribed procedure; or
- (b) qualified under the regulations to carry out the prescribed procedure.

***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.

***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.

***prescribed procedure*** means a procedure specified by regulations made for the purposes of subsection (2) to be a prescribed procedure for determining a person's age.



- (2) The regulations may specify a particular procedure, which may include the taking of an X-ray of a part of a person's body, to be a prescribed procedure for determining a person's age.
- (3) A procedure prescribed for the purposes of subsection (2):
  - (a) may involve the operation of particular equipment that is specified for the purpose; and
  - (b) must require that equipment to be operated by an appropriately qualified person.
- (4) Before the Governor-General makes a regulation for the purposes of subsection (2), the Minister must consult with the Minister responsible for the administration of the *Therapeutic Goods Act 1989*.

### **Subdivision B—Determination of age during investigation**

#### **3ZQB Circumstances where investigating official may seek authority to carry out a prescribed procedure**

- (1) If:
  - (a) an investigating official suspects, on reasonable grounds, that a person may have committed a Commonwealth offence; and
  - (b) it is necessary to determine whether or not the person is, or was, at the time of the alleged commission of the offence, under 18 because that question is relevant to the rules governing the person's detention, the investigation of the offence or the institution of criminal proceedings;  
the investigating official may, whether or not the person is in custody at the time, arrange for the carrying out of a prescribed procedure in respect of the person only if:
    - (c) the investigating official obtains, in accordance with section 3ZQC, the requisite consents to the carrying out of the procedure in respect of the person; or
    - (d) a magistrate orders, on application by the investigating official, the carrying out of the procedure in respect of the person.
- (2) An application to a magistrate by an investigating official for the purposes of paragraph (1)(d) may be made:
  - (a) in person; or

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- (b) by telephone, telex, fax or other electronic means.
- (3) In deciding whether to make such an order on application by an investigating official, the magistrate must be satisfied that:
  - (a) there are reasonable grounds for the suspicion that the person has committed a Commonwealth offence; and
  - (b) there is uncertainty as to whether or not the person is, or was, at the time of the alleged commission of the offence, under 18; and
  - (c) the uncertainty will need to be resolved in order to determine the application of the rules governing the person's detention, the investigation of the offence or the institution of criminal proceedings.

**3ZQC Obtaining of consents for the carrying out of a prescribed procedure**

- (1) For the purposes of paragraph 3ZQB(1)(c), an investigating official is taken to have obtained the requisite consents to the carrying out of a prescribed procedure in respect of a person if the following persons agree in writing to the carrying out of the procedure:
  - (a) the person in respect of whom it is sought to carry out the procedure;
  - (b) either:
    - (i) a parent or guardian of the person; or
    - (ii) if a parent or guardian is not available or is not acceptable to the person—an independent adult person (other than an investigating official involved in the investigation of the person) 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.
- (2) Before seeking the consents referred to in subsection (1), an investigating official must first inform each of the persons from whom such a consent is being sought, in a language in which the person is able to communicate with reasonable fluency:
  - (a) the purpose and reasons for which the prescribed procedure is to be carried out; and
  - (b) the nature of the procedure; and

- (c) if the procedure involves the operation of particular equipment—the nature of that equipment; and
  - (d) that the information obtained from the carrying out of the procedure could affect the manner of dealing with the person on whom the procedure is to be carried out; and
  - (e) the known risks (if any) that would be posed to the health of the person on whom the procedure is to be carried out; and
  - (ea) that the persons giving the requisite consent may withdraw that consent at any time; and
  - (f) that the seeking of the requisite consent and any giving of such consent was being, or would be, recorded; and
  - (g) that the persons giving the requisite consent are each entitled to a copy of that record; and
  - (h) that the person on whom the procedure is to be carried out may have, so far as is reasonably practicable, a person of his or her choice present while the procedure is carried out.
- (3) The requisite consents may be given:
- (a) in person; or
  - (b) by telephone, telex, fax or other electronic means.
- (4) Nothing in this section affects the rights of a person under Part IC, in particular a person's rights under:
- (a) section 23G (Right to communicate with friend, relative and legal practitioner); or
  - (b) section 23P (Right of foreign national to communicate with consular office).

### **3ZQD Withdrawal of consent**

If a person who has given consent to the carrying out of a prescribed procedure expressly withdraws consent to the carrying out of that procedure (or if the withdrawal of such consent can reasonably be inferred from the person's conduct) before or during the carrying out of the procedure, the carrying out of the procedure is not to proceed otherwise than by order of a magistrate on the application of an investigating official.

**3ZQE Recording of giving of information about carrying out a prescribed procedure and relevant responses**

- (1) An investigating official must, if practicable, ensure that:
  - (a) the giving of information about a prescribed procedure and the responses (if any) of the persons to whom the information is given are recorded by audio tape, video tape or other electronic means; and
  - (b) a copy of the record is made available to the person on whom it is sought to carry out the procedure.
- (2) If recording the giving of information and the responses (if any) of the persons to whom the information is given in the manner referred to in subsection (1) is not practicable, the investigating official must ensure that:
  - (a) a written record of the giving of the information and of the responses (if any) is made; and
  - (b) a copy of the record is made available to the person on whom it is sought to carry out the procedure.

**Subdivision C—Determination of age during proceedings**

**3ZQF Circumstances where judge or magistrate may order carrying out of a prescribed procedure on own initiative**

If:

- (a) a person is being prosecuted for a Commonwealth offence; and
- (b) the judge or magistrate presiding over the proceedings related to that offence is satisfied that it is necessary to ascertain whether or not the person is, or was, at the time of the alleged commission of that offence, under 18;

the judge or magistrate presiding may make an order requiring the carrying out of a prescribed procedure in respect of the person.

**Subdivision D—Communication of orders by judges or magistrates**

**3ZQG Orders made by judges or magistrates concerning carrying out of a prescribed procedure**

- (1) If a judge or a magistrate orders the carrying out of a prescribed procedure (whether as a result of a request by an investigating official or not), the judge or magistrate must:
  - (a) ensure that a written record of the order, and of the reasons for the making of the order, is kept; and
  - (b) ensure that the person on whom the procedure is to be carried out is told by an investigating official in a language in which the person is able to communicate with reasonable fluency:
    - (i) that an order for the carrying out of the procedure has been made and of the reasons for the making of the order; and
    - (ii) of the arrangements for the carrying out of the procedure; and
    - (iii) of the fact that reasonable force may be used to secure the compliance of the person to whom the order relates.
- (2) The judge or magistrate may give directions as to the time, place and manner in which the procedure is to be carried out.

**Subdivision E—Matters relating to the carrying out of prescribed procedures**

**3ZQH Appropriate medical or other standards to be applied**

A prescribed procedure must be carried out in a manner consistent with either or both of the following:

- (a) appropriate medical standards;
- (b) appropriate other relevant professional standards.

**3ZQI Reasonable and necessary force**

Except where the carrying out of a prescribed procedure to determine a person's age is undertaken with the consent of that person and of an additional adult person in accordance with section 3ZQC, the person carrying out the procedure, and any

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person assisting that person, is entitled to use such force as is reasonable and necessary in the circumstances.

**Subdivision F—Disclosure and destruction of age determination information**

**3ZQJ Disclosure of age determination information**

- (1) A person is guilty of an offence if:
- (a) the person's conduct causes the disclosure of age determination information other than as provided by this section; and
  - (b) the person is reckless as to any such disclosure.

Penalty: Imprisonment for 2 years.

- (2) A person may only disclose age determination information:
- (a) for a purpose related to establishing and complying with the rules governing:
    - (i) the detention of the person to whom the age determination information relates; or
    - (ii) the investigation of a Commonwealth offence by that person; or
    - (iii) the institution of criminal proceedings against that person for a Commonwealth offence; or
  - (b) for a purpose related to the conduct of:
    - (i) the investigation of the person to whom the age determination information relates for a Commonwealth offence; or
    - (ii) proceedings for a Commonwealth offence against that person; or
  - (c) for the purpose of an investigation by the Information Commissioner of the Commonwealth or the Commonwealth Ombudsman; or
  - (d) if the person to whom the age determination information relates consents in writing to the disclosure.

Note: A defendant bears an evidential burden in relation to the matters referred to in subsection (2)—see subsection 13.3(3) of the *Criminal Code*.

**3ZQK Destruction of age determination information**

- (1) If, in relation to a Commonwealth offence:
  - (a) age determination information relating to a person has been obtained by carrying out a prescribed procedure; and
  - (b) 12 months have passed since the carrying out of the procedure; and
  - (c) proceedings in respect of the offence have not been instituted against the person from whom the information was taken or have discontinued;the information must be destroyed as soon as practicable.
- (2) If, in relation to a Commonwealth offence, age determination information relating to a person has been obtained by carrying out a prescribed procedure and:
  - (a) the person is found to have committed the offence but no conviction is recorded; or
  - (b) the person is acquitted of the 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 information must be destroyed as soon as practicable unless an investigation into, or a proceeding against, the person for another Commonwealth offence is pending.
- (3) A magistrate may, on application by an investigating official, extend the period of 12 months referred to in subsection (1), or that period as previously extended under this subsection in relation to the information, if the magistrate is satisfied that there are special reasons for doing so.

## **Division 4B—Power to obtain information and documents**

### **Subdivision A—Definitions**

#### **3ZQL Definitions**

In this Division:

*authorised AFP officer* means:

- (a) the Commissioner; or
- (b) a Deputy Commissioner; or
- (c) a senior executive AFP employee who:
  - (i) is a member of the Australian Federal Police; and
  - (ii) is authorised in writing by the Commissioner for the purposes of this paragraph.

*Federal Magistrate* has the meaning given by the *Federal Magistrates Act 1999*.

### **Subdivision B—Power to request information or documents about terrorist acts from operators of aircraft or ships**

#### **3ZQM Power to request information or documents about terrorist acts from operators of aircraft or ships**

- (1) This section applies if an authorised AFP officer believes on reasonable grounds that an operator of an aircraft or ship has information or documents (including in electronic form) that are relevant to a matter that relates to the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).
- (2) The officer may:
  - (a) ask the operator questions relating to the aircraft or ship, or its cargo, crew, passengers, stores or voyage, that are relevant to the matter; or
  - (b) request the operator to produce documents relating to the aircraft or ship, or its cargo, crew, passengers, stores or voyage:
    - (i) that are relevant to the matter; and



- (ii) that are in the possession or under the control of the operator.
- (3) A person who is asked a question or requested to produce a document under subsection (2) must answer the question or produce the document as soon as practicable.

*Offence*

- (4) A person commits an offence if:
- (a) the person is an operator of an aircraft or ship; and
  - (b) the person is asked a question or requested to produce a document under subsection (2); and
  - (c) the person fails to answer the question or produce the document.

Penalty: 60 penalty units.

- (5) Subsection (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (6) It is a defence to a prosecution for an offence against subsection (4) if the person charged had a reasonable excuse for:
- (a) failing to answer the question; or
  - (b) failing to produce the document.

*Definitions*

- (7) In this section:

**operator** has the meaning given by section 4 of the *Customs Act 1901*.

**terrorist act** has the meaning given by section 100.1 of the *Criminal Code*.

**Subdivision C—Power to obtain documents relating to serious terrorism and non-terrorism offences**

**3ZQN Power to obtain documents relating to serious terrorism offences**

- (1) This section applies if an authorised AFP officer considers on reasonable grounds that a person has documents (including in electronic form) that are relevant to, and will assist, the investigation of a serious terrorism offence.
- (2) The officer may give the person a written notice requiring the person to produce documents that:
  - (a) relate to one or more of the matters set out in section 3ZQP, as specified in the notice; and
  - (b) are in the possession or under the control of the person.
- (3) The notice must:
  - (a) specify the name of the person to whom the notice is given; and
  - (b) specify the matters to which the documents to be produced relate; and
  - (c) specify the manner in which the documents are to be produced; and
  - (d) specify the place at which the documents are to be produced; and
  - (e) state that the person must comply with the notice as soon as practicable; and
  - (f) set out the effect of section 3ZQS (offence for failure to comply); and
  - (g) if the notice specifies that information about the notice must not be disclosed—set out the effect of section 3ZQT (offence for disclosing existence or nature of a notice).

**3ZQO Power to obtain documents relating to serious offences**

- (1) An authorised AFP officer may apply to a Federal Magistrate for a notice under this section in respect of a person if the AFP officer considers on reasonable grounds that the person has documents (including in electronic form) that are relevant to, and will assist, the investigation of a serious offence.

- (2) If the Magistrate is satisfied on the balance of probabilities, by information on oath or by affirmation, that:
- (a) the person has documents (including in electronic form) that are relevant to, and will assist, the investigation of a serious offence; and
  - (b) giving the person a notice under this section is reasonably necessary, and reasonably appropriate and adapted, for the purpose of investigating the offence;
- the Magistrate may give the person a written notice requiring the person to produce documents that:
- (c) relate to one or more of the matters set out in section 3ZQP, as specified in the notice; and
  - (d) are in the possession or under the control of the person.
- (3) The Magistrate must not give the notice unless the authorised AFP officer or some other person has given to the Magistrate, either orally or by affidavit, such further information (if any) as the Magistrate requires concerning the grounds on which the issue of the notice is being sought.
- (4) The notice must:
- (a) specify the name of the person to whom the notice is given; and
  - (b) specify the matters to which the documents to be produced relate; and
  - (c) specify the manner in which the documents are to be produced; and
  - (d) specify the place at which the documents are to be produced; and
  - (e) state that the person must comply with the notice within 14 days after the day on which the notice is given; and
  - (f) set out the effect of section 3ZQS (offence for failure to comply); and
  - (g) if the notice specifies that information about the notice must not be disclosed—set out the effect of section 3ZQT (offence for disclosing existence or nature of a notice).

### **3ZQP Matters to which documents must relate**

A document to be produced under a notice under section 3ZQN or 3ZQO must relate to one or more of the following matters:

- (a) determining whether an account is held by a specified person with a specified financial institution, and details relating to the account (including details of any related accounts);
- (b) determining whether a specified person is a signatory to an account with a specified financial institution, and details relating to the account (including details of any related accounts);
- (c) determining whether a transaction has been conducted by a specified financial institution on behalf of a specified person, and details relating to the transaction (including details relating to other parties to the transaction);
- (d) determining whether a specified person travelled or will travel between specified dates or specified locations, and details relating to the travel (including details relating to other persons travelling with the specified person);
- (e) determining whether assets have been transferred to or from a specified person between specified dates, and details relating to the transfers (including details relating to the names of any other persons to or from whom the assets were transferred);
- (f) determining whether an account is held by a specified person in respect of a specified utility (such as gas, water or electricity), and details relating to the account (including the names of any other persons who also hold the account);
- (g) determining who holds an account in respect of a specified utility (such as gas, water or electricity) at a specified place, and details relating to the account;
- (h) determining whether a telephone account is held by a specified person, and details relating to the account (including:
  - (i) details in respect of calls made to or from the relevant telephone number; or
  - (ii) the times at which such calls were made or received; or
  - (iii) the lengths of such calls; or
  - (iv) the telephone numbers to which such calls were made and from which such calls were received);

- (i) determining who holds a specified telephone account, and details relating to the account (including details mentioned in paragraph (h));
- (j) determining whether a specified person resides at a specified place;
- (k) determining who resides at a specified place.

### **3ZQQ Powers conferred on Federal Magistrates in their personal capacity**

- (1) A power conferred on a Federal Magistrate by section 3ZQO is conferred on the Magistrate in a personal capacity and not as a court or a member of a court.
- (2) A Federal Magistrate need not accept the power conferred.
- (3) A Federal Magistrate exercising a power conferred by section 3ZQO has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the Magistrate is a member.

### **3ZQR Documents must be produced**

- (1) A person is not excused from producing a document under section 3ZQN or 3ZQO on the ground that to do so:
  - (a) would contravene any other law; or
  - (b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability; or
  - (c) would disclose material that is protected against disclosure by legal professional privilege or any other duty of confidence; or
  - (d) would be otherwise contrary to the public interest.
- (2) However, neither:
  - (a) the production of the document; nor
  - (b) any information, document or thing obtained as a direct or indirect consequence of producing the document;is admissible in evidence against the person in proceedings other than proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Act.

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- (3) A person is not liable to any penalty by reason of his or her producing a document when required to do so under section 3ZQN or 3ZQO.
- (4) The fact that a person is not excused under subsection (1) from producing a document does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that document.

**3ZQS Offence for failure to comply with notice under section 3ZQN or 3ZQO**

A person commits an offence if:

- (a) the person is given a notice under section 3ZQN or 3ZQO; and
- (b) the person fails to comply with the notice.

Penalty: 30 penalty units.

**3ZQT Offence for disclosing existence or nature of notice**

- (1) A person commits an offence if:
  - (a) the person is given a notice under section 3ZQN or 3ZQO; and
  - (b) the notice specifies that information about the notice must not be disclosed; and
  - (c) the person discloses the existence or nature of the notice.

Penalty: 120 penalty units or imprisonment for 2 years, or both.

- (2) Subsection (1) does not apply if:
  - (a) the person discloses the information to another person in order to obtain a document that is required by the notice in order to comply with it, and that other person is directed not to inform the person to whom the document relates about the matter; or
  - (b) the disclosure is made to obtain legal advice or legal representation in relation to the notice; or
  - (c) the disclosure is made for the purposes of, or in the course of, legal proceedings.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

**Division 4C—Using, sharing and returning things seized  
and documents produced**

**Subdivision A—Using and sharing things seized and documents  
produced**

**3ZQU Purposes for which things and documents may be used and  
shared**

*Use and sharing of thing or document by constable or  
Commonwealth officer*

- (1) A constable or Commonwealth officer may use, or make available to another constable or Commonwealth officer to use, a thing seized under this Part, or the original or a copy of a document produced under Division 4B, for the purpose of any or all of the following if it is necessary to do so for that purpose:
  - (a) preventing, investigating or prosecuting an offence;
  - (b) proceedings under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*;
  - (c) proceedings under a corresponding law (within the meaning of either of the Acts mentioned in paragraph (b)) that relate to a State offence that has a federal aspect;
  - (d) proceedings for the forfeiture of the thing under a law of the Commonwealth;
  - (e) the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter arising under, Division 104 or 105 of the *Criminal Code*;
  - (f) investigating or resolving a complaint or an allegation of misconduct relating to an exercise of a power or the performance of a function or duty under this Part;
  - (g) investigating or resolving an AFP conduct or practices issue (within the meaning of the *Australian Federal Police Act 1979*) under Part V of that Act;
  - (h) investigating or resolving a complaint under the *Ombudsman Act 1976* or the *Privacy Act 1988*;

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- (i) investigating or inquiring into a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006*;
  - (j) proceedings in relation to a complaint, allegation or issue mentioned in paragraph (f), (g), (h) or (i);
  - (k) deciding whether to institute proceedings, to make an application or request, or to take any other action, mentioned in any of the preceding paragraphs of this subsection;
  - (l) the performance of the functions of the Australian Federal Police under section 8 of the *Australian Federal Police Act 1979*.
- (2) A constable or Commonwealth officer may use a thing seized under this Part, or the original or a copy of a document produced under Division 4B, for any other use that is required or authorised by or under a law of a State or a Territory.
- (3) A constable or Commonwealth officer may make available to another constable or Commonwealth officer to use a thing seized under this Part, or the original or a copy of a document produced under Division 4B, for any purpose for which the making available of the thing or document is required or authorised by a law of a State or Territory.
- (4) To avoid doubt, this section does not limit any other law of the Commonwealth that:
- (a) requires or authorises the use of a document or other thing; or
  - (b) requires or authorises the making available (however described) of a document or other thing.

*Sharing thing or document for use by State, Territory or foreign agency*

- (5) A constable or Commonwealth officer may make a thing seized under this Part, or the original or a copy of a document produced under Division 4B, available to:
- (a) a State or Territory law enforcement agency; or
  - (b) an agency that has responsibility for:
    - (i) law enforcement in a foreign country; or
    - (ii) intelligence gathering for a foreign country; or
    - (iii) the security of a foreign country;



to be used by that agency for a purpose mentioned in subsection (1), (2) or (3) and the purpose of any or all of the following (but not for any other purpose):

- (c) preventing, investigating or prosecuting an offence against a law of a State or Territory;
- (d) proceedings under a corresponding law (within the meaning of the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*);
- (e) proceedings for the forfeiture of the thing under a law of a State or Territory;
- (f) deciding whether to institute proceedings or to take any other action mentioned in any of paragraphs (1)(a) to (l) (inclusive), subsection (2) or (3) or paragraph (c), (d) or (e) of this subsection.

*Ministerial arrangements for sharing*

- (6) This Division does not prevent the Minister from making an arrangement with a Minister of a State or Territory for:
  - (a) the making available to a State or Territory law enforcement agency of that State or Territory, for purposes mentioned in subsections (1), (3) and (5), of things seized under this Part and originals and copies of documents produced under Division 4B; and
  - (b) the disposal by the agency of such things, originals and copies when they are no longer of use to that agency for those purposes.

Note: This subsection does not empower the Minister to make such an arrangement.

*Definition*

- (7) In this section:

***State or Territory law enforcement agency*** means:

- (a) the police force or police service of a State or Territory; or
- (b) the New South Wales Crime Commission constituted by the *New South Wales Crime Commission Act 1985* of New South Wales; or

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- (c) the Independent Commission Against Corruption constituted by the *Independent Commission Against Corruption Act 1988* of New South Wales; or
- (d) the Police Integrity Commission constituted by the *Police Integrity Commission Act 1996* of New South Wales; or
- (e) the Office of Police Integrity continued by the *Police Integrity Act 2008* of Victoria; or
- (f) the Crime and Misconduct Commission of Queensland; or
- (g) the Corruption and Crime Commission established by the *Corruption and Crime Commission Act 2003* of Western Australia.

**3ZQV Operating seized electronic equipment**

- (1) This section applies to electronic equipment seized under this Part or moved from warrant premises under section 3K.
- (2) The electronic equipment may be operated at any location after it has been seized or moved, for the purpose of determining whether data that is evidential material is held on or accessible from the electronic equipment, and obtaining access to such data.
- (3) The data referred to in subsection (2) includes, but is not limited to, the following:
  - (a) data held on the electronic equipment, including data held on the electronic equipment when operated under this section that was not held on the electronic equipment at the time the electronic equipment was seized;
  - (b) data not held on the electronic equipment but accessible by using it, including data that was not accessible at the time the electronic equipment was seized.
- (4) If the electronic equipment was seized under a warrant or moved under section 3K, the electronic equipment may be operated before or after the expiry of the warrant.
- (5) This section does not limit the operation of other provisions of this Part that relate to dealing with items seized under this Part or moved under section 3K.

Note: For example, this section does not affect the operation of the time limits in section 3K on examination or processing of a thing removed under that section from warrant premises.

### **3ZQW Compensation for damage to electronic equipment**

- (1) This section applies if:
  - (a) as a result of equipment being operated as mentioned in section 3ZQV:
    - (i) damage is caused to the equipment; or
    - (ii) damage is caused to data recorded on the equipment or data access to which was obtained from the operation of the equipment; or
    - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
  - (b) the damage or corruption occurs because:
    - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
    - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in a court of competent jurisdiction for such reasonable amount of compensation as the court determines.
- (4) If the equipment was seized or moved from premises, then, 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, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):

**damage**, in relation to data, includes damage by erasure of data or addition of other data.

**Subdivision B—Returning things seized under Division 2 or 4**

**3ZQX When things seized under Division 2 or 4 must be returned**

- (1) If the Commissioner is satisfied that a thing seized under Division 2 or 4 is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings, the Commissioner must 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.
- (2) However, the Commissioner does not have to take those steps if:
  - (a) the thing may otherwise be retained, destroyed or disposed of under a law, or an order of a court or tribunal, of the Commonwealth or of a State or a Territory; or
  - (b) the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

**Subdivision C—Returning things seized under Division 3**

**3ZQY When things seized under Division 3 must be returned**

- (1) If:
  - (a) the Commissioner is satisfied that a thing seized under Division 3 is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings; or
  - (b) the period of 60 days after the thing's seizure ends;the Commissioner must 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.
- (2) However, the Commissioner does not have to take those steps if:
  - (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 thing may be retained because of an order under section 3ZQZ; or

- (c) the thing may otherwise be retained, destroyed or disposed of under a law, or an order of a court or tribunal, of the Commonwealth or of a State or a Territory; or
- (d) the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

**3ZQZ Magistrate may permit a thing seized under Division 3 to be retained**

- (1) The Commissioner may apply to a magistrate for an order under this section that a thing seized under Division 3 may be retained for a period if the application is made:
  - (a) before the end of 60 days after the seizure; or
  - (b) before the end of a period previously specified in an order in relation to the thing under this section.
- (2) If the magistrate is satisfied that the thing is being used, or is required to be used, for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings, the magistrate may order that the thing may be retained for the period specified in the order.
- (3) Before making the application, the Commissioner must:
  - (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 Commissioner believes to have such an interest of the proposed application.

**Subdivision D—Returning things seized under Division 3A**

**3ZQZA Owner may request return of thing**

- (1) The Commissioner must take reasonable steps to return a thing seized under Division 3A if the owner requests the return of the thing.
- (2) However, the Commissioner does not have to take those steps if:
  - (a) the Commissioner suspects on reasonable grounds that if the thing is returned to the owner, the thing is likely to be used by the owner or another person in the commission of a terrorist act, a terrorism offence or a serious offence; or

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- (b) the Commissioner is satisfied that the thing is being used, or is required to be used, for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings.
- (3) If:
  - (a) the owner of a thing requests the return of the thing:
    - (i) within 90 days after the date of the seizure notice served under section 3UF in relation to the thing; or
    - (ii) if subsection 3UF(2) applied in relation to the thing so that a seizure notice was not served—within 90 days after the day on which the thing was seized; and
  - (b) the thing has not been returned to the owner by the end of the 90th day;  
the Commissioner must, before the end of the 95th day:
    - (c) take reasonable steps to return the thing to the owner; or
    - (d) apply to a magistrate for an order under section 3ZQZB.

- (4) In this section:

*terrorist act* has the same meaning as in subsection 100.1(1) of the *Criminal Code*.

**3ZQZB Magistrate may permit a thing seized under Division 3A to be retained, forfeited etc.**

- (1) If subsection 3ZQZA(3) applies, the Commissioner may apply to a magistrate for an order in relation to the thing.
- (2) The magistrate must, in determining an application by the Commissioner under subsection (1), allow the owner of the thing to appear and be heard.
- (3) If the magistrate is satisfied that the thing is being used, or is required to be used, for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings, the magistrate may order that the thing may be retained for the period specified in the order.
- (4) If the magistrate is satisfied that there are reasonable grounds to suspect that, if the thing is returned to the owner, the thing is likely to be used by the owner or another person in the commission of a

terrorist act, a terrorism offence or a serious offence, the magistrate may make any of the following orders:

- (a) that the thing may be retained for the period specified in the order;
  - (b) that the thing is forfeited to the Commonwealth;
  - (c) that the thing is to be sold and the proceeds given to the owner;
  - (d) that the thing is to be otherwise sold or disposed of.
- (5) If the magistrate is not satisfied as mentioned in subsection (3) or (4), the magistrate must order that the thing be returned to the owner.
- (6) In this section:

***terrorist act*** has the same meaning as in subsection 100.1(1) of the *Criminal Code*.

## Division 5—General

### 3ZR Conduct of ordinary searches and frisk searches

An ordinary search or a frisk search of a person under this Part must, if practicable, be conducted by a person of the same sex as the person being searched.

### 3ZS Announcement before entry

- (1) A constable must, before any person enters premises under a warrant 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 constable 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 constable); or
  - (b) that the effective execution of the warrant or the arrest is not frustrated.

### 3ZT Offence for making false statements in warrants

A person must not make, in an application for a warrant, a statement that the person knows to be false or misleading in a material particular.

Penalty: Imprisonment for 2 years.

### 3ZU Offences relating to telephone warrants

A person must not:

- (a) state in a document that purports to be a form of warrant under section 3R 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.

Penalty: Imprisonment for 2 years.

### **3ZW Delegation by Commissioner**

The Commissioner may delegate to a constable any or all of the Commissioner's powers, functions or duties under this Part.

### **3ZX Law relating to legal professional privilege not affected**

This Part does not affect the law relating to legal professional privilege.

## Part IA—General

### 4AAA Commonwealth laws conferring non-judicial functions and powers on officers

#### *Application*

- (1) This section sets out the rules that apply if, under a law of the Commonwealth relating to criminal matters, a function or power that is neither judicial nor incidental to a judicial function or power, is conferred on one or more of the following persons:
- (aa) a Judge of the Federal Court of Australia;
  - (ab) a Federal Magistrate;
    - (a) a State or Territory judge;
    - (b) a magistrate;
  - (c) a Justice of the Peace or other person:
    - (i) employed in a State or Territory court; and
    - (ii) authorised to issue search warrants, or warrants of arrest.

Note 1: **Magistrate** is defined in section 16C of the *Acts Interpretation Act 1901*.

Note 2: **Justice of the Peace** is defined in paragraph 26(e) of the *Acts Interpretation Act 1901*.

#### *Functions and powers conferred personally*

- (2) The function or power is conferred on the person only in a personal capacity and not, in the case of a Judge of the Federal Court of Australia, Federal Magistrate, State or Territory judge or magistrate, as a court or a member of a court.

#### *Function or power need not be accepted*

- (3) The person need not accept the function or power conferred.

#### *Protection and immunity provided*

- (3A) A Judge of the Federal Court of Australia or a Federal Magistrate performing a conferred function, or exercising a conferred power,

has the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

- (4) A State or Territory judge or magistrate performing a conferred function, or exercising a conferred power, has the same protection and immunity as if he or she were performing that function, or exercising that power, as, or as a member of, a court (being the court of which the judge or magistrate is a member).
- (5) A person referred to in paragraph (1)(c) performing a conferred function, or exercising a conferred power, has the same protection and immunity as he or she would have in performing functions and powers as part of the person's employment with a State or Territory court, as the case may be.

*This section applies regardless of when Commonwealth law made*

- (6) This section applies whether the law conferring a function or power was made before, on or after, the commencement of this section.

*Contrary intention*

- (6A) Despite subsection (1), a rule set out in this section does not apply if the contrary intention appears.

*A law of the Commonwealth relating to criminal matters*

- (7) In this section, a reference to ***a law of the Commonwealth relating to criminal matters*** includes a reference to this Act.

#### **4AAB Arrangements for conferral of non-judicial functions and powers**

*Governor-General may make arrangements*

- (1) The Governor-General may make arrangements with:
  - (a) the Governor of a State (excluding the Northern Territory); and
  - (b) the Chief Minister for the Australian Capital Territory; and
  - (c) the Administrator of the Northern Territory; and
  - (d) the Administrator of Norfolk Island;

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for the performance of functions, and the exercise of powers, that are neither judicial nor incidental to a judicial function or power, conferred by a law of the Commonwealth relating to criminal matters on:

- (e) a State or Territory judge; or
- (f) a magistrate; or
- (g) a Justice of the Peace or other person:
  - (i) employed in a State or Territory court; and
  - (ii) authorised to issue search warrants, or warrants of arrest.

Note 1: **Magistrate** is defined in section 16C of the *Acts Interpretation Act 1901*.

Note 2: **Justice of the Peace** is defined in paragraph 26(e) of the *Acts Interpretation Act 1901*.

*Lack of arrangement does not affect validity of exercise of power or performance of function*

- (2) The validity of the performance of a function, or the exercise of a power, is not affected by the absence of an arrangement under this section covering the performance of the function or exercise of the power.

*This section applies regardless of when Commonwealth law made*

- (3) This section applies to functions or powers conferred by laws made before, on or after the commencement of this section.

*A law of the Commonwealth relating to criminal matters*

- (4) In this section, a reference to **a law of the Commonwealth relating to criminal matters** includes a reference to this Act.

#### 4A Meaning of certain words

In a law of the Commonwealth, unless the contrary intention appears:

**committed for trial**, in relation to a person, means committed to prison with a view to the person being tried before a judge and jury, or admitted to bail upon a recognizance to appear and be so tried.

*indictment* includes an information and a presentment.

#### **4AA Penalty units**

- (1) In a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears:

*penalty unit* means \$110.

- (2) In this section:

*Territory Ordinance* means an ordinance that:

- (a) was made under an Act providing for the acceptance, administration or government of a Territory other than the Territory of Norfolk Island; and
- (b) has not become an enactment of the Australian Capital Territory;

and includes a regulation made under such an ordinance.

#### **4AB Conversion of pecuniary penalties expressed in dollar amounts to penalty units**

- (1) A reference in a law of the Commonwealth or in a Territory Ordinance to a pecuniary penalty of D dollars, where D is a number, is taken to be a reference to a pecuniary penalty of P penalty units, where P is:
- (a) if  $D \div 100$  is a whole number—that whole number; or
  - (b) if  $D \div 100$  is not a whole number—the next highest whole number.
- (2) Subsection (1) does not apply to a reference to the maximum amount of a penalty that is not imposed by a court, or by a service tribunal under the *Defence Force Discipline Act 1982*.
- (3) Subsection (1) does not apply to:
- (a) section 76 of the *Competition and Consumer Act 2010*; or
  - (c) a provision of a law of the Commonwealth prescribed for the purposes of this subsection.

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- (4) In this section:

*penalty* includes a fine.

*Territory Ordinance* has the same meaning as in section 4AA.

**4B Pecuniary penalties—natural persons and bodies corporate**

- (1) A provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons.
- (2) Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:

Term of Imprisonment      5

where:

*Term of Imprisonment* is the maximum term of imprisonment, expressed in months, by which the offence is punishable.

- (2A) Where a natural person is convicted of an offence against a law of the Commonwealth in respect of which a court may impose a penalty of imprisonment for life, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding 2,000 penalty units.
- (3) Where a body corporate is convicted of an offence against a law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.

- (3A) Where an Act (whether enacted before or after the commencement of this subsection) confers power to make an instrument (including rules, regulations or by-laws but not including a law of a Territory) and specifies the maximum pecuniary penalty that can be imposed for offences created by such an instrument, then:
- (a) unless the contrary intention appears, the specified penalty is taken to be the maximum penalty that the instrument can prescribe for such offences by natural persons; and
  - (b) where a body corporate is convicted of such an offence—the specifying of that penalty is not to be treated as an indication of a contrary intention for the purposes of applying subsection (3).
- (4) Where under a law of the Commonwealth any forfeiture, penalty or reparation is paid to a person aggrieved, it is payable to a body corporate where the body corporate is the person aggrieved.

#### **4C Offences under 2 or more laws**

- (1) Where an act or omission constitutes an offence:
- (a) under 2 or more laws of the Commonwealth; or
  - (b) both under a law of the Commonwealth and at common law;
- the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws of the Commonwealth or at common law, but shall not be liable to be punished twice for the same act or omission.
- (2) Where an act or omission constitutes an offence under both:
- (a) a law of the Commonwealth and a law of a State; or
  - (b) a law of the Commonwealth and a law of a Territory;
- and the offender has been punished for that offence under the law of the State or the law of the Territory, as the case may be, the offender shall not be liable to be punished for the offence under the law of the Commonwealth.
- (3) Where an act or omission constitutes an offence against a law of a Territory, the validity of that law is not affected merely because the act or omission also constitutes an offence against a law of the Commonwealth.

#### 4D Penalties

- (1) Except so far as the contrary intention appears, a penalty, whether pecuniary or otherwise, set out at the foot of any provision of an Act as described in a paragraph of subsection (1A) indicates:
  - (a) if the provision expressly creates an offence—that the offence is punishable on conviction by a penalty not exceeding the penalty so set out; or
  - (b) in any other case—that contravention of the provision is an offence against the provision, punishable on conviction by a penalty not exceeding the penalty so set out.
- (1A) Subsection (1) applies to a penalty set out:
  - (a) at the foot of a section of an Act; or
  - (b) at the foot of a subsection of an Act, but not at the foot of the section containing the subsection; or
  - (c) at the foot of a clause of any Schedule to an Act; or
  - (d) at the foot of a subclause of any Schedule to an Act, but not at the foot of the clause containing the subclause.
- (1B) Subsection (1) does not affect the operation of subsection 4B(2), (2A) or (3).
- (2) Subsection (1) applies to any instrument made under an Act (including rules, regulations or by-laws but not including a law of a Territory) as if the instrument were an Act and as if each such rule, regulation or by-law were a section of an Act.

#### 4E Pecuniary penalties

A pecuniary penalty for an offence against a law of the Commonwealth may, unless the contrary intention appears, be recovered in any court of summary jurisdiction.

#### 4F Effect of alterations in penalties

- (1) Where a provision of a law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of that provision.
  - (2) Where a provision of a law of the Commonwealth reduces the penalty or maximum penalty for an offence, the penalty or
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maximum penalty as reduced extends to offences committed before the commencement of that provision, but the reduction does not affect any penalty imposed before that commencement.

#### **4G Indictable offences**

Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.

#### **4H Summary offences**

Offences against a law of the Commonwealth, being offences which:

- (a) are punishable by imprisonment for a period not exceeding 12 months; or
  - (b) are not punishable by imprisonment;
- are summary offences, unless the contrary intention appears.

#### **4J Certain indictable offences may be dealt with summarily**

- (1) Subject to subsection (2), an indictable offence (other than an offence referred to in subsection (4)) against a law of the Commonwealth, being an offence punishable by imprisonment for a period not exceeding 10 years, may, unless the contrary intention appears, be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.
- (2) Subsection (1) does not apply in relation to an indictable offence where, under a law of the Commonwealth other than this Act, that offence may be heard and determined by a court of summary jurisdiction.
- (3) Subject to subsection (6), where an offence is dealt with by a court of summary jurisdiction under subsection (1), the court may impose:
  - (a) where the offence is punishable by imprisonment for a period not exceeding 5 years—a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both; or
  - (b) where the offence is punishable by imprisonment for a period exceeding 5 years but not exceeding 10 years—a sentence of

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imprisonment for a period not exceeding 2 years or a fine not exceeding 120 penalty units, or both.

- (4) A court of summary jurisdiction may, if it thinks fit, upon the request of the prosecutor, hear and determine any proceeding in respect of an indictable offence against a law of the Commonwealth if the offence relates to property whose value does not exceed \$5,000.
- (5) Subject to subsection (6), where an offence is dealt with by a court of summary jurisdiction under subsection (4), the court may impose a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both.
- (6) A court of summary jurisdiction shall not impose under subsection (3) or (5):
  - (a) a sentence of imprisonment for a period exceeding the maximum period that could have been imposed had the offence been tried on indictment;
  - (b) a fine exceeding the maximum fine that could have been imposed had the offence been so tried; or
  - (c) both a sentence of imprisonment and a fine if the offence is punishable on trial on indictment by a sentence of imprisonment or a fine, but not both.
- (7) This section does not apply to an offence against:
  - (a) section 24AA or 24AB or subsection 79(2) or (5) of this Act; or
  - (b) Division 80 or section 91.1 of the *Criminal Code*.

**4JA Some indictable offences punishable by fine only may be dealt with summarily**

- (1) A court of summary jurisdiction may hear and determine an indictable offence if:
  - (a) the offence is not punishable by imprisonment; and
  - (b) the pecuniary penalty for the offence is not more than 600 penalty units for an individual or 3,000 penalty units for a body corporate; and
  - (c) the defendant and prosecution consent.

- (2) If the defendant is convicted, the court may impose a pecuniary penalty of:
- (a) not more than 60 penalty units for an individual or 300 penalty units for a body corporate if the offence would be punishable on indictment by a pecuniary penalty of not more than 300 penalty units for an individual or 1,500 penalty units for a body corporate; or
  - (b) not more than 120 penalty units for an individual or 600 penalty units for a body corporate if the offence would be punishable on indictment by a pecuniary penalty of not more than 600 penalty units for an individual or 3,000 penalty units for a body corporate.
- However, the court may not impose a pecuniary penalty greater than the penalty that could have been imposed if the offence had been prosecuted on indictment.
- (3) This section has effect subject to any contrary intention indicated by the law creating the offence.
- (4) Without limiting subsection (3), this section does not apply to an indictable offence:
- (a) created by a law that provides that the offence may be heard and determined by a court of summary jurisdiction; or
  - (b) described in subsection 4J(4) (about offences relating to property valued at \$5,000 or less).

#### **4K Continuing and multiple offences**

- (1) Where, under a law of the Commonwealth, an act or thing is required to be done within a particular period or before a particular time, then, unless the contrary intention appears, the obligation to do that act or thing continues, notwithstanding that the period has expired or the time has passed, until the act or thing is done.
- (2) Where a refusal or failure to comply with a requirement referred to in subsection (1) is an offence against a law of the Commonwealth, a person is guilty of an offence in respect of each day during which the person refuses or fails to comply with that requirement, including the day of a conviction for any such offence or any later day.

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- (3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.
- (4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence.

**4L Specified defences not to preclude other defences**

Where a provision of a law of the Commonwealth provides a defence to a particular offence, the provision does not, unless the contrary intention appears, prevent the use of any defence that is otherwise available.

**4M Children under 10**

A child under 10 years old cannot be liable for an offence against a law of the Commonwealth.

**4N Children over 10 but under 14**

- (1) A child aged 10 years or more but under 14 years old can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong.
- (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

**6 Accessory after the fact**

Any person who receives or assists another person, who is, to his or her knowledge, guilty of any offence against a law of the Commonwealth, in order to enable him or her to escape punishment or to dispose of the proceeds of the offence shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

**9 Seizure and condemnation of forfeitable goods**

- (1) Any constable may, without warrant, seize any articles which are forfeited or which he or she has reasonable ground to believe are forfeited under any law of the Commonwealth, and take them before a court of summary jurisdiction.
- (2) Where articles are taken before a court of summary jurisdiction under subsection (1), the court shall inquire into the matter and:
  - (a) if the court is satisfied that the articles are forfeited—shall order that the articles be condemned; or
  - (b) if the court is not so satisfied—shall order that the articles be delivered to such person as the court is satisfied is entitled to the articles.
- (2A) A court of summary jurisdiction may, before inquiring into a matter under subsection (2), require notice of the inquiry to be given to such persons as the court thinks fit.
- (3) Where any prosecution is pending, an order for the condemnation or the delivery to any persons of any articles relating thereto shall not be made until the prosecution is determined.
- (4) All articles that are condemned as forfeited must be transferred to the Official Trustee to be dealt with under section 9A.

**9A Forfeited articles to be dealt with by Official Trustee**

Where articles are transferred to the Official Trustee under subsection 9(4), the Official Trustee must, subject to any direction by the Attorney-General given in a particular case:

- (a) sell or otherwise dispose of the articles; and
- (b) apply the proceeds of the sale or disposition in payment of the Official Trustee's remuneration and other costs, charges and expenses of the kind referred to in section 9B payable to or incurred by it in connection with the sale or disposition; and
- (c) credit the remainder of those proceeds to the Confiscated Assets Account as required by section 296 of the *Proceeds of Crime Act 2002*.

### **9B Costs etc. payable to Official Trustee**

- (1) The regulations may make provision in relation to:
  - (a) the costs, charges and expenses incurred in connection with;  
and
  - (b) the Official Trustee's remuneration in respect of;  
the performance or exercise by the Official Trustee of functions,  
duties or powers under section 9A.
- (2) An amount equal to each amount of remuneration that the Official Trustee receives under the regulations is to be paid to the Commonwealth.
- (3) Where there are no regulations in relation to a matter referred to in subsection (1):
  - (a) the regulations referred to in section 288 of the *Proceeds of Crime Act 2002* apply, so far as they are applicable, and with appropriate changes, in relation to the matter; and
  - (b) a reference in subsection (1) or (2) to regulations is taken to be a reference to the regulations referred to in section 288 of the *Proceeds of Crime Act 2002*.

### **13 Institution of proceedings in respect of offences**

Unless the contrary intention appears in the Act or regulation creating the offence, any person may:

- (a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or
- (b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction.

### **15 Remand of defendant**

Where a person is charged, before a court of summary jurisdiction, with an offence against the law of the Commonwealth, if, from the absence of witnesses or from any other reasonable cause, it becomes necessary or advisable to defer the hearing of the case, the court before whom the accused person appears or is brought, may:

- (a) by warrant from time to time remand the defendant to some gaol, lock-up, or other place of custody for such period as the

court shall deem necessary to be there kept until the time appointed for continuing the hearing; or

- (b) order the discharge of the defendant upon his or her entering into a recognizance conditioned for his or her appearance at the time and place appointed for continuing the hearing.

### **15AA Bail not to be granted in certain cases**

- (1) Despite any other law of the Commonwealth, a bail authority must not grant bail to a person (the *defendant*) charged with, or convicted of, an offence covered by subsection (2) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.
- (2) This subsection covers:
  - (a) a terrorism offence (other than an offence against section 102.8 of the *Criminal Code*); and
  - (b) an offence against a law of the Commonwealth, if:
    - (i) a physical element of the offence is that the defendant engaged in conduct that caused the death of a person; and
    - (ii) the fault element for that physical element is that the defendant intentionally engaged in that conduct (whether or not the defendant intended to cause the death, or knew or was reckless as to whether the conduct would result in the death); and
  - (c) an offence against a provision of Division 80 or Division 91 of the *Criminal Code*, or against section 24AA of this Act, if:
    - (i) the death of a person is alleged to have been caused by conduct that is a physical element of the offence; or
    - (ii) conduct that is a physical element of the offence carried a substantial risk of causing the death of a person; and
  - (d) an ancillary offence against a provision of Division 80 or Division 91 of the *Criminal Code*, or against section 24AA of this Act, if, had the defendant engaged in conduct that is a physical element of the primary offence to which the ancillary offence relates, there would have been a substantial risk that the conduct would have caused the death of a person.

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- (3) To avoid doubt, the express reference in paragraph (2)(d) to an ancillary offence does not imply that references in paragraphs (2)(a), (b) or (c) to an offence do not include references to ancillary offences.
- (3A) Despite any law of the Commonwealth, the Director of Public Prosecutions or the defendant may appeal against a decision of a bail authority:
- (a) to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is satisfied that exceptional circumstances exist; or
  - (b) to refuse to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is not satisfied that exceptional circumstances exist.
- (3B) An appeal under subsection (3A):
- (a) may be made to a court that would ordinarily have jurisdiction to hear and determine appeals (however described) from directions, orders or judgments of the bail authority referred to in subsection (3A), whether the jurisdiction is in respect of appeals relating to bail or appeals relating to other matters; and
  - (b) is to be made in accordance with the rules or procedures (if any) applicable under a law of the Commonwealth, a State or a Territory in relation to the exercise of such jurisdiction.
- (3C) If:
- (a) a bail authority decides to grant bail to a person charged with or convicted of an offence covered by subsection (2); and
  - (b) immediately after the decision is made, the Director of Public Prosecutions notifies the bail authority that he or she intends to appeal against the decision under subsection (3A);
- the decision to grant bail is stayed with effect from the time of the notification.
- (3D) A stay under subsection (3C) ends:
- (a) when a decision on the appeal is made; or
  - (b) when the Director of Public Prosecutions notifies:
    - (i) the bail authority; or



- (ii) if an appeal has already been instituted in a court—the court;  
that he or she does not intend to proceed with the appeal; or
  - (c) 72 hours after the stay comes into effect;  
whichever occurs first.
- (4) To avoid doubt, except as provided by subsections (1), (3A), (3B), (3C) and (3D), this section does not affect the operation of a law of a State or a Territory.
- Note: These provisions indirectly affect laws of the States and Territories because they affect section 68 of the *Judiciary Act 1903*.
- (5) In this section:
- ancillary offence* has the meaning given in the *Criminal Code*.
- primary offence* has the meaning given in the *Criminal Code*.

### **15AB Matters to be considered in certain bail applications**

- (1) In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Commonwealth, or in determining conditions to which bail granted to such a person should be subject, a bail authority:
- (a) must take into consideration the potential impact of granting bail on:
    - (i) any person against whom the offence is, or was, alleged to have been committed; and
    - (ii) any witness, or potential witness, in proceedings relating to the alleged offence, or offence; and
  - (b) must not take into consideration any form of customary law or cultural practice as a reason for:
    - (i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or
    - (ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.
- (2) If a person referred to in subparagraph (1)(a)(i) or (ii) is living in, or otherwise located in, a remote community, the bail authority

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must also take into consideration that fact in considering the potential impact of granting bail on that person.

(3) In paragraph (1)(b):

*criminal behaviour* includes:

- (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
  - (b) any fault element relating to such a physical element.
- (4) To avoid doubt, except as provided by subsections (1) and (2), this section does not affect:
- (a) any other matters that a bail authority must, must not or may take into consideration in determining whether to grant bail or in determining conditions to which bail should be subject; or
  - (b) the operation of a law of a State or a Territory.

Note: Subsections (1) and (2) indirectly affect laws of the States and Territories because they affect section 68 of the *Judiciary Act 1903*.

**15A Enforcement of fines etc.**

- (1) A law of a State or Territory relating to the enforcement or recovery of a fine imposed on an offender applies to a person convicted in the State or Territory of an offence against a law of the Commonwealth. The law applies:
  - (a) so far as it is not inconsistent with a law of the Commonwealth; and
  - (b) with the modifications made by or under this section.
- (1AA) If a law of a State or Territory requires or permits a person or authority other than a court to take action to impose a penalty described in subsection (1AB) for failure to pay a fine, the law applies under subsection (1) as if the law did not require or permit the person or authority to take the action but instead:
  - (a) allowed any person to apply to a court of summary jurisdiction of the State or Territory for an order imposing the penalty; and
  - (b) allowed the court to make the order; and
  - (c) provided for the order to have the same effect that the taking of the action by the person or authority has under the law

without the modifications made by or under this subsection;  
and

- (d) were subject to any prescribed modifications consequential on the other modifications described in this subsection, or facilitating the operation of the law with those modifications.

(1AB) Subsection (1AA) applies in relation to any of the following penalties:

- (a) garnishment of a debt, wage or salary;
- (b) a charge or caveat on property;
- (c) seizure of property;
- (d) forfeiture of property;
- (e) community service by a person who failed to pay a fine;
- (f) detention or imprisonment of a person who failed to pay a fine;
- (g) a penalty that is similar to a penalty described in paragraph (a), (b), (c), (d), (e) or (f);
- (h) a penalty prescribed by the regulations.

(1AC) Jurisdiction is conferred on a court of summary jurisdiction of a State or Territory to make orders described in subsection (1AA).

(1ACA) Paragraph 26(d) of the *Acts Interpretation Act 1901* does not apply in relation to subsections (1AA) and (1AC).

(1AD) If a law of a State or Territory requires or permits a court or a court officer to:

- (a) refer a matter to a person or organisation; or
- (b) notify a person or organisation; or
- (c) provide information to a person or organisation;

in relation to the enforcement or recovery of a fine imposed by the court, the law applies under subsection (1) in relation to a federal court in the same way as it applies to a court of the State or Territory.

(1A) Where there is a law of a State or Territory with respect to the enforcement or recovery of fines ordered to be paid by offenders (including a law described in subsection (1AA)) that applies in relation to fines ordered to be paid by offenders convicted by courts of summary jurisdiction:

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- (a) subsection (1) operates to require that law to apply and be applied to persons who are convicted summarily of federal offences by a federal court in the same manner as that law would apply and be applied if the federal court were a court of summary jurisdiction; and
  - (b) that subsection does not operate in relation to any law of that State or Territory that applies in relation to fines ordered to be paid by offenders convicted by superior courts.
- (1B) If a law of a State or Territory:
- (a) is with respect to the enforcement or recovery of fines ordered to be paid by offenders (including a law described in subsection (1AA)); and
  - (b) applies in relation to fines ordered to be paid by offenders convicted on indictment;
- subsection (1) operates to require that law to apply and be applied in the same manner to persons who are convicted on indictment of federal offences by a federal court.
- (2) Without limiting the generality of subsection (1), in the application to a person convicted of a federal offence of any State or Territory laws with respect to the enforcement or recovery of fines, a requirement that the amount of a fine be paid to a State or Territory office or officer is to be treated as a requirement that the amount of the fine be paid in accordance with the law of the Commonwealth.
  - (3) Where a court imposes a sentence or sentences of imprisonment on a person in respect of a failure to pay a fine or fines imposed for a federal offence or offences, the court must direct that the sentence, or all the sentences, commence to be served from the earliest practicable day despite the fact that the person may, on that day, already be serving another sentence of imprisonment for a federal, State or Territory offence.
  - (4) Despite subsection (3), a court may, where it is of the opinion that, in all the circumstances of the case, it is more appropriate to do so, direct that a period of imprisonment imposed on a person in respect of a failure to pay a fine imposed in respect of a federal offence commence to be served during, or at the end of, a period of imprisonment imposed for a similar failure in respect of another federal offence.

(5) In this section:

*federal offence* means an offence against the law of the Commonwealth.

*modifications* includes additions, omissions and substitutions.

### **15B Time for commencement of prosecutions**

- (1) Subject to subsection (1B), a prosecution of an individual for an offence against any law of the Commonwealth may be commenced as follows:
- (a) if the maximum penalty which may be imposed for the offence in respect of an individual is, or includes, a term of imprisonment of more than 6 months in the case of a first conviction—at any time;
  - (b) in any other case—at any time within one year after the commission of the offence.
- (1A) A prosecution of a body corporate for an offence against any law of the Commonwealth may be commenced as follows:
- (a) if the maximum penalty which may be imposed for the offence in respect of a body corporate is, or includes, a fine of more than 150 penalty units in the case of a first conviction—at any time;
  - (b) in any other case—at any time within one year after the commission of the offence.
- (1B) A prosecution of an individual for an offence that is taken to have been committed because of section 11.2 or 11.2A of the *Criminal Code*, or against another law of the Commonwealth dealing with aiding and abetting, in relation to an offence committed by a body corporate may be commenced as follows:
- (a) if the maximum penalty which may be imposed for the principal offence in respect of a body corporate is, or includes, a fine of more than 150 penalty units in the case of a first conviction—at any time;
  - (b) in any other case—at any time within one year after the commission of the offence by the individual.
- (2) Notwithstanding any provision in any law of the Commonwealth passed before the commencement of this Act and providing any shorter time for the commencement of the prosecution, any
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prosecution for an offence against the law may be commenced at any time within one year after the commission of the offence.

- (3) Where by any law of the Commonwealth any longer time than the time provided by this section is provided for the commencement of a prosecution in respect of an offence against that law, a prosecution in respect of the offence may be commenced at any time within that longer time.

**15C Form of indictments, informations and summonses**

- (1) At the hearing of any indictment, information or summons, the court may make such amendment in the indictment, information or summons as appears to it to be desirable or to be necessary to enable the real question in dispute to be determined.
- (2) If in any such case the court considers that the defendant has been misled by the form in which the indictment, information or summons has been made out, it may adjourn the hearing of the case for such period as it thinks fit and may make such order as to the costs of the adjournment as it thinks proper.
- (3) The power of the court under subsection (1) shall not be exercised in cases where the court considers that the required amendments cannot be made without injustice to the defendant.

**15E Privilege of Parliament not affected**

Nothing in this Act shall derogate from any power or privilege of either House of the Parliament or of the members or committees of either House of Parliament as existing at the commencement of this Act.

**15F Civil rights not affected**

Nothing in this Act shall affect the right of any person aggrieved by any act or omission which is punishable as an offence against this Act to institute civil proceedings in any court in respect of such act or omission.

## **Part IAB—Controlled operations**

### **Division 1—Preliminary**

#### **15G Objects of Part**

The main objects of this Part are:

- (a) to provide for the authorisation, conduct and monitoring of controlled operations; and
- (b) to exempt from criminal liability, and to indemnify from civil liability:
  - (i) law enforcement officers who, in the course of a controlled operation authorised under this Part, take an active part in, or are otherwise involved in, the commission of a Commonwealth offence or an offence against a law of a State or Territory or conduct that may result in a civil liability; and
  - (ii) certain other persons who, in accordance with the instructions of a law enforcement officer and in the course of a controlled operation authorised under this Part, take an active part in, or are otherwise involved in, the commission of a Commonwealth offence or an offence against a law of a State or Territory or conduct that may result in a civil liability.

#### **15GA Relationship to other laws and matters**

- (1) Subject to subsection (2) and section 15HZ, this Part is not intended to limit a discretion that a court has:
  - (a) to admit or exclude evidence in any proceedings; or
  - (b) to stay criminal proceedings in the interests of justice.
- (2) In determining whether evidence should be admitted or excluded in any proceedings, the fact that the evidence was obtained as a result of a person engaging in criminal activity is to be disregarded if:
  - (a) both:
    - (i) the person was a participant in a controlled operation authorised under this Part acting in the course of the controlled operation; and

- (ii) the criminal activity was controlled conduct; or
- (b) both:
  - (i) the person was a participant in an operation authorised under a corresponding State controlled operations law acting in the course of that operation; and
  - (ii) the criminal activity was conduct constituting an offence for which a person would, but for section 15HH, be criminally responsible.

### **15GB Concurrent operation of State and Territory laws**

It is the intention of the Parliament that this Part is not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Part.

### **15GC Definitions**

In this Part:

*ACC authorising officer* has the meaning given by subsection 15GF(4).

*ACLEI authorising officer* has the meaning given by subsection 15GF(5).

*AFP authorising officer* has the meaning given by subsection 15GF(3).

*appropriate authorising officer*, for a controlled operation authorised under this Part, means the following:

- (a) if the authority to conduct the controlled operation was granted by an AFP authorising officer—any AFP authorising officer;
- (b) if the authority to conduct the controlled operation was granted by an ACC authorising officer—any ACC authorising officer;
- (c) if the authority to conduct the controlled operation was granted by an ACLEI authorising officer—any ACLEI authorising officer.



**authorising agency**, for a controlled operation authorised under this Part, means the following:

- (a) if the authority to conduct the controlled operation was granted by an AFP authorising officer—the Australian Federal Police;
- (b) if the authority to conduct the controlled operation was granted by an ACC authorising officer—the ACC;
- (c) if the authority to conduct the controlled operation was granted by an ACLEI authorising officer—the Australian Commission for Law Enforcement Integrity.

**authorising officer** has the meaning given by subsection 15GF(1).

**authority** means an authority (whether formal or urgent) to conduct a controlled operation granted under section 15GI, and includes any such authority as varied.

**chief officer** means the following:

- (a) in relation to the Australian Federal Police—the Commissioner;
- (b) in relation to the police force of a State or Territory—the Commissioner of Police in that police force or the person holding equivalent rank;
- (c) in relation to Customs—the Chief Executive Officer of Customs;
- (d) in relation to the ACC—the Chief Executive Officer of the ACC;
- (e) in relation to the Australian Commission for Law Enforcement Integrity—the Integrity Commissioner.

**civilian participant** in a controlled operation means a participant in the controlled operation who is not a law enforcement officer.

**conduct** has the same meaning as in the *Criminal Code*.

**controlled conduct** means conduct constituting an offence for which a person would, but for section 15HA, be criminally responsible.

**controlled operation** has the meaning given by subsection 15GD(1).

***corresponding State controlled operations law*** means:

- (a) a law of a State or Territory; or
- (b) a provision or provisions of a law of a State or Territory; prescribed by the regulations for the purposes of this definition.

***exercise*** a function includes perform a duty.

***formal application*** has the meaning given by paragraph 15GH(2)(a).

***formal authority*** has the meaning given by paragraph 15GJ(1)(a).

***formal variation application:***

- (a) in relation to an application under subsection 15GP(1)—has the meaning given by paragraph 15GP(3)(a); and
- (b) in relation to an application under subsection 15GU(1)—has the meaning given by paragraph 15GU(3)(a).

***formal variation of authority:***

- (a) in relation to a variation made by an appropriate authorising officer—has the meaning given by paragraph 15GR(1)(a); and
- (b) in relation to a variation made by a nominated Tribunal member—has the meaning given by paragraph 15GW(1)(a).

***function*** includes a power, authority or duty.

***law enforcement agency*** means any of the following:

- (a) the Australian Federal Police;
- (b) the police force of a State or Territory;
- (c) Customs;
- (d) the ACC;
- (e) the Australian Commission for Law Enforcement Integrity.

***law enforcement participant*** in a controlled operation means a participant in the controlled operation who is a law enforcement officer.

***major controlled operation*** has the meaning given by subsection 15GD(2).

***nominated Tribunal member*** means a person in respect of whom a nomination under subsection 15GG(1) is in force.

***participant*** in a controlled operation means a person who is authorised under this Part to engage in controlled conduct for the purposes of the controlled operation.

***person targeted***, in relation to a controlled operation, means the person about whom, as a result of the controlled operation:

- (a) it is intended to obtain evidence; or
- (b) evidence is being, or has been, obtained.

***principal law enforcement officer***, for a controlled operation authorised under this Part, means the Australian law enforcement officer specified in the authority to conduct the controlled operation as the officer who is responsible for the conduct of the controlled operation.

***serious Commonwealth offence*** has the meaning given by subsections 15GE(1) and (3).

***serious State offence that has a federal aspect*** has the meaning given by subsection 15GE(4).

***urgent application*** has the meaning given by paragraph 15GH(2)(b).

***urgent authority*** has the meaning given by paragraph 15GJ(1)(b).

***urgent variation application***:

- (a) in relation to an application under subsection 15GP(1)—has the meaning given by paragraph 15GP(3)(b); and
- (b) in relation to an application under subsection 15GU(1)—has the meaning given by paragraph 15GU(3)(b).

***urgent variation of authority***:

- (a) in relation to a variation made by an appropriate authorising officer—has the meaning given by paragraph 15GR(1)(b); and
- (b) in relation to a variation made by a nominated Tribunal member—has the meaning given by paragraph 15GW(1)(b).

**15GD Meaning of *controlled operation* and *major controlled operation***

- (1) A ***controlled operation*** is an operation that:
- (a) involves the participation of law enforcement officers; and
  - (b) is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence that has a federal aspect; and
  - (c) may involve a law enforcement officer or other person in conduct that would, apart from section 15HA, constitute a Commonwealth offence or an offence against a law of a State or Territory.

Note: Section 15GN specifies when a controlled operation begins and ends.

- (2) A ***major controlled operation*** is a controlled operation that is likely to:
- (a) involve the infiltration of an organised criminal group by one or more undercover law enforcement officers for a period of more than 7 days; or
  - (b) continue for more than 3 months; or
  - (c) be directed against suspected criminal activity that includes a threat to human life.

Note: Section 15GN specifies when a controlled operation begins and ends.

**15GE Meaning of *serious Commonwealth offence* and *serious State offence that has a federal aspect***

*Meaning of serious Commonwealth offence*

- (1) For the purposes of this Part, ***serious Commonwealth offence*** means a Commonwealth offence that:
- (a) involves a matter mentioned in subsection (2); and
  - (b) is punishable on conviction by imprisonment for a period of 3 years or more.
- (2) The matters are as follows:
- (a) theft;
  - (b) fraud;
  - (c) tax evasion;

- (d) currency violations;
  - (e) controlled substances;
  - (f) illegal gambling;
  - (g) obtaining financial benefit by vice engaged in by others;
  - (h) extortion;
  - (i) money laundering;
  - (j) perverting the course of justice;
  - (k) bribery or corruption of, or by, an officer of the Commonwealth, of a State or of a Territory;
  - (l) bankruptcy and company violations;
  - (m) harbouring of criminals;
  - (n) forgery (including forging of passports);
  - (o) armament dealings;
  - (p) illegal importation or exportation of fauna into or out of Australia;
  - (q) espionage, sabotage or threats to national security;
  - (r) misuse of a computer or electronic communications;
  - (s) people smuggling;
  - (t) slavery;
  - (u) piracy;
  - (v) the organisation, financing or perpetration of sexual servitude or a sexual offence against a person who is under 18 outside Australia;
  - (w) dealings in child pornography or material depicting child abuse;
  - (x) importation of prohibited imports;
  - (y) exportation of prohibited exports;
  - (z) violence;
  - (za) firearms;
  - (zb) a matter that is of the same general nature as a matter mentioned in one of the preceding paragraphs;
  - (zc) a matter that is prescribed by the regulations for the purposes of this paragraph.
- (3) Without limiting subsections (1) and (2), an offence against one of the following provisions of the *Criminal Code* is a **serious Commonwealth offence** for the purposes of this Part:
- (a) Part 5.3 (Terrorism);

- (b) Subdivision B of Division 471 (Use of postal or similar service for child pornography material or child abuse material);
- (c) Subdivision C of Division 471 (Use of postal or similar service involving sexual activity with person under 16);
- (d) Subdivision D of Division 474 (Use of carriage service for child pornography material or child abuse material);
- (e) Subdivision F of Division 474 (Use of carriage service involving sexual activity with person under 16).

*Meaning of serious State offence that has a federal aspect*

- (4) For the purposes of this Part, ***serious State offence that has a federal aspect*** means a State offence that has a federal aspect and that would be a serious Commonwealth offence if it were a Commonwealth offence.

Note: For when a State offence has a ***federal aspect***, see section 3AA.

**15GF Meaning of *authorising officer* etc.**

- (1) Any of the following is an ***authorising officer*** for a controlled operation:
- (a) if the operation is a major controlled operation and the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police—the Commissioner or a Deputy Commissioner;
  - (b) if the operation is not a major controlled operation, but the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police—any AFP authorising officer;
  - (c) if the investigation of the offence to which the controlled operation relates is within the functions of the ACC—any ACC authorising officer;
  - (d) if the controlled operation relates to the investigation of a corruption issue (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*)—any ACLEI authorising officer.
- (2) The following are ***AFP authorising officers***:
- (a) the Commissioner;
  - (b) a Deputy Commissioner;

- (c) a senior executive AFP employee who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner for the purposes of this paragraph.
- (3) The following are *ACC authorising officers*:
  - (a) the Chief Executive Officer of the ACC;
  - (b) a member of the staff of the ACC who is an SES employee and who is authorised in writing by the Chief Executive Officer of the ACC for the purposes of this paragraph.
- (4) The following are *ACLEI authorising officers*:
  - (a) the Integrity Commissioner;
  - (b) the Assistant Integrity Commissioner;
  - (c) a member of the staff of the ACLEI who is an SES employee and is authorised in writing by the Integrity Commissioner for the purposes of this paragraph.

### **15GG Minister may nominate AAT members**

- (1) The Minister may, by writing, nominate a person who holds one of the following appointments to the Administrative Appeals Tribunal to deal with applications under subsection 15GU(1) (which deals with extending authorities for controlled operations beyond 3 months):
  - (a) Deputy President;
  - (b) full-time senior member;
  - (c) part-time senior member;
  - (d) member.
- (2) Despite subsection (1), the Minister must not nominate a person who holds an appointment as a part-time senior member or a member of the Tribunal unless the person:
  - (a) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or of the Australian Capital Territory; and
  - (b) has been so enrolled for not less than 5 years.
- (3) A nomination ceases to have effect if:
  - (a) the nominated Tribunal member ceases to hold an appointment described in subsection (1); or
  - (b) the Minister, by writing, withdraws the nomination.

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- (4) A nominated Tribunal member has, in relation to the performance or exercise of a function or power conferred on a nominated Tribunal member by this Act, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.



## **Division 2—Authorisation of controlled operations**

### **Subdivision A—Authorities to conduct controlled operations**

#### **15GH Applications for authorities to conduct controlled operations**

- (1) An Australian law enforcement officer of a law enforcement agency may apply to an authorising officer for an authority to conduct a controlled operation on behalf of the law enforcement agency.
- (2) An application for an authority may be made:
  - (a) by means of a written document signed by the applicant (such an application is a *formal application*); or
  - (b) if the applicant has reason to believe that the delay caused by making a formal application may affect the success of the controlled operation—orally in person, or by telephone or any other means of communication (such an application is an *urgent application*).
- (3) Nothing in this Part prevents an application for an authority being made in respect of a controlled operation that has been the subject of a previous application, but in that case the subsequent application must be a formal application.

Note: An urgent authority can be varied, but not so as to extend its duration—see sections 15GO and 15GS.

- (4) An application (whether formal or urgent) must:
  - (a) provide sufficient information to enable the authorising officer to decide whether or not to grant the application; and
  - (b) state whether or not the proposed controlled operation, or any other controlled operation with respect to the same criminal activity, has been the subject of an earlier application (whether formal or urgent) for an authority or variation of an authority and, if so, whether or not the authority was given or the variation granted; and
  - (c) state the proposed period of effect of the authority, which must not exceed:
    - (i) in the case of a formal application—3 months; and
    - (ii) in the case of an urgent application—7 days.

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- (5) An authorising officer may require an applicant to provide such additional information concerning the proposed controlled operation as is necessary for the proper consideration of the application.
- (6) As soon as practicable after making an urgent application that was not made in writing, the applicant must make a written record of the application and give a copy of it to the authorising officer to whom the application was made.

**15GI Determination of applications**

- (1) An authorising officer may, after considering an application for an authority to conduct a controlled operation, and any additional information provided under subsection 15GH(5):
  - (a) authorise the controlled operation by granting the authority, either unconditionally or subject to conditions; or
  - (b) refuse the application.
- (2) An authorising officer must not grant an authority to conduct a controlled operation unless the authorising officer is satisfied on reasonable grounds:
  - (a) that a serious Commonwealth offence or a serious State offence that has a federal aspect has been, is being or is likely to be, committed; and
  - (b) that the nature and extent of the suspected criminal activity are such as to justify the conduct of a controlled operation; and
  - (c) that any unlawful conduct involved in conducting the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation; and
  - (d) that the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods involved in the controlled operation will be under the control of an Australian law enforcement officer at the end of the controlled operation; and
  - (e) that the proposed controlled conduct will be capable of being accounted for in a way that will enable the reporting requirements of Division 4 to be complied with; and

- (f) that the controlled operation will not be conducted in such a way that a person is likely to be induced to commit a Commonwealth offence or an offence against a law of a State or Territory that the person would not otherwise have intended to commit; and
  - (g) that any conduct involved in the controlled operation will not:
    - (i) seriously endanger the health or safety of any person; or
    - (ii) cause the death of, or serious injury to, any person; or
    - (iii) involve the commission of a sexual offence against any person; or
    - (iv) result in significant loss of, or serious damage to, property (other than illicit goods); and
  - (h) that any role assigned to a civilian participant in the operation is not one that could be adequately performed by a law enforcement officer.
- (3) To avoid doubt, an authorising officer may authorise a particular controlled operation only if he or she is an authorising officer for the controlled operation within the meaning of section 15GF.
- (4) An authority granted under this section is not a legislative instrument.

### **15GJ Manner of granting authority**

- (1) An authority to conduct a controlled operation may be granted:
- (a) in the case of a formal application (other than a formal application referred to in subparagraph (b)(ii))—by means of a written document, signed by the authorising officer (such an authority is a **formal authority**); or
  - (b) in the case of:
    - (i) an urgent application; or
    - (ii) a formal application, if the authorising officer is satisfied that the delay caused by granting a formal authority may affect the success of the controlled operation;orally in person, or by telephone or any other means of communication (such an authority is an **urgent authority**).

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- (2) Nothing in this Part prevents an authority being granted in respect of a controlled operation that has been the subject of a previous authority, but in that case the subsequent authority must be a formal authority.

Note: An urgent authority can be varied, but not so as to extend its duration—see sections 15GO and 15GS.

**15GK Form of authority**

- (1) A formal authority must:
- (a) state the name and rank or position of the person granting the authority; and
  - (b) identify the principal law enforcement officer for the controlled operation and, if the principal law enforcement officer is not the applicant for the authority, the name of the applicant; and
  - (c) state that the application was a formal application; and
  - (d) identify the nature of the criminal activity (including the suspected serious Commonwealth offences and serious State offences that have a federal aspect) in respect of which the controlled conduct is to be engaged in; and
  - (e) state the identity of the persons authorised to engage in controlled conduct for the purposes of the controlled operation; and
  - (f) specify:
    - (i) with respect to the law enforcement participants, the nature of the controlled conduct that those participants may engage in; and
    - (ii) with respect to the civilian participants, the particular controlled conduct (if any) that each such participant may engage in; and
  - (g) identify (to the extent known) the person or persons targeted; and
  - (h) specify the period of effect of the authority, being a period not exceeding 3 months; and
  - (i) specify any conditions to which the conduct of the controlled operation is subject; and
  - (j) state the date and time when the authority is granted; and
  - (k) identify the following details (to the extent to which they are known and are relevant):

- (i) the nature and quantity of any illicit goods that will be involved in the controlled operation;
  - (ii) the foreign countries through which those goods are likely to pass in the course of the controlled operation;
  - (iii) the place or places at which those goods are likely to be dealt with by Customs;
  - (iv) if subparagraph (iii) does not apply—the place or places where those goods are likely to enter into Australia;
  - (v) the time or times when, and the day or days on which, those goods are likely to be dealt with by Customs.
- (2) An urgent authority must:
- (a) state the name and rank or position of the person who granted the authority; and
  - (b) identify the principal law enforcement officer for the controlled operation and, if the principal law enforcement officer is not the applicant for the authority, the name of the applicant; and
  - (c) state whether the application was a formal application or an urgent application; and
  - (d) identify the nature of the criminal activity (including the suspected serious Commonwealth offences and serious State offences that have a federal aspect) in respect of which the controlled conduct is to be engaged in; and
  - (e) state the identity of the persons authorised to engage in controlled conduct for the purposes of the controlled operation; and
  - (f) specify:
    - (i) with respect to the law enforcement participants, the nature of the controlled conduct that those participants may engage in; and
    - (ii) with respect to the civilian participants, the particular controlled conduct (if any) that each such participant may engage in; and
  - (g) identify (to the extent known) the person or persons targeted; and
  - (h) specify the period of effect of the authority, being a period not exceeding 7 days beginning on the day on which the authority was granted; and
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- (i) specify any conditions to which the conduct of the operation is subject; and
  - (j) state the date and time when the authority was granted.
- (3) A person is sufficiently identified for the purposes of paragraph (1)(e) or (2)(e) if the person is identified:
- (a) by an assumed name under which the person is operating; or
  - (b) by a code name or code number;
- as long as the chief officer of the authorising agency for the controlled operation can match the assumed name, code name or code number to the person's identity.
- (4) An authority must not identify persons for the purposes of paragraph (1)(e) or (2)(e) by identifying a class of persons.

**15GL Written record of urgent authority must be issued**

If an authorising officer grants an urgent authority, the authorising officer must, within 7 days, issue a written record of the urgent authority that complies with subsection 15GK(2) to the principal law enforcement officer for the controlled operation.

**15GM Change of principal law enforcement officer**

If an authorising officer in relation to a controlled operation becomes satisfied that the principal law enforcement officer for the controlled operation ceases for any reason to have responsibility for the controlled operation:

- (a) the authorising officer may, by instrument in writing, nominate another person as the principal law enforcement officer for the controlled operation; and
- (b) with effect from the execution of the instrument or such later time as is specified in the instrument, that other person becomes the principal law enforcement officer for the controlled operation.

**15GN Commencement and duration of authorities**

- (1) An authority to conduct a controlled operation comes into force, and the controlled operation is taken to commence, at the time the authority is granted under section 15GI.

- (2) To avoid doubt, an urgent authority is granted when the authorising officer tells the applicant that the urgent authority is granted.

Note: An authority is granted under subsection 15GI(1). Paragraph 15GJ(1)(b) enables an authority to be granted orally in specified circumstances.

- (3) An authority (whether formal or urgent) has effect for the period of effect specified in it under paragraph 15GK(1)(h) or (2)(h) unless:
- (a) it is cancelled before the end of the period of effect; or
  - (b) in the case of a formal authority—the period of effect is extended under Subdivision B or C.

### **Subdivision B—Variation of authorities by appropriate authorising officers**

#### **15GO Variation of authority by appropriate authorising officer**

- (1) An appropriate authorising officer may vary an authority:
- (a) at any time on the authorising officer's own initiative; or
  - (b) on application under subsection 15GP(1).
- (2) A variation may:
- (a) extend the period of effect of the authority (subject to subsections (3) and (4)); or
  - (b) authorise additional persons to engage in controlled conduct for the purposes of the controlled operation and specify:
    - (i) with respect to additional law enforcement participants—the nature of the controlled conduct that those participants may engage in; and
    - (ii) with respect to additional civilian participants—the particular controlled conduct (if any) that each such participant may engage in; or
  - (c) provide that specified persons are no longer authorised to engage in controlled conduct for the purposes of the controlled operation; or
  - (d) authorise participants in the controlled operation to engage in additional or alternative controlled conduct.
- (3) A variation cannot be made that has the effect of extending the period of effect of an urgent authority.

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- (4) A formal authority must not be varied in such a way that the period of effect of the authority will, after the variation is made, exceed 3 months (including any previous extensions).
- (5) An authority must not be varied unless the authorising officer is satisfied on reasonable grounds that the variation will not authorise a significant alteration of the nature of the controlled operation concerned.
- (6) A variation is not a legislative instrument.

**15GP Application to appropriate authorising officer**

- (1) The principal law enforcement officer for a controlled operation, or any other Australian law enforcement officer acting on behalf of the principal law enforcement officer, may apply under this section to an appropriate authorising officer for a variation of an authority in respect of a matter mentioned in subsection 15GO(2).
- (2) An application cannot be made under subsection (1) for a variation that would extend the period of effect of a formal authority in such a way that the period of effect of the authority will, after the variation is made, exceed 3 months (including any previous extensions).
- (3) An application for the variation may be made:
  - (a) by means of a written document that is signed by the applicant (such an application is a ***formal variation application***); or
  - (b) if the applicant has reason to believe that the delay caused by making a formal variation application may affect the success of the controlled operation to which the authority relates— orally in person, or by telephone or any other means of communication (such an application is an ***urgent variation application***).
- (4) More than one application for a variation under this section may be made in respect of the same authority. However, if an urgent variation of authority was granted as a result of an application under this section, the next application must be a formal variation application.



- (5) The application (whether a formal variation application or an urgent variation application) must state whether or not the controlled operation has been the subject of an earlier urgent variation application under this section and, if so:
  - (a) whether the urgent variation application was the last application under this section for a variation; and
  - (b) whether or not the variation was granted.
- (6) If the variation would extend the period of effect of a formal authority, the application (whether a formal variation application or an urgent variation application) must state the proposed period of the extension, which must not exceed:
  - (a) in the case of a formal variation application—the period that would result in the period of effect of the authority exceeding 3 months (including any previous extensions); and
  - (b) in the case of an urgent variation application—the lesser of:
    - (i) 7 days; and
    - (ii) a period that would result in the period of effect of the authority exceeding 3 months (including any previous extensions).
- (7) The authorising officer to whom the application is made may require the applicant to provide such information concerning the proposed variation as is necessary for the authorising officer's proper consideration of the application.
- (8) As soon as practicable after making an urgent variation application that was not made in writing, the applicant must make a written record of the application and give a copy of it to the authorising officer to whom the application was made.

### **15GQ Requirements for variation of authority**

- (1) After considering an application for a variation of an authority, and any additional information provided under subsection 15GP(7), an appropriate authorising officer:
  - (a) may vary the authority in accordance with the application, either unconditionally or subject to conditions; or
  - (b) may refuse the application.

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- (2) An appropriate authorising officer must not vary an authority, whether on application or on the authorising officer's own initiative, unless the authorising officer is satisfied on reasonable grounds:
- (a) that a serious Commonwealth offence or a serious State offence that has a federal aspect has been, is being or is likely to be, committed; and
  - (b) that the nature and extent of the suspected criminal activity are such as to justify the variation; and
  - (c) that any unlawful conduct involved in conducting the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation; and
  - (d) that the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods involved in the controlled operation will be under the control of an Australian law enforcement officer at the end of the controlled operation; and
  - (e) that the proposed controlled conduct will be capable of being accounted for in a way that will enable the reporting requirements of Division 4 to be complied with; and
  - (f) that the controlled operation will not be conducted in such a way that a person is likely to be induced to commit a Commonwealth offence or an offence against a law of a State or Territory that the person would not otherwise have intended to commit; and
  - (g) that any conduct involved in the controlled operation will not:
    - (i) seriously endanger the health or safety of any person; or
    - (ii) cause the death of, or serious injury to, any person; or
    - (iii) involve the commission of a sexual offence against any person; or
    - (iv) result in significant loss of, or serious damage to, property (other than illicit goods); and
  - (h) that any role assigned to a civilian participant in the operation is not one that could be adequately performed by a law enforcement officer.

### **15GR Manner of varying authority**

- (1) An authority may be varied by an appropriate authorising officer (whether on application or on the authorising officer's own initiative) only:
  - (a) in the case of a variation on the authorising officer's own initiative or on a formal variation application (other than a variation referred to in subparagraph (b)(ii))—by means of a written document, signed by the authorising officer (such a variation is a *formal variation of authority*); or
  - (b) in the case of a variation on:
    - (i) an urgent variation application; or
    - (ii) the authorising officer's own initiative or a formal variation application, if the authorising officer is satisfied that the delay caused by granting a formal variation of authority may affect the success of the controlled operation;  
orally in person, or by telephone or any other means of communication (such a variation is an *urgent variation of authority*).
- (2) The authorising officer must, as soon as practicable, prepare and give a written document that complies with section 15GS to the applicant or, if the variation was on the initiative of the authorising officer, to the principal law enforcement officer for the controlled operation.

### **15GS Form of variation of authority**

- (1) A variation of an authority by an appropriate authorising officer (whether formal or urgent) must:
  - (a) identify the controlled operation to which the authority relates; and
  - (b) state the name and rank or position of the person varying the authority; and
  - (c) if the authority was varied on an application made under section 15GP, state:
    - (i) the name of the applicant; and
    - (ii) whether the application was a formal variation application or an urgent variation application; and

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- (d) state the date and time when the variation of authority is or was granted; and
  - (e) describe the variation having regard to the matters referred to in subsection 15GO(2); and
  - (f) if the variation extends the period of effect of a formal authority—state the period of the extension.
- (2) For the purposes of paragraph (1)(f), the period of the extension must not exceed:
- (a) in the case of a formal variation of authority—the period that would result in the period of effect of the authority exceeding 3 months (including any previous extensions); and
  - (b) in the case of an urgent variation of authority—the lesser of:
    - (i) 7 days; and
    - (ii) a period that would result in the period of effect of the authority exceeding 3 months (including any previous extensions).

**Subdivision C—Variations of authorities by nominated Tribunal member: extensions beyond 3 months**

**15GT Variation of formal authority to extend period of effect beyond 3 months**

- (1) A nominated Tribunal member may vary a formal authority on application under subsection 15GU(1).
- (2) Subject to subsection (3), a variation may extend the period of effect of the authority.
- (3) For the purposes of subsection (2), the period of the extension must not exceed the lesser of:
  - (a) 3 months; and
  - (b) a period that would result in the period of effect of the authority exceeding 24 months (including any previous extensions under this Subdivision or Subdivision B).
- (4) A nominated Tribunal member may only vary a formal authority during the period of 2 weeks before the end of the period of effect of the authority.

### **15GU Application to nominated Tribunal member**

- (1) The principal law enforcement officer for a controlled operation for which there is a formal authority, or any other Australian law enforcement officer acting on behalf of the principal law enforcement officer, may apply to a nominated Tribunal member for a variation of the authority that would extend its period of effect:
  - (a) if the period of effect of the authority is 3 months or more (including any previous extensions); or
  - (b) in such a way that the period of effect of the authority will, after the variation is made, be 3 months or more (including any previous extensions).
- (2) An application cannot be made under subsection (1) for a variation that would extend the period of effect of a formal authority in such a way that the period of effect of the authority will, after the variation is made, exceed 24 months (including any previous extensions under this Subdivision or Subdivision B).
- (3) An application for the variation may be made:
  - (a) by means of a written document that is signed by the applicant (such an application is a ***formal variation application***); or
  - (b) if the applicant has reason to believe that the delay caused by making a formal application for the variation may affect the success of the controlled operation to which the authority relates—orally in person, or by telephone or any other means of communication (such an application is an ***urgent variation application***).
- (4) More than one application for a variation under this section may be made in respect of the same authority. However, if an urgent variation of authority was granted as a result of an application under this section, the next application must be a formal variation application.
- (5) An application for a variation (whether a formal variation application or an urgent variation application) must state:
  - (a) whether or not the controlled operation has been the subject of an earlier urgent variation application under this section and, if so:

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- (i) whether the urgent variation application was the last application under this section for a variation; and
  - (ii) whether or not the variation was granted; and
- (b) the proposed period of the extension, which must be such as to comply with subsection (2) and must not exceed:
  - (i) in the case of a formal variation application—3 months; and
  - (ii) in the case of an urgent variation application—7 days.
- (6) The nominated Tribunal member may require the applicant to provide such information concerning the proposed variation as is necessary for the nominated Tribunal member's proper consideration of the application.
- (7) As soon as practicable after making an urgent variation application that was not made in writing, the applicant must make a written record of the application and give a copy of it to the nominated Tribunal member to whom the application was made.

**15GV Determination of application**

- (1) After considering an application for a variation of a formal authority, and any additional information provided under subsection 15GU(6), the nominated Tribunal member concerned:
  - (a) may vary the authority in accordance with the application, either unconditionally or subject to conditions; or
  - (b) may refuse the application.
- (2) The nominated Tribunal member must not grant the variation unless the nominated Tribunal member is satisfied on reasonable grounds:
  - (a) that a serious Commonwealth offence or a serious State offence that has a federal aspect has been, is being or is likely to be, committed; and
  - (b) that the nature and extent of the suspected criminal activity are such as to justify the variation; and
  - (c) that any unlawful conduct involved in conducting the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation; and

- (d) that the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods involved in the controlled operation will be under the control of an Australian law enforcement officer at the end of the controlled operation; and
- (e) that the proposed controlled conduct will be capable of being accounted for in a way that will enable the reporting requirements of Division 4 to be complied with; and
- (f) that the controlled operation will not be conducted in such a way that a person is likely to be induced to commit a Commonwealth offence or an offence against a law of a State or Territory that the person would not otherwise have intended to commit; and
- (g) that any conduct involved in the controlled operation will not:
  - (i) seriously endanger the health or safety of any person; or
  - (ii) cause the death of, or serious injury to, any person; or
  - (iii) involve the commission of a sexual offence against any person; or
  - (iv) result in significant loss of, or serious damage to, property (other than illicit goods); and
- (h) that any role assigned to a civilian participant in the operation is not one that could be adequately performed by a law enforcement officer.

(3) A variation is not a legislative instrument.

### **15GW Manner of varying formal authority**

- (1) A formal authority may be varied by a nominated Tribunal member only:
  - (a) in the case of a formal variation application (other than a formal variation application referred to in subparagraph (b)(ii))—by means of a written document, signed by the nominated Tribunal member (such a variation is a *formal variation of authority*); or
  - (b) in the case of:
    - (i) an urgent variation application; or
    - (ii) a formal variation application, if the nominated Tribunal member is satisfied that the delay caused by granting a

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formal variation of authority may affect the success of the controlled operation;

orally in person, or by telephone or any other means of communication (such a variation is an *urgent variation of authority*).

- (2) The nominated Tribunal member must, as soon as practicable, prepare and give a written document that complies with section 15GX to the applicant.

**15GX Form of variation of formal authority**

- (1) A variation of a formal authority by a nominated Tribunal member (whether formal or urgent) must:
- (a) identify the controlled operation to which the authority relates; and
  - (b) state the name and position of the person varying the authority; and
  - (c) state the name of the applicant; and
  - (d) state whether the application for the variation was a formal variation application or an urgent variation application; and
  - (e) state the date and time when the variation of authority is or was granted; and
  - (f) state the period of the extension.
- (2) The period of the extension:
- (a) must not exceed the period that would result in the period of effect of the authority exceeding 24 months (including any previous extensions under this Subdivision or Subdivision B); and
  - (b) must not exceed:
    - (i) in the case of a formal variation of authority—3 months; and
    - (ii) in the case of an urgent variation of authority—7 days.

**Subdivision D—Other matters**

**15GY Cancellation of authorities**

- (1) An appropriate authorising officer may, by order in writing given to the principal law enforcement officer for a controlled operation,
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cancel the authority to conduct the controlled operation at any time and for any reason.

- (2) Without limiting subsection (1), an appropriate authorising officer may cancel an authority at any time at the request of the principal law enforcement officer for the controlled operation concerned.
- (3) Cancellation of an authority takes effect at the time the order is made or at the later time specified in the order.

### **15GZ Effect of authorities**

- (1) Subject to subsection (2), an authority:
  - (a) authorises each law enforcement participant in the controlled operation to which the authority relates who is identified in the authority to engage in the controlled conduct specified in the authority in respect of that participant; and
  - (b) authorises each civilian participant (if any) in the controlled operation to which the authority relates who is identified in the authority to engage in the particular controlled conduct (if any) specified in the authority in respect of that participant.
- (2) A person identified in an authority as being authorised to engage in controlled conduct for the purposes of the controlled operation is authorised to do so for the period of effect of the authority, unless:
  - (a) the authority specifies a shorter period during which the person is so authorised; or
  - (b) the authority is varied to provide that the person is no longer so authorised; or
  - (c) the authority is cancelled before the end of that period.
- (3) The authority to engage in controlled conduct given to a participant cannot be delegated to any other person.

### **15H Defect in authority**

An application for an authority or variation of an authority, and any authority or variation of an authority granted on the basis of such an application, is not invalidated by any defect, other than a defect that affects the application, authority or variation in a material particular.

**Division 3—Protection from criminal responsibility and related provisions**

**Subdivision A—Controlled operations under this Part**

**15HA Protection from criminal responsibility for controlled conduct during controlled operations**

- (1) This section applies if:
  - (a) a participant in a controlled operation engages in conduct in the course of, and for the purposes of, the controlled operation; and
  - (b) engaging in that conduct is a Commonwealth offence or an offence against a law of a State or Territory.
- (2) Despite any other law of the Commonwealth, a State or a Territory, the participant is not criminally responsible for the offence, if:
  - (a) the participant engages in the conduct in accordance with the authority to conduct the controlled operation; and
  - (b) the participant is identified in the authority as a person authorised to engage in controlled conduct for the purposes of the controlled operation; and
  - (c) the conduct does not involve the participant intentionally inducing a person to commit a Commonwealth offence or an offence under a law of a State or Territory that the person would not otherwise have intended to commit; and
  - (d) the conduct does not involve the participant engaging in any conduct that is likely to:
    - (i) cause the death of, or serious injury to, any person; or
    - (ii) involve the commission of a sexual offence against any person; and
  - (e) if the participant is a civilian participant in the operation—he or she acts in accordance with the instructions of a law enforcement officer.

### **15HB Indemnification of participants against civil liability**

The Commonwealth must indemnify a participant in a controlled operation against any civil liability (including reasonable costs) the participant incurs because of conduct the participant engages in if:

- (a) the participant engages in the conduct in the course of, and for the purposes of, the controlled operation in accordance with the authority to conduct the controlled operation; and
- (b) the participant is identified in the authority as a person authorised to engage in controlled conduct for the purposes of the controlled operation; and
- (c) the conduct does not involve the participant intentionally inducing a person to commit a Commonwealth offence or an offence under a law of a State or Territory that the person would not otherwise have intended to commit; and
- (d) the conduct does not involve the participant engaging in any conduct that is likely to:
  - (i) cause the death of, or serious injury to, any person; or
  - (ii) involve the commission of a sexual offence against any person; and
- (e) if the participant is a civilian participant in the operation—he or she acts in accordance with the instructions of a law enforcement officer; and
- (f) the requirements (if any) specified in the regulations have been met.

### **15HC Effect of sections 15HA and 15HB on other laws relating to criminal investigation**

Sections 15HA and 15HB do not apply to a person's conduct that is, or could have been, authorised under Commonwealth law or a law of a State or Territory relating to the following:

- (a) arrest or detention of individuals;
- (b) searches of individuals;
- (c) entry onto, or searches or inspection of, premises;
- (d) searches, inspections or seizures of other property;
- (e) forensic procedure;
- (f) electronic surveillance devices or telecommunications interception;
- (g) identification procedures;

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- (h) the acquisition or use of assumed identities;
- (i) any other matter concerning powers of criminal investigation.

**15HD Effect of being unaware of variation or cancellation of authority**

- (1) If an authority to conduct a controlled operation is varied in a way that limits its scope, this Part continues to apply to a participant in the controlled operation as if the authority had not been varied in that way, for so long as the participant:
  - (a) is unaware of the variation; and
  - (b) is not reckless about the existence of the variation.
- (2) If an authority to conduct a controlled operation is cancelled, this Part continues to apply to a person who was a participant in the controlled operation immediately before the cancellation as if the authority had not been cancelled in that way, for so long as the person:
  - (a) is unaware of the cancellation; and
  - (b) is not reckless about the existence of the cancellation.
- (3) For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an authority if:
  - (a) the person is aware of a substantial risk that the variation or cancellation has happened; and
  - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk that the authority has not been varied or cancelled.

**15HE Protection from criminal responsibility for certain ancillary conduct**

- (1) This section applies if:
  - (a) a person engages in conduct (the *ancillary conduct*) that relates to controlled conduct (the *related controlled conduct*) engaged in by another person; and
  - (b) engaging in the ancillary conduct is an ancillary offence in relation to the offence constituted by the related controlled conduct.

(2) Despite any other law of the Commonwealth, a State or a Territory, the person who engaged in the ancillary conduct is not criminally responsible for the ancillary offence if, at the time the person engaged in the ancillary conduct, he or she believed the related controlled conduct was being engaged in, or would be engaged in, by a participant in a controlled operation authorised under this Part.

(3) In this section:

*ancillary offence*, in relation to an offence constituted by related controlled conduct, means a Commonwealth offence or an offence under a law of a State or Territory:

- (a) of conspiring to commit the offence constituted by the related controlled conduct; or
- (b) of aiding, abetting, counselling or procuring, inciting or being in any way knowingly concerned in, the commission of the offence constituted by the related controlled conduct.

#### **15HF Compensation for property loss or serious damage**

(1) If a person suffers loss of or serious damage to property, or personal injury, in the course of, or as a direct result of a controlled operation authorised under this Part, the Commonwealth is liable to pay to the person compensation as agreed between the Commonwealth and the person or, in default of agreement, as determined by action against the Commonwealth in a court of competent jurisdiction.

(2) Subsection (1) does not apply if:

- (a) the person suffered the loss, damage or injury in the course of, or as a direct result of, engaging in any criminal activity (other than criminal activity that is controlled conduct); or
- (b) the person was a law enforcement participant at the time of suffering the loss, damage or injury.

#### **15HG Notification requirements**

(1) If:

- (a) any loss of or serious damage to property occurs in the course of, or as a direct result of, a controlled operation (other than property of the law enforcement agency on behalf

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- of which the operation is conducted or a participant in the operation); or
- (b) any personal injury occurs in the course of, or as a direct result of, such an operation;
- the principal law enforcement officer for the controlled operation must report the loss, damage or injury to the chief officer of the law enforcement agency as soon as practicable.
- (2) If loss or serious damage to property is reported to the chief officer under subsection (1), the chief officer must take all reasonable steps to notify the owner of the property of the loss or damage.
- (3) If a personal injury is reported to the chief officer under subsection (1), the chief officer must take all reasonable steps to notify the person that the injury occurred in the course of, or as a direct result of, the controlled operation.
- (4) The chief officer is not required to give a notification under subsection (2) or (3) until the chief officer is satisfied that the notification would not:
- (a) compromise or hinder the controlled operation or any related investigation; or
  - (b) compromise the identity of a participant in the controlled operation; or
  - (c) endanger the life or safety of any person; or
  - (d) prejudice any legal proceeding; or
  - (e) otherwise be contrary to the public interest.
- (5) A chief officer may, by written instrument, delegate any of the chief officer's powers or functions under this section to:
- (a) in relation to the Australian Federal Police—a Deputy Commissioner or a person of equivalent or higher rank; or
  - (b) in relation to Customs—a Deputy Chief Executive Officer of Customs or a person occupying an equivalent or higher position; or
  - (c) in relation to the ACC:
    - (i) an Executive Director or a person occupying an equivalent or higher position; or
    - (ii) a person occupying a position prescribed by the regulations; or

- (d) in relation to ACLEI—the Assistant Integrity Commissioner;  
or
- (e) in relation to the police force of a State or Territory—a  
Deputy Commissioner or a person of equivalent or higher  
rank.

**Subdivision B—Controlled operations under a corresponding  
State controlled operations law**

**15HH Protection from criminal responsibility for conduct under a  
corresponding State controlled operations law**

- (1) This section applies to a participant in an operation authorised  
under a corresponding State controlled operations law if:
  - (a) the participant engages in conduct in the course of, and for  
the purposes of, the operation; and
  - (b) engaging in that conduct is a Commonwealth offence.
- (2) Despite any other law of the Commonwealth, the participant is not  
criminally responsible for the Commonwealth offence, if:
  - (a) the conduct is authorised by, and is engaged in in accordance  
with, the authority to conduct the controlled operation; and
  - (b) the conduct does not involve the participant intentionally  
inducing a person to commit a Commonwealth offence or an  
offence against a law of a State or Territory that the person  
would not otherwise have intended to commit; and
  - (c) the conduct does not involve the participant engaging in any  
conduct that is likely to:
    - (i) cause the death of, or serious injury to, any person; or
    - (ii) involve the commission of a sexual offence against any  
person; and
  - (d) if the person is a civilian participant in the operation—he or  
she acts in accordance with the instructions of a law  
enforcement officer.
- (3) Expressions used in this section have the same meanings as in the  
corresponding State controlled operations law under which the  
operation was authorised.

**15HI Effect of section 15HH on other laws relating to criminal investigation**

Section 15HH does not apply to a person's conduct that is, or could have been, authorised under a Commonwealth law or a law of a State or Territory relating to the following:

- (a) arrest or detention of individuals;
- (b) searches of individuals;
- (c) entry onto, or searches or inspection of, premises;
- (d) searches, inspections or seizures of other property;
- (e) forensic procedure;
- (f) electronic surveillance devices or telecommunications interception;
- (g) identification procedures;
- (h) the acquisition or use of assumed identities;
- (i) any other matter concerning powers of criminal investigation.

**15HJ Protection from criminal responsibility for certain ancillary conduct**

- (1) This section applies if:
    - (a) a person engages in conduct (the *ancillary conduct*) that relates to conduct (the *related conduct*) that:
      - (i) was engaged in by another person; and
      - (ii) constitutes an offence for which a person would, but for section 15HH, be criminally responsible; and
    - (b) engaging in the ancillary conduct is an ancillary offence (within the meaning of the *Criminal Code*) in relation to the offence constituted by the related conduct.
  - (2) Despite any law of the Commonwealth, the person who engaged in the ancillary conduct is not criminally responsible for the ancillary offence if, at the time the person engaged in the ancillary conduct, he or she believed the related conduct was being engaged in, or would be engaged in, by a participant in an operation authorised under a corresponding State controlled operations law.
  - (3) Expressions used in this section have the same meanings as in the corresponding State controlled operations law under which the person believed the controlled conduct was being engaged in.
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## **Division 4—Compliance and monitoring**

### **15HK Unauthorised disclosure of information**

- (1) A person commits an offence if:
  - (a) the person discloses information; and
  - (b) the information relates to a controlled operation.

Penalty: Imprisonment for 2 years.
- (2) Subsection (1) does not apply if the disclosure was:
  - (a) in connection with the administration or execution of this Part; or
  - (b) for the purposes of any legal proceedings arising out of or otherwise related to this Part or of any report of any such proceedings; or
  - (c) for the purposes of obtaining legal advice in relation to the controlled operation; or
  - (d) in accordance with any requirement imposed by law; or
  - (e) in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency.
- (3) Subsection (1) does not apply if:
  - (a) the person (the *discloser*) discloses the information to the Ombudsman or the Integrity Commissioner; and
  - (b) the discloser informs the person to whom the disclosure is made of the discloser's identity before making the disclosure; and
  - (c) the information concerns misconduct in relation to a controlled operation; and
  - (d) the discloser considers that the information may assist a person referred to in paragraph (a) to perform the person's functions or duties; and
  - (e) the discloser makes the disclosure in good faith.

Note: A defendant bears an evidential burden in relation to the matters in subsections (2) and (3)—see subsection 13.3(3) of the Criminal Code.

**15HL Unauthorised disclosure of information—endangering safety, etc.**

- (1) A person commits an offence if:
- (a) the person discloses information; and
  - (b) the information relates to a controlled operation; and
  - (c) either:
    - (i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a controlled operation; or
    - (ii) the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation.

Penalty: Imprisonment for 10 years.

- (2) Subsection (1) does not apply if the disclosure was:
- (a) in connection with the administration or execution of this Part; or
  - (b) for the purposes of any legal proceedings arising out of or otherwise related to this Part or of any report of any such proceedings; or
  - (c) for the purposes of obtaining legal advice in relation to the controlled operation; or
  - (d) in accordance with any requirement imposed by law; or
  - (e) in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency.
- (3) Subsection (1) does not apply if:
- (a) the person (the *discloser*) discloses the information to the Ombudsman or the Integrity Commissioner; and
  - (b) the discloser informs the person to whom the disclosure is made of the discloser's identity before making the disclosure; and
  - (c) the information concerns misconduct in relation to a controlled operation; and
  - (d) the discloser considers that the information may assist a person referred to in paragraph (a) to perform the person's functions or duties; and

(e) the discloser makes the disclosure in good faith.

Note: A defendant bears an evidential burden in relation to the matters in subsections (2) and (3)—see subsection 13.3(3) of the Criminal Code.

(4) An offence against this section is an indictable offence.

### **15HM Chief officers' 6 monthly reports to Ombudsman and Minister**

- (1) As soon as practicable after 30 June and 31 December in each year, the chief officer of each authorising agency must submit a report to the Ombudsman setting out the details required by subsection (2) in relation to controlled operations for which the agency was the authorising agency during the previous 6 months.
- (2) The report must include the following details:
  - (a) the number of formal authorities that were granted or varied by an authorising officer of the agency during the period to which the report relates;
  - (b) the number of formal applications for the grant of formal authorities that were refused by an authorising officer of the agency during the period to which the report relates, the date of those applications and the date of the refusals;
  - (c) the number of formal variation applications and urgent variation applications for the variation of formal authorities that were refused by an authorising officer of the agency during the period to which the report relates, the date of those applications and the date of the refusals;
  - (d) the number of urgent authorities that were granted or varied by an authorising officer of the agency during the period to which the report relates;
  - (e) the number of formal applications and urgent applications for the granting of urgent authorities that were refused by an authorising officer of the agency during the period to which the report relates, the date of those applications and the date of the refusals;
  - (f) the number of formal variation applications and urgent variation applications for the variation of urgent authorities that were refused by an authorising officer of the agency during the period to which the report relates, the date of those applications and the date of the refusals;

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- (g) the number of formal authorities that were varied by a nominated Tribunal member during the period to which the report relates;
- (h) the number of formal variation applications and urgent variation applications for the variation of formal authorities that were refused by a nominated Tribunal member during the period to which the report relates, the date of those applications and the date of the refusals;
- (i) for each authority that was in force at any time during the period to which the report relates:
  - (i) the date the controlled operation commenced; and
  - (ii) if the controlled operation ceased during that period—the date of cessation and the outcomes of the controlled operation; and
  - (iii) if subparagraph (ii) does not apply—the last day of the period of effect of the authority (including any extensions);
- (j) for each authority that was varied by an authorising officer of the agency during the period to which the report relates—the date of the application for the variation and the date of the variation;
- (k) for each authority in relation to which an application for variation was refused by an authorising officer of the agency during the period to which the report relates—the date of the application and the date of the refusal;
- (l) for each authority that was varied by a nominated Tribunal member during the period to which the report relates—the date of the application for the variation and the date of the variation;
- (m) for each authority in relation to which an application for variation was refused by a nominated Tribunal member during the period to which the report relates—the date of the application and the date of the refusal;
- (n) the nature of the criminal activities against which the controlled operations were directed;
- (o) the identity of each person targeted under controlled operations;
- (p) the nature of the controlled conduct engaged in for the purposes of the controlled operations;

- (q) if any of the controlled operations involved illicit goods, a statement (to the extent known) of:
    - (i) the nature and quantity of the illicit goods; and
    - (ii) the route through which the illicit goods passed in the course of the operations; and
    - (iii) all foreign countries through which the illicit goods passed in the course of the operation;
  - (r) details of any loss of or serious damage to property (other than property of the law enforcement agency on behalf of which the operation is conducted or a participant in the operation) occurring in the course of or as a direct result of the controlled operations;
  - (s) details of any personal injuries occurring in the course of or as a direct result of the operations;
  - (t) the number of authorities for controlled operations that were cancelled by an authorising officer of the agency or that expired during the period to which the report relates.
- (2A) If the controlled operation involved illicit goods that are narcotic goods, the report is to:
- (a) identify each law enforcement agency an officer of which had possession of the narcotic goods in the course of the controlled operation; and
  - (b) identify to the extent known any other person who had possession of the narcotic goods in the course of the controlled operation; and
  - (c) state whether the narcotic goods have been destroyed; and
  - (d) if the narcotic goods have not been destroyed—contain the information specified in subsection (2B) relating to the possession of the narcotic goods, or state that it is not known who has possession of them.
- (2B) If the controlled operation involved narcotic goods that have not been destroyed, and the identity of the person who has possession of the narcotic goods is known, the report is to:
- (a) if the person is a law enforcement officer—identify the law enforcement agency of which the person is an officer; or
  - (b) otherwise—identify the person.

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- (2C) If the chief officer of the authorising agency is of the view that disclosing the identity of a person may:
- (a) endanger the safety of the person; or
  - (b) prejudice an investigation or prosecution;
- then the person is sufficiently identified for the purposes of paragraphs (2A)(b) and (2B)(b) if the person is identified:
- (c) by an assumed name under which the person is operating; or
  - (d) by a code name or code number;
- as long as the chief officer can match the assumed name, code name or code number to the person's identity.
- (3) The Ombudsman may require the chief officer of an authorising agency to give additional information covering any controlled operation to which a report relates.
- (4) Nothing in paragraphs (2)(o) to (t) requires particulars of a controlled operation to be included in a report for a period of 6 months if the operation had not been completed during that period, but the particulars must instead be included in the report for the period of 6 months in which the operation is completed.
- (5) A copy of a report given to the Ombudsman under this section must be given to the Minister at the same time as it is given to the Ombudsman.

**15HN Chief officers' annual reports to Minister and Ombudsman**

- (1) As soon as practicable after 30 June in each year, the chief officer of each authorising agency must submit a report to the Minister setting out the details required by subsections 15HM(2), (2A), (2B) and (2C) in relation to controlled operations for which the agency was the authorising agency during the previous 12 months.
- (2) Each chief officer must advise the Minister of any information in a report that, in the chief officer's opinion, should be excluded from the report before the report is laid before the Parliament because:
- (a) the information, if made public, could reasonably be expected to:
    - (i) endanger a person's safety; or
    - (ii) prejudice an investigation or prosecution; or
    - (iii) compromise any law enforcement agency's operational activities or methodologies; or

- (b) making the information public would be contrary to the public interest for any other reason.
- (3) The Minister must exclude information from a report if the Minister is satisfied on the advice of the chief officer of any of the grounds set out in subsection (2) and must then 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.
- (4) A report must not disclose any information that identifies any person involved in an operation or that is likely to lead to such a person being identified.
- (5) Nothing in this section requires particulars of a controlled operation to be included in a report for a year if the operation had not been completed as at 30 June in that year, but the particulars must instead be included in the report for the year in which the operation is completed.
- (6) If a report relates, in whole or in part, to the work or activities of the ACC under a corresponding State controlled operations law, the Minister must, as soon as practicable after the report is laid before each House of the Parliament, send a copy of the report to the State or Territory Minister with responsibility for the corresponding State controlled operations law.
- (7) A copy of a report given to the Minister under this section must be given to the Ombudsman at the same time as it is given to the Minister.

### **15HO Annual report by Ombudsman**

- (1) The Ombudsman must, as soon as practicable after 30 June in each year:
  - (a) prepare a report of the work and activities under this Part of the Ombudsman for the preceding 12 months and give a copy of the report to the Minister and to the chief officer of the law enforcement agency to which the report relates; and
  - (b) prepare a report of the work and activities of the Ombudsman for the preceding 12 months, being work or activities under a corresponding State controlled operations law, and give a copy of the report to the Minister and to the chief officer of the ACC.

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- (2) A report under this section must not include information which, if made public, could reasonably be expected to:
  - (a) endanger a person's safety; or
  - (b) prejudice an investigation or prosecution; or
  - (c) compromise any law enforcement agency's operational activities or methodologies.
- (3) 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.
- (4) A report must include, for each authorising agency concerned, comments on the comprehensiveness and adequacy of the reports which were provided to the Ombudsman by the chief officer of the authorising agency under sections 15HM and 15HN.
- (5) A report must not disclose any information that identifies any person involved in an operation or that is likely to lead to such a person being identified.
- (6) Nothing in this section requires particulars of a controlled operation to be included in a report for a year if the operation had not been completed as at 30 June in that year, but the particulars must instead be included in the report for the year in which the operation is completed.
- (7) If a report relates, in whole or in part, to the work or activities of the ACC under a corresponding State controlled operations law, the Minister must, as soon as practicable after the report is laid before each House of the Parliament, send a copy of the report to the State or Territory Minister with responsibility for the corresponding State controlled operations law.

**15HP Keeping documents connected with controlled operations**

The chief officer of an authorising agency must cause the following to be kept:

- (a) each formal application made to an authorising officer of the agency;
- (b) each written record of an urgent application made to such an authorising officer;
- (c) each formal authority granted by such an authorising officer;



- (d) each written record of an urgent authority issued under section 15GL;
- (e) each formal variation application made to such an authorising officer or to a nominated Tribunal member;
- (f) each written record of an urgent variation application made to such an authorising officer or to a nominated Tribunal member;
- (g) each formal variation of authority by such an authorising officer or by a nominated Tribunal member;
- (h) each written document given under subsection 15GR(2) in relation to a variation of an authority by such an authorising officer;
- (i) each written document given under subsection 15GW(2) in relation to a variation of a formal authority by a nominated Tribunal member;
- (j) each order cancelling an authority granted by such an authorising officer.

### **15HQ General register**

- (1) The chief officer of each authorising agency must cause a general register to be kept.
- (2) The general register is to specify:
  - (a) for each application under this Part made to an authorising officer of the agency (including an application for a variation of an authority):
    - (i) the date of the application; and
    - (ii) whether the application was formal or urgent; and
    - (iii) whether the application was granted, refused or withdrawn; and
    - (iv) if the application was refused or withdrawn—the date and time of the refusal or withdrawal; and
  - (b) for each authority under this Part granted by an authorising officer of the agency:
    - (i) the date and time the authority was granted; and
    - (ii) whether the authority was formal or urgent; and
    - (iii) the name and rank or position of the person who granted the authority; and

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- (iv) each serious Commonwealth offence or serious State offence that has a federal aspect in respect of which controlled conduct under the authority was to be engaged in; and
  - (v) the period of effect of the authority; and
  - (vi) the identity of each person authorised to engage in controlled conduct for the purposes of the controlled operation; and
  - (vii) with respect to the law enforcement participants, the nature of the controlled conduct that those participants were authorised to engage in; and
  - (viii) with respect to the civilian participants, the particular controlled conduct (if any) that each such participant was authorised to engage in; and
  - (viiia) the nature of the controlled conduct that was engaged in by law enforcement participants and civilian participants (if any); and
  - (ix) if the authority was cancelled, the date and time of cancellation; and
  - (x) the date and time the controlled operation began, the date on which the operation ceased, and the outcomes of the operation; and
  - (xi) if the controlled operation involved illicit goods (to the extent known), the nature and quantity of the illicit goods and the route and all foreign countries through which the illicit goods passed in the course of the operation; and
  - (xii) details of any loss of or serious damage to property (other than property of the law enforcement agency on behalf of which the operation is conducted or a participant in the operation) occurring in the course of or as a direct result of the controlled operation; and
  - (xiii) details of any personal injuries occurring in the course of or as a direct result of the operation; and
- (c) for each variation of an authority under this Part made by an authorising officer of the agency:
- (i) the date and time the variation was made; and
  - (ii) whether the variation was formal or urgent; and
  - (iii) the name and rank or position of the person who made the variation.

- (2A) If the controlled operation involved illicit goods that are narcotic goods, the general register is to:
- (a) identify each law enforcement agency an officer of which had possession of the narcotic goods in the course of the controlled operation; and
  - (b) identify to the extent known any other person who had possession of the narcotic goods in the course of the controlled operation; and
  - (c) state whether the narcotic goods have been destroyed; and
  - (d) if the narcotic goods have not been destroyed—contain the information specified in subsection (2B) relating to the possession of the narcotic goods, or state that it is not known who has possession of them.
- (2B) If the controlled operation involved narcotic goods that have not been destroyed, and the identity of the person who has possession of the narcotic goods is known, the general register is to:
- (a) if the person is a law enforcement officer—identify the law enforcement agency of which the person is an officer; or
  - (b) otherwise—identify the person.
- (2C) If the chief officer of the authorising agency is of the view that disclosing the identity of a person may:
- (a) endanger the safety of the person; or
  - (b) prejudice an investigation or prosecution;
- then the person is sufficiently identified for the purposes of paragraphs (2A)(b) and (2B)(b) if the person is identified:
- (c) by an assumed name under which the person is operating; or
  - (d) by a code name or code number;
- as long as the chief officer can match the assumed name, code name or code number to the person's identity.
- (3) A register kept under this section is not a legislative instrument.

### **15HR Appointment of inspecting officers**

- (1) The Ombudsman may appoint members of the Ombudsman's staff to be inspecting officers for the purposes of this Part.
- (2) An appointment under subsection (1) must be in writing.

**15HS Inspection of records by the Ombudsman**

- (1) The Ombudsman must, from time to time and at least once every 12 months, inspect the records of each authorising agency to determine the extent of compliance with this Part by the agency and by law enforcement officers.
- (2) The Ombudsman must also, from time to time and at least once every 12 months, inspect the records of the ACC to determine the extent of compliance with corresponding State controlled operations laws, in relation to any authorities (within the meaning of each such law):
  - (a) for which a law enforcement officer of the ACC applied; or
  - (b) that were granted to a law enforcement officer of the ACC;unless the corresponding State controlled operations law provides for the inspection of records of the ACC to determine the extent of compliance with that law.
- (3) For the purpose of an inspection under this section, the Ombudsman:
  - (a) may, after notifying the chief officer of the agency, enter at any reasonable time premises occupied by the agency; and
  - (b) is entitled to have full and free access at all reasonable times to all records of the agency that are relevant to the inspection; and
  - (c) may require a member of staff of the agency to give the Ombudsman any information that the Ombudsman considers necessary, being information that is in the member's possession, or to which the member has access, and that is relevant to the inspection; and
  - (d) may, despite any other law, make copies of, and take extracts from, records of the agency.
- (4) The chief officer must ensure that members of staff of the agency give the Ombudsman any assistance the Ombudsman reasonably requires to enable the Ombudsman to perform functions under this section.
- (5) Nothing in this section requires the Ombudsman to inspect records relating to operations that have not been completed at the time of the inspection.

### **15HT Power to obtain relevant information**

- (1) If the Ombudsman has reasonable grounds to believe that a law enforcement officer of a particular law enforcement agency (whether or not the agency is an authorising agency) is able to give information relevant to an inspection under this Division of an authorising agency's records, subsections (2) and (3) have effect.
- (2) The Ombudsman may, by writing given to the law enforcement officer, require the officer to give the information to the Ombudsman:
  - (a) by writing signed by the officer; and
  - (b) at a specified place and within a specified period.
- (3) The Ombudsman may, by writing given to the law enforcement officer, require the officer to attend:
  - (a) before a specified inspecting officer; and
  - (b) at a specified place; and
  - (c) within a specified period or at a specified time on a specified day;to answer questions relevant to the inspection.
- (4) If the Ombudsman:
  - (a) has reasonable grounds to believe that a law enforcement officer of a particular law enforcement agency (whether or not the agency is an authorising agency) is able to give information relevant to an inspection under this Division of an authorising agency's records; and
  - (b) does not know the officer's identity;the Ombudsman may, by writing given to the chief officer of the agency, require the chief officer, or a person nominated by the chief officer, to attend:
  - (c) before a specified inspecting officer; and
  - (d) at a specified place; and
  - (e) within a specified period or at a specified time on a specified day;to answer questions relevant to the inspection.
- (5) The place, and the period or the time and day, specified in a requirement under this section, must be reasonable having regard to the circumstances in which the requirement is made.

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**15HU Offence**

A person commits an offence if:

- (a) the person is required under section 15HT to attend before an inspecting officer, to give information or to answer questions; and
- (b) the person refuses or fails to do so.

Penalty: Imprisonment for 6 months.

**15HV Ombudsman to be given information and access despite other laws**

- (1) Despite any other law, a person is not excused from giving information, answering a question, or giving access to a document, as and when required under this Division, on the ground that giving the information, answering the question, or giving access to the document, as the case may be:
  - (a) would contravene a law; or
  - (b) would be contrary to the public interest; or
  - (c) might tend to incriminate the person or make the person liable to a penalty; or
  - (d) would disclose one of the following:
    - (i) a legal advice given to a Minister, a Department or a prescribed authority;
    - (ii) a communication between an officer of a Department or of a prescribed authority and another person or body, being a communication protected against disclosure by legal professional privilege.
- (2) However, if the person is a natural person:
  - (a) the information, the answer, or the fact that the person has given access to the document, as the case may be; and
  - (b) any information or thing (including a document) obtained as a direct or indirect consequence of giving the information, answering the question or giving access to the document;is not admissible in evidence against the person except in a proceeding by way of a prosecution for an offence against section 15HK or 15HL of this Act or Part 7.4 or 7.7 of the *Criminal Code*.

- (3) Nothing in section 15HK or 15HL or in any other law prevents an officer of an agency from:
- (a) giving information to an inspecting officer (whether orally or in writing and whether or not in answer to a question); or
  - (b) giving access to a record of the agency to an inspecting officer;
- for the purposes of an inspection under this Division of the agency's records.
- (4) Nothing in section 15HK or 15HL or in any other law prevents an officer of an agency from making a record of information, or causing a record of information to be made, for the purposes of giving the information to a person as permitted by subsection (3).
- (5) The fact that a person is not excused under subsection (1) from giving information, answering a question or giving access to a document does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that information, answer or document.
- (6) In this section:
- prescribed authority* has the same meaning as in the *Ombudsman Act 1976*.

### **15HW Exchange of information between Ombudsman and State inspecting authorities**

- (1) In this section:
- State or Territory agency* means a law enforcement agency of a State or Territory within the meaning of a corresponding State controlled operations law.
- State or Territory inspecting authority*, in relation to a State or Territory agency, means the authority that, under the law of the State or Territory concerned, has the function of making inspections of a similar kind to those provided for in section 15HS when the State or Territory agency is exercising powers under a corresponding State controlled operations law.

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- (2) The Ombudsman may give information that:
  - (a) relates to a State or Territory agency; and
  - (b) was obtained by the Ombudsman under this Division;to the State or Territory inspecting authority in relation to the agency.
- (3) The Ombudsman may only give information to an authority under subsection (2) if the Ombudsman is satisfied that the giving of the information is necessary to enable the authority to perform its functions in relation to the State or Territory agency.
- (4) The Ombudsman may receive from a State or Territory inspecting authority information relevant to the performance of the Ombudsman's functions under this Division.

**15HX Delegation by Ombudsman**

- (1) The Ombudsman may, by written instrument, delegate to an APS employee responsible to the Ombudsman all or any of the Ombudsman's powers under this Division, other than a power to report to the Minister.
- (2) A delegate must, upon request by a person affected by the exercise of any power delegated to the delegate, produce the instrument of delegation, or a copy of the instrument, for inspection by the person.

**15HY Ombudsman not to be sued**

The Ombudsman, an inspecting officer, or a person acting under an inspecting officer's direction or authority, is not liable to an action, suit or proceeding for or in relation to an act done, or omitted to be done, in good faith in the performance or exercise, or the purported performance or exercise, of a function or power conferred by this Division.



## **Division 5—Miscellaneous**

### **15HZ Evidence of authorities**

A document purporting to be an authority granted under section 15GI or under a corresponding State controlled operations law:

- (a) is admissible in any legal proceedings; and
- (b) in the absence of evidence to the contrary, is proof in any proceedings (not being criminal or disciplinary proceedings against a law enforcement officer) that the person granting the authority was satisfied of the facts he or she was required to be satisfied of to grant the authority.

### **15J Chief Executive Officer of Customs to be notified of certain authorities**

- (1) This section applies if:
  - (a) an authority is granted under section 15GI by an AFP authorising officer, an ACC authorising officer or an ACLEI authorising officer; and
  - (b) the applicant for the authority believes that illicit goods involved in the conduct of the operation may be dealt with by Customs.
- (2) The applicant must, as soon as practicable after the authority is granted, notify the Chief Executive Officer of Customs, or a person (the *nominated person*) nominated by him or her for the purposes of this section, in writing of:
  - (a) the applicant's name; and
  - (b) the date on which the authority was granted; and
  - (c) to the extent to which it is known:
    - (i) the place or places at which the illicit goods will pass into the control of Customs; and
    - (ii) the time or times when, and the day or days on which, the illicit goods are expected to pass into the control of Customs.
- (3) A failure to comply with this section does not affect the validity of an authority.

## Part IAC—Assumed Identities

### Division 1—Preliminary

#### 15K Definitions

In this Part:

**acquire** an assumed identity, means acquire evidence of the assumed identity and includes taking steps towards acquiring evidence of the identity.

**agency** means one or more of the following:

- (a) an issuing agency;
- (b) an intelligence agency;
- (c) a law enforcement agency.

**authorised civilian** means a person who is authorised under an authority to acquire or use an assumed identity, but does not include an officer of an intelligence agency, an officer of a law enforcement agency, or a foreign officer.

**authorised foreign officer** means a foreign officer who is authorised under an authority to acquire or use an assumed identity.

**authorised intelligence officer** means an intelligence officer who is authorised under an authority to acquire or use an assumed identity.

**authorised law enforcement officer** means a law enforcement officer who is authorised under an authority to acquire or use an assumed identity.

**authorised person** means:

- (a) an authorised civilian; and
- (b) an authorised intelligence officer; and
- (c) an authorised law enforcement officer; and
- (d) an authorised foreign officer.

**authority** means an authority granted under section 15KB to acquire and use an assumed identity, including the authority as varied under section 15KE.

**chief officer:**

- (a) of an intelligence agency—means the following:
  - (i) in relation to the Australian Security Intelligence Organisation—the Director-General of Security;
  - (ii) in relation to the Australian Secret Intelligence Service—the Director-General of Australian Secret Intelligence Service; and
- (b) of an issuing agency—means the chief executive officer (however described) of the agency; and
- (c) of a law enforcement agency—means the following:
  - (i) in relation to the Australian Federal Police—the Commissioner of the Australian Federal Police;
  - (ii) in relation to Customs—the Chief Executive Officer of Customs;
  - (iii) in relation to the ACC—the Chief Executive Officer of the ACC;
  - (iv) in relation to the Australian Commission for Law Enforcement Integrity—the Integrity Commissioner;
  - (v) in relation to the Australian Taxation Office—the Commissioner of Taxation;
  - (vi) in relation to a Commonwealth agency specified in the regulations for the purposes of the definition of **law enforcement agency**—the officer specified in the regulations as the chief officer of that agency.

**Commonwealth agency** means:

- (a) the Commonwealth; or
- (b) an authority of the Commonwealth.

**Commonwealth government issuing agency** means a Commonwealth agency that issues evidence of identity and that is named in an authority.

**conduct** includes any act or omission.

***corresponding assumed identity law*** means:

- (a) a law of a State or Territory; or
- (b) a provision or provisions of a law of a State or Territory; prescribed by the regulations for the purposes of this definition.

***corresponding authority*** means:

- (a) an authority under a corresponding assumed identity law to acquire or use an assumed identity; or
- (b) an authority under a corresponding assumed identity law to request the production of evidence of an assumed identity from a Commonwealth government issuing agency.

***doing*** a thing, includes failing to do the thing.

***evidence*** of identity, means a document or other thing (such as a driver's licence, birth certificate, credit card or identity card) that evidences or indicates, or can be used to evidence or indicate, a person's identity or any aspect of a person's identity.

***foreign officer*** means an officer, however described, of an agency that has responsibility for:

- (a) law enforcement in a foreign country; or
- (b) intelligence gathering for a foreign country; or
- (c) security of a foreign country.

***intelligence agency*** means:

- (a) the Australian Security Intelligence Organisation;
- (b) the Australian Secret Intelligence Service.

***intelligence officer*** means:

- (a) in relation to the Australian Security Intelligence Organisation—an officer of the Australian Security Intelligence Organisation; and
  - (b) in relation to the Australian Secret Intelligence Service—a staff member of the Australian Secret Intelligence Service;
- and includes a person who is seconded to an intelligence agency.

***issuing agency*** means:

- (a) a Commonwealth government issuing agency; or
- (b) a non-Commonwealth government issuing agency.

**jurisdiction** means the Commonwealth or a State or Territory of the Commonwealth.

**law enforcement agency** means the following agencies:

- (a) the Australian Federal Police;
- (b) Customs;
- (c) the ACC;
- (d) the Australian Commission for Law Enforcement Integrity;
- (e) the Australian Taxation Office;
- (f) any other Commonwealth agency specified in the regulations.

**law enforcement officer** means:

- (a) in relation to the Australian Federal Police—the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police (all within the meaning of the *Australian Federal Police Act 1979*); and
- (b) in relation to Customs—an officer of Customs; and
- (c) in relation to the ACC—a member of the staff of the ACC; and
- (d) in relation to the Australian Commission for Law Enforcement Integrity—a member of the staff of the Australian Commission for Law Enforcement Integrity; and
- (e) in relation to the Australian Taxation Office—a person engaged under the *Public Service Act 1999* and performing duties in the Australian Taxation Office; and
- (f) in relation to a Commonwealth agency specified in the regulations for the purposes of the definition of **law enforcement agency**—an officer specified in the regulations as an officer of the agency;

and includes a person who is seconded to a law enforcement agency, including (but not limited to) a member of the police force or police service or a police officer (however described) of another jurisdiction.

**National Witness Protection Program** means the program by that name established by the *Witness Protection Act 1994*.

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***non-Commonwealth government issuing agency*** means a person, body or entity (other than a Commonwealth government issuing agency) that issues evidence of identity and that is named in an authority.

***officer*** of an agency, includes a person employed or engaged in the agency.

***originating agency:***

- (a) in relation to the transfer of an authority under subsection 15KV(1)—has the meaning given by that subsection; and
- (b) in relation to the transfer of an authority under subsection 15KV(2)—has the meaning given by that subsection.

***participating jurisdiction*** means a jurisdiction in which a corresponding assumed identity law is in force.

***receiving agency:***

- (a) in relation to the transfer of an authority under subsection 15KV(1)—has the meaning given by that subsection; and
- (b) in relation to the transfer of an authority under subsection 15KV(2)—has the meaning given by that subsection.

***supervisor*** of an authorised civilian means the law enforcement officer or the intelligence officer who supervises or is to supervise the acquisition or use of an assumed identity by the authorised civilian.

***use*** an assumed identity, includes representing (whether expressly or impliedly, or by saying or doing something) the assumed identity to be real when it is not.

## **Division 2—Authority for Assumed Identity**

### **15KA Application for authority to acquire or use assumed identity**

- (1) A law enforcement officer of a law enforcement agency may apply to the chief officer mentioned in subsection (2) for an authority for the officer or any other person to do either or both of the following:
  - (a) acquire an assumed identity;
  - (b) use an assumed identity.
- (2) An application by a law enforcement officer of a law enforcement agency under subsection (1) is to be made to:
  - (a) if the person who is to acquire or use the assumed identity is a foreign officer, or the assumed identity is to be used in a foreign country:
    - (i) if the applicant is a member of the staff of the ACC—the chief officer of the ACC; or
    - (ii) in any other case—the chief officer of the Australian Federal Police; or
  - (b) in any other case—the chief officer of the law enforcement agency.
- (3) An intelligence officer of an intelligence agency may apply to the chief officer of the agency for an authority for the officer or any other person (including a foreign officer) to do either or both of the following:
  - (a) acquire an assumed identity;
  - (b) use an assumed identity.
- (4) A separate application must be made in respect of each assumed identity to be acquired or used.
- (5) An application:
  - (a) must be in writing in the form approved by the chief officer; and
  - (b) must contain:
    - (i) the name of the applicant; and
    - (ii) the name of the person to be authorised to acquire or use an assumed identity (if not the applicant); and

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- (iii) if the person referred to in subparagraph (ii) is not an officer of either an intelligence agency or a law enforcement agency or a foreign officer—the name and rank or position of the person proposed to be appointed as supervisor and an explanation of why it is necessary for a person who is not an officer to acquire or use the assumed identity; and
  - (iv) details of the proposed assumed identity; and
  - (v) reasons for the need to acquire or use an assumed identity; and
  - (vi) if the assumed identity is necessary for a purpose mentioned in subparagraph 15KB(2)(a)(i) or (ii)—details of the investigation or intelligence-gathering exercise in which the assumed identity will be used (to the extent known); and
  - (vii) details of any issuing agencies and the types of evidence to be issued by them; and
  - (viii) details of any application of a kind referred to in section 15KG (making entries in register of births, deaths or marriages) that is to be made under a corresponding assumed identity law.
- (6) The chief officer may require the applicant to give such additional information concerning the application as is necessary for the chief officer's proper consideration of the application.

Note: The chief officer may delegate functions under this section—see section 15LH.

**15KB Determination of applications**

- (1) After considering an application for an authority to acquire or use an assumed identity, and any additional information under subsection 15KA(6), the chief officer:
  - (a) may grant an authority to acquire or use the assumed identity, either unconditionally or subject to conditions; or
  - (b) may refuse the application.
- (2) An authority to acquire or use an assumed identity may not be granted unless the chief officer is satisfied on reasonable grounds:
  - (a) that the assumed identity is necessary for one or more of the following purposes:



- (i) investigation of, or intelligence gathering in relation to, criminal activity (whether a particular criminal activity or criminal activity generally);
  - (ii) the exercise of powers and performance of functions of an intelligence agency;
  - (iii) the exercise of powers and performance of functions for the purposes of the National Witness Protection Program;
  - (iv) the training of persons for any of the purposes mentioned in subparagraphs (i) to (iii);
  - (v) any administrative function in support of any of the purposes mentioned in subparagraphs (i) to (iv); and
  - (b) that the risk of abuse of the assumed identity by the authorised person is minimal; and
  - (c) if the application is for authorisation of an assumed identity for a person who is not an officer of either an intelligence agency or a law enforcement agency—that it would be impossible or impracticable in the circumstances for an officer to acquire or use the assumed identity for the purpose sought.
- (3) If an authority is granted for an authorised civilian, the chief officer must appoint an officer of the law enforcement agency or the intelligence agency (as the case may be) to supervise the acquisition or use of the assumed identity by the authorised civilian.
- (4) The officer appointed as supervisor must be:
- (a) in the case of the Australian Federal Police—a person who holds the rank of sergeant or an equivalent or higher rank; or
  - (b) in the case of Customs—a person who holds the position, or performs the duties, of a Customs Level 4 officer, or an equivalent or higher position, in Customs; or
  - (c) in the case of the ACC—a person who holds the position, or performs the duties, of either a senior investigator or of an APS Executive Level 1 position, or an equivalent or higher position, in the ACC; or
  - (d) in the case of the Australian Commission for Law Enforcement Integrity—a staff member of the Australian Commission for Law Enforcement Integrity who is

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- authorised in writing by the Integrity Commissioner to act as a supervisor; or
- (e) in the case of the Australian Taxation Office—a person who holds the position, or performs the duties, of an APS Executive Level 2 position, or an equivalent or higher position, in the Australian Taxation Office; or
  - (f) in the case of the Australian Security Intelligence Organisation—a person who holds the position, or performs the duties, of an ASIO Executive Officer Level 1 position, or an equivalent or higher position, in the Australian Security Intelligence Organisation; or
  - (g) in the case of the Australian Secret Intelligence Service—an intelligence officer of the Australian Secret Intelligence Service who is determined by the Director-General of the Australian Secret Intelligence Service.
- (5) An authority may also authorise any one or more of the following:
- (a) an application of a kind referred to in section 15KG for an order for an entry in a register of births, deaths or marriages under a corresponding assumed identity law;
  - (b) a request under section 15KI or 15KX;
  - (c) the use of an assumed identity in a foreign country.
- (6) However, the chief officer of the ACC, the chief officer of the Australian Federal Police or the chief officer of an intelligence agency may only authorise the use of the assumed identity in a foreign country if he or she is satisfied that it is reasonably necessary to do so.
- Note: This subsection does not affect any obligation to obtain authority to use the assumed identity in the foreign country.
- (7) A separate authority is required for each assumed identity.
- Note: The chief officer may delegate functions under this section—see section 15LH.
- (8) An authority is not a legislative instrument.

**15KC Form of authority**

- (1) An authority must be:
- (a) in writing in the form approved by the chief officer; and
  - (b) signed by the person granting it.
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- (2) An authority must state the following:
- (a) the name of the person granting the authority;
  - (b) the date of the authority;
  - (c) details of the assumed identity authorised;
  - (d) details of any evidence of the assumed identity that may be acquired under the authority;
  - (e) the conditions (if any) to which the authority is subject;
  - (f) why the authority is granted;
  - (g) if the authority relates to an authorised intelligence officer, an authorised law enforcement officer or a foreign officer—the name of the officer;
  - (h) if the authority relates to an authorised civilian whose supervisor is a law enforcement officer:
    - (i) the name of the authorised civilian; and
    - (ii) the name of his or her supervisor under the authority; and
    - (iii) the period for which the authority will remain in force, being a period not exceeding 3 months;
  - (i) if the authority relates to an authorised civilian whose supervisor is an intelligence officer:
    - (i) the name of the authorised civilian; and
    - (ii) the name of his or her supervisor under the authority.
- (3) The authority must also state the following:
- (a) each issuing agency to which a request may be made under section 15KI or 15KX;
  - (b) whether it authorises an application under a corresponding assumed identity law for an order for an entry in a register of births, deaths or marriages;
  - (c) whether the assumed identity can be used in a foreign country and the reasons for the need for this use.

Note: The chief officer may delegate functions under this section—see section 15LH.

- (4) To avoid doubt, subparagraph (2)(h)(iii) does not prevent the grant of one or more further authorities in relation to an authorised civilian.

Section 15KD

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**15KD Period of authority**

- (1) An authority for an authorised person (other than an authorised civilian of a kind covered by paragraph 15KC(2)(h)) remains in force until cancelled under section 15KE.
- (2) An authority for an authorised civilian of a kind covered by paragraph 15KC(2)(h) remains in force until the end of the period specified in the authority in accordance with subparagraph 15KC(2)(h)(iii), unless the authority is cancelled sooner under section 15KE.

**15KE Variation or cancellation of authority**

- (1) The chief officer of an agency:
  - (a) may, at any time, vary or cancel an authority that was granted by the chief officer of the agency; and
  - (b) must cancel the authority if the chief officer is satisfied (on a review under section 15KF or otherwise) that use of the assumed identity is no longer necessary.

Note: Section 15KW modifies the effect of this provision if control of the authority is transferred.

- (2) The chief officer must give written notice of the variation or cancellation to:
  - (a) where practicable, the authorised person to whom it relates; and
  - (b) if the authorised person is an authorised civilian—the authorised person’s supervisor.
- (3) The notice must state why the authority is varied or cancelled.
- (4) The variation or cancellation takes effect:
  - (a) if the written notice is given to the authorised person and the authorised person is not an authorised civilian—on the day the written notice is given to the authorised person or, if a later day is stated in the notice, on the later day; or
  - (b) if the authorised person is an authorised civilian and the written notice is given to the authorised person’s supervisor—on the day the written notice is given to the authorised person’s supervisor or, if a later day is stated in the notice, on the later day; or

(c) in any other case—on the day stated in the notice.

Note 1: The chief officer may delegate functions under this section—see section 15LH.

Note 2: Despite the variation or cancellation of an authority, a person is, in certain circumstances, protected from prosecution for offences even if the person is unaware of the variation or cancellation—see section 15KU.

(5) A variation of an authority is not a legislative instrument.

### **15KF Yearly review of authority**

(1) The chief officer of an agency must periodically review each authority granted by the chief officer or a delegate of the chief officer under this Part.

(2) A review of an authority under this section is to be conducted:

(a) in the case of an authority granted by the chief officer or a delegate of the chief officer of an intelligence agency to an authorised intelligence officer—at least once every 3 years;  
or

(b) in all other cases—at least once every 12 months.

Note: Section 15KW modifies the effect of this provision if control of the authority is transferred.

(3) The purpose of a review is to determine whether use of the assumed identity under the authority is still necessary.

(4) If the chief officer is satisfied on a review that use of the assumed identity under the authority is no longer necessary, he or she must cancel the authority under section 15KE.

(5) If the chief officer is satisfied on a review that use of the assumed identity under the authority is still necessary, he or she must record his or her opinion, and the reasons for it, in writing.

Note: The chief officer may delegate functions under this section—see section 15LH.

(6) Failure to comply with the requirements of this section does not invalidate an authority or anything lawfully done under the authority.

**15KG Making entries in register of births, deaths or marriages**

The chief officer of:

- (a) a law enforcement agency; or
- (b) an intelligence agency;

may apply, under a corresponding assumed identity law, to the Supreme Court of a State or Territory of a participating jurisdiction for an order that an entry be made in a register of births, deaths or marriages under the relevant law of that jurisdiction in relation to the acquisition of an assumed identity under an authority or corresponding authority.

**15KH Effect of authority ceasing to be in force on register of births, deaths or marriages**

- (1) This section applies if:
  - (a) an authority for an assumed identity ceases to be in force; and
  - (b) there is an entry in relation to that assumed identity in a register of births, deaths or marriages because of an order under a corresponding assumed identity law.
- (2) The chief officer must apply for an order under the corresponding assumed identity law to cancel the entry within 28 days after the day the authority ceases to be in force.

## **Division 3—Evidence of Assumed Identity**

### **15KI Request for evidence of assumed identity**

- (1) This section applies if an authority granted under section 15KB authorises a request under this section.
- (2) The chief officer of a law enforcement agency or an intelligence agency who grants the authority may request the chief officer of an issuing agency stated in the authority to:
  - (a) produce evidence of an assumed identity in accordance with the authority; and
  - (b) give evidence of the assumed identity to the following:
    - (i) the authorised person named in the authority;
    - (ii) an officer of the law enforcement agency or the intelligence agency specified by the chief officer of that agency in the request.

Note: Section 15KW modifies the effect of this provision if control of the authority is transferred.

- (3) The request must state a reasonable period for compliance with the request.
- (4) The request must include:
  - (a) the date of the authority granted under section 15KB; and
  - (b) details of the assumed identity authorised; and
  - (c) details of any evidence of the assumed identity that may be acquired under the authority.
- (5) A request must not be made under this section for an entry in a register of births, deaths or marriages.

- (6) In this section:

***evidence*** means evidence similar to that ordinarily produced or given by the issuing agency.

Note: The chief officer may delegate functions under this section—see section 15LH.

Section 15KJ

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**15KJ Government issuing agencies to comply with request**

The chief officer of a Commonwealth government issuing agency who receives a request under section 15KI must comply with the request within the reasonable period stated in the request.

**15KK Non-government issuing agencies may comply with request**

The chief officer of a non-Commonwealth government issuing agency who receives a request under section 15KI may comply with the request.

**15KL Cancellation of evidence of assumed identity**

- (1) The chief officer of an issuing agency who produces evidence of an assumed identity under this Part must cancel the evidence if directed in writing to do so by the chief officer who requested the evidence.

Note 1: The chief officer who requested the evidence may delegate functions under this section—see section 15LH.

Note 2: Section 15KW modifies the effect of this provision if control of the authority is transferred.

- (2) In this section:

*cancel* includes delete or alter an entry in a record of information.

**15KM Return of evidence of assumed identity**

- (1) This section applies if an authority for a person to acquire or use an assumed identity ceases to be in force.
- (2) The chief officer of a law enforcement agency or the chief officer of an intelligence agency may, in writing, request the person to return to the chief officer any evidence of the assumed identity acquired under the authority.
- (3) A person commits an offence if:
- (a) a request has been made to the person under subsection (2);
  - and
  - (b) the person fails to comply with the request.

Penalty: 10 penalty units.



**15KN Protection from criminal liability—officers of issuing agencies**

The chief officer, or an officer, of an issuing agency who does something that, apart from this section, would be a Commonwealth offence or an offence against a law of a State or Territory, is not criminally responsible for the offence if the thing is done to comply with a request under section 15KI or a direction under section 15KL.

**15KO Indemnity for issuing agencies and officers**

- (1) This section applies if the chief officer of either a law enforcement agency or an intelligence agency makes a request under section 15KI or gives a direction under section 15KL to the chief officer of an issuing agency.
- (2) The Commonwealth must indemnify the issuing agency, or an officer of the issuing agency, for any liability incurred by the agency or officer (including reasonable costs) if:
  - (a) the liability is incurred because of something done by the agency or officer in the course of duty to comply with the request or direction in the course of duty; and
  - (b) any requirements prescribed under the regulations have been met.

## Division 4—Effect of Authority

### 15KP Assumed identity may be acquired and used

A person may acquire or use an assumed identity if:

- (a) the person is an authorised person (other than an authorised civilian) and the acquisition or use is:
  - (i) in accordance with an authority; and
  - (ii) in the course of duty; or
- (b) the person is an authorised civilian and the acquisition or use is in accordance with:
  - (i) an authority; and
  - (ii) any direction by the person's supervisor under the authority.

### 15KQ Protection from criminal liability—authorised persons

If an authorised person does something that, apart from this section, would be a Commonwealth offence or an offence under a law of a State or Territory, the person is not criminally responsible for the offence if:

- (a) the thing is done in the course of acquiring or using an assumed identity in accordance with an authority; and
- (b) the thing is done:
  - (i) in the case of an authorised intelligence officer, an authorised law enforcement officer or an authorised foreign officer—in the course of his or her duty; or
  - (ii) in the case of an authorised civilian—in accordance with any direction by his or her supervisor under the authority; and
- (c) doing the thing would not be an offence if the assumed identity were the person's real identity.

### 15KR Protection from criminal liability—third parties

If a person does something that, apart from this section, would be a Commonwealth offence or an offence under a law of a State or Territory, the person is not criminally responsible for the offence if:

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- (a) the person is a Commonwealth officer; and
- (b) the thing is done in the course of the person's duty; and
- (c) the chief officer who granted the authority has authorised the doing of the thing; and
- (d) if an authorised person had done the thing in accordance with an authority, the authorised person would not have been criminally responsible for the offence because of the application of section 15KQ.

### **15KS Indemnity for authorised persons**

- (1) This section applies if the chief officer of either a law enforcement agency or an intelligence agency grants an authority.
- (2) The Commonwealth must indemnify the authorised person under the authority for any liability incurred by the person (including reasonable costs) because of something done by the person if:
  - (a) the thing is done in the course of acquiring or using an assumed identity in accordance with the authority; and
  - (b) the thing is done:
    - (i) in the case of an authorised intelligence officer, an authorised law enforcement officer or an authorised foreign officer—in the course of his or her duty; or
    - (ii) in the case of an authorised civilian—in accordance with any direction by his or her supervisor under the authority; and
  - (c) any requirements prescribed under the regulations have been met.

### **15KT Particular qualifications**

- (1) Sections 15KQ, 15KR and 15KS do not apply to anything done by an authorised person if:
  - (a) a particular qualification is needed to do the thing; and
  - (b) the person does not have that qualification.
- (2) Subsection (1) applies whether or not the person has acquired, as evidence of an assumed identity, a document that indicates that he or she has that qualification.

Example: An officer who cannot fly a plane is not authorised to fly even though he or she has acquired a pilot's licence under an assumed identity.

**15KU Effect of being unaware of variation or cancellation of authority**

- (1) If an authority has been varied in a way that limits its scope, this Part continues to apply to the authorised person to whom it relates as if it had not been varied in that way, for as long as the person:
  - (a) is unaware of the variation; and
  - (b) is not reckless about the existence of the variation.
- (2) If an authority has been cancelled, this Part continues to apply to the authorised person to whom it related as if it had not been cancelled, for as long as the person:
  - (a) is unaware of the cancellation; and
  - (b) is not reckless about the existence of the cancellation.
- (3) For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an authority or authorisation if:
  - (a) the person is aware of a substantial risk that the variation or cancellation has happened; and
  - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk that the authority has not been varied or cancelled.

**15KV Transfer of control of authorities**

- (1) The chief officer of an intelligence agency (the *originating agency*) may agree in writing with the chief officer of another intelligence agency (the *receiving agency*) to transfer control of an authority to the chief officer of the receiving agency if:
  - (a) the authority was granted by the chief officer of the originating agency; or
  - (b) control of the authority was transferred to the chief officer of the originating agency under a previous application of this subsection.

Note: The chief officer may delegate functions under this section—see section 15LH.

- (2) The chief officer of a law enforcement agency (the *originating agency*) may agree in writing with the chief officer of another law enforcement agency (the *receiving agency*) to transfer control of an authority to the chief officer of the receiving agency if:

- (a) the authority was granted by the chief officer of the originating agency; or
- (b) control of the authority was transferred to the chief officer of the originating agency under a previous application of this subsection.

Note: The chief officer may delegate functions under this section—see section 15LH.

- (3) The chief officer of the originating agency must give the chief officer of the receiving agency a written document setting out:
  - (a) whether the authority has been reviewed under section 15KF, and if so, when a review was last conducted; and
  - (b) whether control of the authority has previously been transferred under this section, and if so:
    - (i) the date of each such transfer; and
    - (ii) the name of the originating agency and receiving agency in relation to each such transfer.
- (4) Control of the authority is transferred at the time when the chief officer of the receiving agency signs and dates a copy of the authority.
- (5) Despite subsection (4), if the authority relates to an authorised civilian, control of the authority is not transferred until the chief officer of the receiving agency appoints an officer of that agency to be the authorised civilian's supervisor.
- (6) The chief officer of the receiving agency must vary the authority in accordance with section 15KE to state the name of the supervisor appointed under subsection (5).
- (7) Control of an authority must not be transferred under this section if:
  - (a) the person who is to acquire or use the assumed identity, or who has acquired or used the assumed identity, is a foreign officer authorised to acquire or use the assumed identity by the chief officer of a law enforcement agency; or
  - (b) the assumed identity is to be, is being or has been used in a foreign country and the authority was granted by the chief officer of a law enforcement agency.

Section 15KW

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**15KW Consequences of transfer of control of authorities**

- (1) This section sets out the consequences of the transfer of control of an authority under section 15KV.
- (2) The authority continues to be in force after the transfer.
- (3) The following provisions have effect, after the transfer, as if the chief officer of the receiving agency had granted the authority instead of the chief officer of the originating agency:
  - (a) section 15KE (which deals with variation and cancellation of authorities);
  - (b) section 15KF (which deals with review of authorities);
  - (c) sections 15KI and 15KX (which deal with requests for evidence of assumed identities).
- (4) To avoid doubt, the obligation under section 15KF, as that section has effect because of subsection (3), for the chief officer of the receiving agency to review the authority, only arises:
  - (a) in the case of an authority transferred under subsection 15KV(1):
    - (i) 3 years after the last review of the authority by the chief officer of an intelligence agency; or
    - (ii) if no such review has been undertaken—3 years after the authority was granted; and
  - (b) in the case of an authority transferred under subsection 15KV(2):
    - (i) 12 months after the last review of the authority by the chief officer of a law enforcement agency; or
    - (ii) if no such review has been undertaken—12 months after the authority was granted.
- (5) Section 15KL (which deals with cancellation of evidence of assumed identity) has effect as if the chief officer of the receiving agency had made the request under section 15KI.

## **Division 5—Mutual Recognition under Corresponding Laws**

### **15KX Requests to a participating jurisdiction for evidence of assumed identity**

- (1) This section applies if an authority granted under section 15KB authorises a request under this section.
  - (2) The chief officer of a law enforcement agency or an intelligence agency who grants the authority may request the chief officer of an issuing agency of a participating jurisdiction stated in the authority to:
    - (a) produce evidence of the assumed identity in accordance with the authority; and
    - (b) give evidence of the assumed identity to the following:
      - (i) the authorised person named in the authority;
      - (ii) an officer of the law enforcement agency or the intelligence agency who is named in the request.
- Note 1: The chief officer may delegate functions under this section—see section 15LH.
- Note 2: Section 15KW modifies the effect of this provision if control of the authority is transferred.
- (3) The request must state that it is a request under this section.
  - (4) A request must not be made under this section for an entry in a register of births, deaths or marriages.

### **15KY Requests from a participating jurisdiction for evidence of assumed identity**

- (1) This section applies if:
  - (a) an authority under a corresponding assumed identity law authorises a request for:
    - (i) the production of evidence of an assumed identity from a Commonwealth government issuing agency; and
    - (ii) the giving of evidence of the assumed identity to the authorised person named in the authority; and

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- (b) the request is made to the chief officer of the Commonwealth government issuing agency; and
  - (c) the request states a reasonable period for compliance with the request.
- (2) Subject to subsection (3), the chief officer of the agency who receives the request must comply with the request within the reasonable period stated in the request.
- (3) This section does not require any of the following to comply with a request made as mentioned in paragraph (1)(b):
- (a) the chief officer of an intelligence agency;
  - (b) the chief officer of the Defence Signals Directorate;
  - (c) the chief officer of the Defence Imagery and Geospatial Organisation.

**15KZ Directions from a participating jurisdiction to cancel evidence of assumed identity**

- (1) The chief officer of an issuing agency who produces evidence of an assumed identity because of a request mentioned in section 15KY must cancel the evidence if directed in writing to do so by the chief officer who authorised the request.
- (2) In this section:
- cancel* includes delete or alter an entry in a record of information.

**15L Indemnity for issuing agencies and officers**

- (1) This section applies if the chief officer of either a law enforcement agency or an intelligence agency makes a request to the chief officer of an issuing agency of a participating jurisdiction under section 15KX.
- (2) The agency that makes the request must indemnify the issuing agency and any officer of the issuing agency, for any liability incurred by the issuing agency or the officer of the issuing agency (including reasonable costs) if:
- (a) the liability is incurred because of something done in the course of duty by the issuing agency or the officer of the issuing agency to comply with the request; and



- (b) any requirements prescribed under the regulations have been met.

**15LA Application of this Part to authorities under corresponding laws**

- (1) The following provisions apply to anything done in relation to a corresponding authority as if it were an authority granted under section 15KB:
  - (a) section 15KP (assumed identity may be acquired and used);
  - (b) section 15KT (particular qualifications);
  - (c) section 15KU (effect of being unaware of variation or cancellation of authority);
  - (d) section 15LB (misuse of assumed identity);
  - (e) section 15LC (disclosing information about assumed identity).
- (2) Sections 15KN, 15KQ and 15KR apply to anything done in relation to a corresponding authority as if:
  - (a) the corresponding authority were an authority granted under section 15KB; and
  - (b) references in those sections to an offence under a law of a State or Territory were omitted.

## **Division 6—Compliance and Monitoring**

### **Subdivision A—Misuse of Assumed Identity and Information**

#### **15LB Misuse of assumed identity**

- (1) A person commits an offence if:
- (a) the person is an authorised person (other than an authorised civilian); and
  - (b) the person acquires evidence of, or uses, an assumed identity; and
  - (c) the acquisition or use is not both:
    - (i) in accordance with an authority; and
    - (ii) in the course of duty; and
  - (d) the person is reckless as to the circumstance mentioned in paragraph (c).

Penalty: Imprisonment for 2 years.

- (2) An authorised civilian commits an offence if:
- (a) the authorised civilian acquires evidence of, or uses, an assumed identity; and
  - (b) the acquisition or use is not in accordance with both:
    - (i) an authority; and
    - (ii) the directions of the authorised civilian's supervisor under the authority; and
  - (c) the authorised civilian is reckless as to the circumstance mentioned in paragraph (b).

Penalty: Imprisonment for 2 years.

#### **15LC Disclosing information about assumed identity**

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct causes the disclosure of information; and
  - (c) the information reveals, or is likely to reveal, that another person has acquired, will acquire, is using or has used an assumed identity.

Penalty: Imprisonment for 2 years.

- (2) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct causes the disclosure of information; and
  - (c) the information reveals, or is likely to reveal, that another person has acquired, will acquire, is using or has used an assumed identity; and
  - (d) the person is reckless as to whether his or her conduct will endanger the health or safety of any person.

Penalty: Imprisonment for 10 years.

- (3) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct causes the disclosure of information; and
  - (c) the information reveals, or is likely to reveal, that another person has acquired, will acquire, is using or has used an assumed identity; and
  - (d) the person is reckless as to whether his or her conduct will prejudice the effective conduct of an investigation or intelligence-gathering in relation to criminal activity.

Penalty: Imprisonment for 10 years.

- (4) A person does not commit an offence under subsection (1), (2) or (3) if the person causes the disclosure of information mentioned in paragraph (1)(c), (2)(c) or (3)(c) (as the case may be) and the disclosure is:
- (a) in connection with the administration or execution of this Part or a corresponding assumed identity law; or
  - (b) for the purposes of any legal proceeding arising out of or otherwise related to this Part or a corresponding assumed identity law or of any report of any such proceedings; or
  - (c) made by the Commonwealth Director of Public Prosecutions for the purposes of a legal proceeding; or
  - (d) in accordance with the exercise of powers or performance of functions of a law enforcement agency or an intelligence agency; or
  - (e) in accordance with any requirement imposed by law.

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- Note 1: A defendant bears an evidential burden in relation to the matters in subsection (4)—see subsection 13.3(3) of the *Criminal Code*.
- Note 2: The mere existence of an exception under subsection (4) does not mean that a person might not commit an offence under a provision of another Act (such as section 39 or 41 of the *Intelligence Services Act 2001*) if the person causes the disclosure of information mentioned in paragraph (1)(c), (2)(c) or (3)(c).

**Subdivision B—Reporting and record-keeping**

**15LD Reports about authorities for assumed identities etc.—law enforcement agencies**

- (1) As soon as practicable after the end of each financial year, the chief officer of a law enforcement agency must submit a report to the Minister that includes the following information for the year:
  - (a) the number of authorities granted during the year;
  - (b) a general description of the activities undertaken by authorised civilians and authorised law enforcement officers when using assumed identities under this Part during the year;
  - (c) the number of applications for authorities that were refused during the year;
  - (d) the number of authorities of which control was transferred by the chief officer under section 15KV during the year;
  - (e) the number of authorities of which control was transferred to the chief officer under section 15KV during the year;
  - (f) a statement whether or not any fraud or other unlawful activity was identified by an audit under section 15LG during the year;
  - (g) any other information relating to authorities and assumed identities and the administration of this Part that the Minister considers appropriate.
- (2) The chief officer must advise the Minister of any information in the report that, in the chief officer's opinion, should be excluded from the report before the report is laid before the Parliament because the information, if made public, could reasonably be expected to:
  - (a) endanger a person's safety; or
  - (b) prejudice an investigation or prosecution; or

- (c) compromise any law enforcement agency's operational activities or methodologies.
- (3) The Minister must exclude information from the report if satisfied on the advice of the chief officer of any of the grounds set out in subsection (2) and 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 day on which the Minister receives the report.

**15LE Reports about authorities for assumed identities etc.—  
intelligence agencies**

As soon as practicable after the end of each financial year, the chief officer of an intelligence agency must submit a report to the Inspector-General of Intelligence and Security (the *Inspector-General*) that includes the following information for the year:

- (a) the number of authorities granted during the year;
- (b) a general description of the activities undertaken by authorised civilians and authorised intelligence officers when using assumed identities under this Part during the year;
- (c) the number of applications for authorities that were refused during the year;
- (d) the number of authorities of which control was transferred by the chief officer under section 15KV during the year;
- (e) the number of authorities of which control was transferred to the chief officer under section 15KV during the year;
- (f) a statement whether or not any fraud or other unlawful activity was identified by an audit under section 15LG during the year;
- (g) any other information relating to authorities and assumed identities and the administration of this Part that the Inspector-General considers appropriate.

**15LF Record keeping**

- (1) The chief officer of either a law enforcement agency or an intelligence agency must keep appropriate records about the operation of this Part in respect of the agency.

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- (2) The records must include the following, in respect of authorities granted, varied or cancelled under this Part in respect of the agency:
- (a) the date on which an authority was granted, varied or cancelled and the name of the person who granted, varied or cancelled it;
  - (b) the name of the authorised person under the authority, together with details of the assumed identity to which the authority applies;
  - (c) details of any request made to an issuing agency under section 15KI or 15KX (request for evidence of assumed identity) in respect of the authority;
  - (d) the general nature of the duties undertaken by the authorised person under the assumed identity;
  - (e) general details of relevant financial transactions entered into using the assumed identity;
  - (f) details of reviews of the authority under section 15KF (yearly review of authority).
- (3) The records must include the following in respect of authorities the control of which has been transferred to or from the chief officer of the agency under section 15KV:
- (a) the names of the chief officers of the originating agency and the receiving agency in relation to the transfer;
  - (b) the name of the originating agency and the receiving agency in relation to the transfer;
  - (c) the date of the transfer;
  - (d) if control of the authority had previously been transferred under section 15KV:
    - (i) the date of each such transfer; and
    - (ii) the name of the originating agency and receiving agency in relation to each such transfer.

**15LG Audit of records**

- (1) The chief officer of either a law enforcement agency or an intelligence agency must cause the records kept under section 15LF for each authority in respect of the agency to be audited:

- (a) at least once every 6 months while the authority is in force;  
and
  - (b) at least once in the 6 months after the cancellation or expiry  
of the authority.
- (2) The audit is to be conducted by a person appointed by the chief  
officer.
- (3) The person appointed to conduct the audit:
- (a) may, but need not be, an officer of the agency; and
  - (b) must not be a person:
    - (i) who granted, varied or cancelled any of the authorities  
to which the records under section 15LF relate; or
    - (ii) to whom control of any of the authorities to which the  
records under section 15LF relate was transferred; or
    - (iii) who is or was an authorised person under any of the  
authorities to which those records relate.
- (4) The results of an audit must be reported to the chief officer.

## Division 7—General

### 15LH Delegation of chief officer's functions

- (1) Except as provided by this section (and despite any other Act or law to the contrary) the functions of a chief officer under this Part may not be delegated to any other person.
- (2) A chief officer may delegate to a senior officer of the law enforcement agency or the intelligence agency (as the case may be) any of the chief officer's functions under this Part relating to the granting, variation, cancellation and transfer of control of authorities (including, but not limited to conducting reviews under section 15KF, making applications under section 15KG, giving directions under section 15KL and making requests under section 15KI or 15KX).
- (3) In this section:

*senior officer* means:

- (a) in relation to the Australian Federal Police:
  - (i) any senior executive AFP employee of the Australian Federal Police within the meaning of section 25 of the *Australian Federal Police Act 1979*; or
  - (ii) any Deputy Commissioner of Police within the meaning of section 6 of the *Australian Federal Police Act 1979*; or
  - (iii) a person occupying a position in the Australian Federal Police that is equivalent to or higher than the positions mentioned in subparagraphs (i) and (ii); and
- (b) in relation to Customs—any SES employee who is a member of the staff of Customs within the meaning of section 15 of the *Customs Administration Act 1985*, or a person occupying an equivalent or higher position in Customs; and
- (c) in relation to the ACC—any SES employee who is a member of the staff of the ACC within the meaning of section 47 of the *Australian Crime Commission Act 2002*, or a person occupying an equivalent or higher position in the ACC; and
- (d) in relation to the Australian Commission for Law Enforcement Integrity:



- (i) the Assistant Integrity Commissioner; or
- (ii) a staff member of the Australian Commission for Law Enforcement Integrity who is an SES employee, or a person occupying an equivalent or higher position in the Australian Commission for Law Enforcement Integrity, and who is authorised in writing by the Integrity Commissioner for the purposes of this provision; and
- (e) in relation to the Australian Taxation Office—any Deputy Commissioner as defined in section 2 of the *Taxation Administration Act 1953*, or a person occupying an equivalent or higher position in the Australian Taxation Office; and
- (f) in relation to the Australian Security Intelligence Organisation—any senior officer of the Australian Security Intelligence Organisation as defined in section 24 of the *Australian Security Intelligence Organisation Act 1979*, or a person occupying an equivalent or higher position in the Australian Security Intelligence Organisation; and
- (g) in relation to the Australian Secret Intelligence Service (*ASIS*)—a senior ASIS intelligence officer designated by the Deputy Director-General of ASIS, or a person occupying an equivalent or higher position in ASIS; and
- (h) in relation to a Commonwealth agency specified in the regulations for the purposes of the definition of *law enforcement agency*—an officer specified in the regulations to be a senior officer of the agency.

## Part IACA—Witness identity protection for operatives

### Division 1—Preliminary

#### 15M Definitions

(1) In this Part:

*assumed name* of an operative has the meaning given by paragraph 15MG(1)(a)(i).

*chief officer* of a law enforcement agency means the following:

- (a) in relation to the Australian Federal Police—the Commissioner of the Australian Federal Police;
- (b) in relation to Customs—the Chief Executive Officer of Customs;
- (c) in relation to the ACC—the Chief Executive Officer of the ACC;
- (d) in relation to the Australian Commission for Law Enforcement Integrity—the Integrity Commissioner;
- (e) in relation to the Australian Taxation Office—the Commissioner of Taxation;
- (f) in relation to a Commonwealth agency specified in the regulations for the purposes of the definition of *law enforcement agency*—the officer specified in the regulations as the chief officer of that agency.

*conduct* includes any act or omission.

*corresponding witness identity protection certificate* means a certificate given under a provision of a corresponding witness identity protection law that corresponds to section 15ME.

*corresponding witness identity protection law* means:

- (a) a law of a State or Territory; or
- (b) a provision or provisions of a law of a State or Territory; prescribed by the regulations for the purposes of this definition.

**court** includes any tribunal or person authorised by law or consent of parties to receive evidence.

**court name** for an operative in relation to a proceeding, means a name (other than the operative's real name) or code used to identify the operative in the proceeding.

**false representation** does not include a representation made under an authority under:

- (a) Part IAB (about controlled operations); or
- (b) Part IAC (about assumed identities).

**investigation** means an investigation in relation to criminal activity, including an investigation extending beyond the Commonwealth.

**jurisdiction** means the Commonwealth or a State or Territory of the Commonwealth.

**law enforcement agency** means the following:

- (a) the Australian Federal Police;
- (b) Customs;
- (c) the ACC;
- (d) the Australian Commission for Law Enforcement Integrity;
- (e) the Australian Taxation Office;
- (f) any other Commonwealth agency specified in the regulations.

**operative** means a person who is or was:

- (a) a participant in a controlled operation authorised under Part IAB; or
  - (b) authorised to acquire and use an assumed identity under Part IAC by the chief officer of a law enforcement agency;
- but does not include a person who is or was an intelligence officer (within the meaning of Part IAC).

**party** to a proceeding, means:

- (a) for a criminal proceeding—the prosecutor and each accused person; or
- (b) for a civil proceeding—each person who is a party to the proceeding.

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**presiding officer** in relation to a proceeding, means the person constituting the court, or presiding over the court, in the proceeding.

**proceeding** means any criminal, civil or other proceeding or inquiry, reference or examination in which by law or consent of parties evidence is or may be given, and includes an arbitration.

**professional misconduct** means fraud, negligence, default, breach of trust, breach of duty, breach of discipline or any other misconduct in the course of duty.

**security** has the meaning given by section 4 of the *Australian Security Intelligence Organisation Act 1979*.

**witness identity protection certificate** means a certificate given under section 15ME.

- (2) For the purposes of this Part:
- (a) anything permitted to be done by a party to a proceeding may be done by the party's lawyer; and
  - (b) any requirement to give something to a party to a proceeding is satisfied by giving the thing to the party's lawyer.

**15MA Meaning of *criminal proceeding***

- (1) In this Part, **criminal proceeding** means a proceeding for the prosecution, whether summarily or on indictment, of an offence or offences.
- (2) To avoid doubt, each of the following is part of a **criminal proceeding**:
- (a) a bail proceeding;
  - (b) a committal proceeding;
  - (c) the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence;
  - (d) a sentencing proceeding;
  - (e) an appeal proceeding;
  - (f) a proceeding with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth (within

the meaning of subsection 39B(1B) of the *Judiciary Act 1903* in relation to:

- (i) a decision to prosecute a person for one or more offences against a law of the Commonwealth; or
- (ii) a related criminal justice process decision (within the meaning of subsection 39B(3) of that Act);
- (g) any other pre-trial, interlocutory or post-trial proceeding prescribed by regulations for the purposes of this paragraph.

### **15MB Meaning of *civil proceeding***

- (1) In this Part, ***civil proceeding*** means any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding.
- (2) To avoid doubt, each of the following is part of a ***civil proceeding***:
  - (a) any proceeding on an ex parte application (including an application made before pleadings are filed in a court);
  - (b) the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence;
  - (c) an appeal proceeding;
  - (d) any interlocutory or other proceeding prescribed by regulations for the purposes of this paragraph.

### **15MC When a charge is outstanding or pending**

- (1) For the purposes of this Part:
  - (a) a charge against a person for an offence is ***outstanding*** until the charge is finally dealt with in any of the following ways:
    - (i) the charge is withdrawn;
    - (ii) the charge is dismissed by a court;
    - (iii) the person is discharged by a court following a committal hearing;
    - (iv) the person is acquitted or found guilty of the offence by a court; and

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- (b) a charge against a person for an offence is ***pending*** if the person has not yet been charged with the offence, but:
  - (i) the person has been arrested for the offence, unless the person has been later released without being charged with an offence; or
  - (ii) a summons to appear before a court to answer a charge for the offence has been served on the person; and
- (c) an allegation of professional misconduct against a person is ***outstanding*** if the allegation has not been finally dealt with in accordance with the procedures that apply for the purposes of dealing with an allegation of that kind.

## **Division 2—Witness Identity Protection Certificates for Operatives**

### **15MD Application of Part**

- (1) This Part applies to a proceeding in which an operative is, or may be, required to give evidence obtained as an operative.
- (2) To avoid doubt, this Part does not affect the operation of any law in relation to the protection of a person who gives, or intends to give, evidence in a proceeding.
- (3) To avoid doubt, this Part does not, other than as expressly provided, limit the power of a court to control proceedings in relation to a matter before it.

### **15ME Witness identity protection certificate**

- (1) The chief officer of a law enforcement agency may give a witness identity protection certificate for an operative in relation to a proceeding if:
  - (a) the operative is, or may be required, to give evidence in the proceeding; and
  - (b) the chief officer is satisfied on reasonable grounds that the disclosure in the proceeding of the operative's identity or where the operative lives is likely to:
    - (i) endanger the safety of the operative or another person; or
    - (ii) prejudice any current or future investigation; or
    - (iii) prejudice any current or future activity relating to security.
- (2) The chief officer must make all reasonable enquiries to enable the chief officer to ascertain the information required to be included in the certificate by section 15MG.
- (3) The chief officer cannot give a certificate for an operative until the chief officer has obtained a statutory declaration from the operative under section 15MF.

Note: The chief officer may delegate functions under this section—see section 15MX.

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- (4) A decision to give a witness identity protection certificate:
  - (a) is final; and
  - (b) cannot be appealed against, reviewed, called into question, quashed or invalidated in any court.
- (5) Subsection (4) does not prevent a decision to give a witness identity protection certificate being called into question in the course of any proceedings of a disciplinary nature against the person who made the decision.
- (6) A witness identity protection certificate purporting to be issued under subsection (1):
  - (a) must be taken to be such a certificate and to have been properly issued; and
  - (b) is prima facie evidence of the matters in the certificate.
- (7) A witness identity protection certificate is not a legislative instrument.

**15MF Statutory declaration by operative**

- (1) Before a witness identity protection certificate is given for an operative, the operative must make a statutory declaration of the following matters:
  - (a) whether the operative has been convicted or found guilty of an offence and, if so, particulars of each offence;
  - (b) whether any charges against the operative for an offence are pending or outstanding and, if so, particulars of each charge;
  - (c) if the operative is or was a law enforcement officer:
    - (i) whether the operative has been found guilty of professional misconduct and, if so, particulars of each finding; and
    - (ii) whether, to the operative's knowledge, any allegations of professional misconduct against him or her are outstanding and, if so, particulars of each allegation;
  - (d) whether, to the operative's knowledge, a court has made any adverse comment about the operative's credibility and, if so, particulars of the comment;
  - (e) whether the operative has made a false representation when the truth was required and, if so, particulars of the representation;



- (f) if there is anything else known to the operative that may be relevant to the operative's credibility—particulars of the thing.
- (2) Subject to subsection (3), a person cannot be compelled to disclose or produce a statutory declaration made under this section in any proceeding.
- (3) Subsection (2) does not apply to:
  - (a) proceedings for perjury or otherwise in respect of the falsity of the statutory declaration; or
  - (b) proceedings of a disciplinary nature against a law enforcement officer; or
  - (c) investigations or inquiries by a person or body in any jurisdiction having jurisdiction to investigate or inquire into the conduct of a law enforcement officer.

### **15MG Form of witness identity protection certificate**

- (1) A witness identity protection certificate for an operative in relation to a proceeding must state the following:
  - (a) if the operative:
    - (i) is known to a party to the proceeding or a party's lawyer by a name other than the operative's real name—that name (the *assumed name*); or
    - (ii) is not known to any party to the proceeding or any party's lawyer by a name—the operative's court name for the proceeding;
  - (b) the period the operative was involved in the investigation to which the proceeding relates;
  - (c) the name of the agency;
  - (d) the date of the certificate;
  - (e) the grounds for giving the certificate;
  - (f) whether the operative has been convicted or found guilty of an offence and, if so, particulars of each offence;
  - (g) whether any charges against the operative for an offence are pending or outstanding and, if so, particulars of each charge;
  - (h) if the operative is or was a law enforcement officer:

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- (i) whether the operative has been found guilty of professional misconduct and, if so, particulars of each finding; and
  - (ii) whether any allegations of professional misconduct against the operative are outstanding and, if so, particulars of each allegation;
  - (i) whether, to the knowledge of the person giving the certificate, a court has made any adverse comment about the operative's credibility and, if so, particulars of the comment;
  - (j) whether, to the knowledge of the person giving the certificate, the operative has made a false representation when the truth was required and, if so, particulars of the representation;
  - (k) if there is anything else known to the person giving the certificate that may be relevant to the operative's credibility—particulars of the thing.
- (2) A witness identity protection certificate for an operative must not contain information that may allow the operative's identity, or where the operative lives, to be revealed.

**15MH Filing and notification**

- (1) A witness identity protection certificate for an operative in relation to a proceeding must be filed in the court before the operative gives evidence in the proceeding.
- (2) The person who files the certificate must give a copy of it to each party to the proceeding at least 14 days (or the shorter period agreed to by the party) before the day the operative is to give evidence.
- (3) The court may order the person filing the certificate to give a copy of it to a person stated in the order.
- (4) This section applies subject to section 15MI.

**15MI Leave for non-compliance**

- (1) The person who has filed, or proposes to file, a witness identity protection certificate may apply to the court for leave not to comply with the requirement under subsection 15MH(2) in relation to the time within which a copy of the certificate is to be given.

- (2) However, the court must not give such leave unless it is satisfied that it was not reasonably practicable to comply with the requirement referred to in subsection (1).

**15MJ Effect of witness identity protection certificate**

- (1) This section applies if a witness identity protection certificate for an operative in relation to a proceeding is filed in a court.
- (2) If this section applies:
- (a) the operative may give evidence in the proceeding under the assumed name, or court name, stated in the certificate; and
  - (b) subject to section 15MM:
    - (i) a question must not be asked of a witness, including the operative, that may lead to the disclosure of the operative's identity or where the operative lives; and
    - (ii) a witness, including the operative, cannot be required to (and must not) answer a question, give evidence or provide information that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives; and
    - (iii) a person involved in the proceeding must not make a statement that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives.
- (3) For the purposes of this section, a person involved in a proceeding includes:
- (a) the court; and
  - (b) a party to the proceeding; and
  - (c) a person given leave to be heard or make submissions in the proceeding; and
  - (d) a lawyer representing a person referred to in paragraph (b) or (c) or a lawyer assisting the court in the proceeding; and
  - (e) any other officer of the court or person assisting the court in the proceeding; and
  - (f) a person acting in the execution of any process or the enforcement of any order in the proceeding.

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**15MK Orders to protect operative's identity etc.**

- (1) The court in which a witness identity protection certificate is filed may make any order it considers necessary or desirable to protect the identity of the operative for whom the certificate is given or to prevent the disclosure of where the operative lives.
- (4) The court must make an order suppressing the publication of anything said when an order is made as mentioned in subsection (1).
- (5) To avoid doubt, subsection (4) does not prevent the taking of a transcript of court proceedings, but the court may make an order for how the transcript is to be dealt with, including an order suppressing its publication.
- (6) A person commits an offence if:
  - (a) an order has been made under subsection (1), (4) or (5); and
  - (b) the person engages in conduct; and
  - (c) the conduct contravenes the order.

Penalty: Imprisonment for 2 years.
- (7) Subsection (6) does not limit the court's powers, including, but not limited to, the court's power to punish for contempt.

**15ML Disclosure of operative's identity to presiding officer**

- (1) This section applies if a witness identity protection certificate for an operative in relation to a proceeding is filed in a court.
  - (2) The presiding officer in the proceeding may require the operative to do one or both of the following:
    - (a) to disclose the operative's true identity to the presiding officer;
    - (b) to provide the presiding officer with photographic evidence of that identity.
  - (3) The presiding officer must not:
    - (a) record information disclosed to the presiding officer under subsection (2); or
    - (b) retain or copy a document or other thing provided to the presiding officer under that subsection.
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**15MM Disclosure of operative's identity etc. despite certificate**

- (1) This section applies if a witness identity protection certificate for an operative in relation to a proceeding is filed in a court.
- (2) A party to the proceeding, or a lawyer assisting the court in the proceeding, may apply to the court:
  - (a) for leave:
    - (i) to ask a question of a witness, including the operative, that may lead to the disclosure of the operative's identity or where the operative lives; or
    - (ii) for a person involved in the proceeding to make a statement that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives; or
  - (b) for an order requiring a witness, including the operative, to answer a question, give evidence or provide information that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives.
- (3) In this section:

*person involved in the proceeding* has the same meaning as in subsection 15MJ(3).
- (4) The court may do either or both of the following:
  - (a) give leave for the party or lawyer to do anything mentioned in paragraph (2)(a);
  - (b) make an order requiring a witness to do anything mentioned in paragraph (2)(b).
- (5) However, the court must not give leave or make an order unless it is satisfied about each of the following:
  - (a) there is evidence that, if accepted, would substantially call into question the operative's credibility;
  - (b) it would be impractical to test properly the credibility of the operative without allowing the risk of disclosure of, or disclosing, the operative's identity or where the operative lives;
  - (c) it is in the interests of justice for the operative's credibility to be able to be tested.

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- (6) If there is a jury in the proceeding, the application must be heard in the absence of the jury.
- (7) Unless the court considers that the interests of justice require otherwise, the court must be closed when:
  - (a) the application is made; and
  - (b) if leave is given or an order is made—the question is asked (and answered), the evidence is given, the information is provided or the statement is made.
- (8) The court must make an order suppressing the publication of anything said when:
  - (a) the application is made; and
  - (b) if leave is given or an order is made—the question is asked (and answered), the evidence is given, the information is provided or the statement is made.
- (9) To avoid doubt, subsection (8) does not prevent the taking of a transcript of court proceedings, but the court may make an order for how the transcript is to be dealt with, including an order suppressing its publication.
- (10) The court may make any other order it considers appropriate to protect the operative’s identity or to prevent the disclosure of where the operative lives.
- (11) A person commits an offence if:
  - (a) an order has been made under subsection (8), (9) or (10); and
  - (b) the person engages in conduct; and
  - (c) the conduct contravenes the order.

Penalty: Imprisonment for 2 years.
- (12) Subsection (11) does not limit the court’s powers, including, but not limited to, the court’s power to punish for contempt.

**15MN Application for leave—joinder as respondent**

- (1) This section applies if:
  - (a) a witness identity protection certificate for an operative in relation to a proceeding is filed in a court; and

- (b) a person applies:
  - (i) for leave under section 15MI or 15MM; or
  - (ii) for an order under section 15MK or 15MM.
- (2) The court in which the application is pending may allow a person to join the application as a respondent if:
  - (a) the person is:
    - (i) the operative in relation to whom the witness identity protection certificate is given; or
    - (ii) the chief officer of the agency who gave the witness identity protection certificate; and
  - (b) the person applies to be joined to the application as a respondent; and
  - (c) the person has sufficient interest in the subject matter of the application.
- (3) If a court allows a person to join the application as a respondent under subsection (2), the court must allow the person, or the person's legal representative, to appear and be heard.

### **15MO Directions to jury**

- (1) This section applies if:
  - (a) a witness identity protection certificate for an operative in relation to a proceeding is filed in a court; and
  - (b) there is a jury in the proceeding; and
  - (c) the operative gives evidence.
- (2) The court must (unless it considers it inappropriate) direct the jury not to give the operative's evidence any more or less weight, or draw any adverse inferences against the defendant or another party to the proceeding, because:
  - (a) there is a witness identity protection certificate for the operative; or
  - (b) the court has made an order under section 15MK or subsection 15MM(8), (9) or (10).

### 15MP Appeals and adjournments

- (1) This section applies if, in proceedings before a court (the *original court*):
  - (a) the original court gives, or refuses, leave under section 15MI or 15MM in relation to a witness identity protection certificate for an operative; or
  - (b) the original court makes, or refuses to make, an order under section 15MK or 15MM in relation to a witness identity protection certificate for an operative.
- (2) A court (the *appeal court*) that has jurisdiction to hear and determine appeals from a judgment, order or direction in the proceedings has jurisdiction to hear and determine an appeal against the decision to give or refuse leave, or to make or refuse to make the order.
- (3) The following persons may appeal against the decision to give or refuse leave, or to make or refuse to make the order:
  - (a) a party to the proceedings;
  - (b) if the appeal court is satisfied that the operative to whom the certificate relates or the chief officer who gave the certificate has a sufficient interest in the decision—the operative or the chief officer.
- (4) If a party to the proceedings appeals against the decision to give or refuse leave, or to make or refuse to make the order, the appeal court may allow the operative to whom the certificate relates, or the chief officer who gave the certificate, to join the appeal as a respondent, if the appeal court is satisfied that the operative or chief officer has a sufficient interest in the decision.
- (5) A party to the proceedings, the operative to whom the certificate relates or the chief officer who gave the certificate may apply to the original court for an adjournment:
  - (a) to appeal against the decision of the original court to give or refuse leave, or to make or refuse to make the order; or
  - (b) to decide whether to appeal or seek leave to appeal against the decision.
- (6) If an application is made under subsection (5), the original court must grant the adjournment.



**15MQ Witness identity protection certificate—cancellation**

- (1) This section applies if the chief officer of a law enforcement agency gives a witness identity protection certificate for an operative in relation to a proceeding.
- (2) The chief officer must cancel the witness identity protection certificate if the chief officer considers that it is no longer necessary or appropriate to prevent the disclosure of the operative's identity or where the operative lives.
- (3) If the chief officer cancels the certificate after it has been filed in a court, the chief officer must immediately give notice to the court and each party to the proceeding, in writing, that the certificate has been cancelled.

Note: The chief officer may delegate functions under this section—see section 15MX.

**15MR Permission to give information disclosing operative's identity etc.**

- (1) This section applies if the chief officer of a law enforcement agency gives a witness identity protection certificate for an operative in relation to a proceeding.
- (2) The chief officer may, in writing, permit a person to give information (otherwise than in the proceeding) that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives if the chief officer considers it necessary or appropriate for the information to be given.
- (3) The permission:
  - (a) must name the person who may give the information; and
  - (b) must name the person to whom the information may be given; and
  - (c) must state the information that may be given; and
  - (d) may state how the information may be given.

Note: The chief officer may delegate functions under this section—see section 15MX.

**15MS Disclosure offences**

- (1) A person commits an offence if:
- (a) a witness identity protection certificate for an operative in relation to a proceeding has been given; and
  - (b) the certificate has not been cancelled under section 15MQ; and
  - (c) the person engages in conduct; and
  - (d) the conduct results in the disclosure of the operative's identity or where the operative lives; and
  - (e) none of the following applies:
    - (i) the conduct is required by section 15ML;
    - (ii) the conduct is authorised by leave or by an order under section 15MM;
    - (iii) the conduct is permitted under section 15MR.

Penalty: Imprisonment for 2 years.

- (2) A person commits an offence if:
- (a) a witness identity protection certificate for an operative in relation to a proceeding has been given; and
  - (b) the certificate has not been cancelled under section 15MQ; and
  - (c) the person engages in conduct; and
  - (d) the conduct results in the disclosure of the operative's identity or where the operative lives; and
  - (e) none of the following applies:
    - (i) the conduct is required by section 15ML;
    - (ii) the conduct is authorised by leave or by an order under section 15MM;
    - (iii) the conduct is permitted under section 15MR; and
  - (f) the person is reckless as to whether his or her conduct will endanger the health or safety of another person.

Penalty: Imprisonment for 10 years.

- (3) A person commits an offence if:
- (a) a witness identity protection certificate for an operative in relation to a proceeding has been given; and

- (b) the certificate has not been cancelled under section 15MQ;  
and
- (c) the person engages in conduct; and
- (d) the conduct results in the disclosure of the operative's  
identity or where the operative lives; and
- (e) none of the following applies:
  - (i) the conduct is required by section 15ML;
  - (ii) the conduct is authorised by leave or by an order under  
section 15MM;
  - (iii) the conduct is permitted under section 15MR; and
- (f) the person is reckless as to whether his or her conduct will:
  - (i) prejudice any current or future investigation; or
  - (ii) prejudice any current or future activity relating to  
security.

Penalty: Imprisonment for 10 years.

### **15MT Evidentiary certificates**

- (1) A chief officer of a law enforcement agency may sign a certificate  
stating any of the following:
  - (a) that, for the purposes of paragraph 15MS(1)(b), (2)(b) or  
(3)(b), a witness identity protection certificate for an  
operative in relation to a proceeding has not been cancelled  
under section 15MQ;
  - (b) whether, for the purposes of subparagraph 15MS(1)(e)(i),  
(2)(e)(i) or (3)(e)(i), the conduct that is the subject of the  
offence was required by section 15ML;
  - (c) whether, for the purposes of subparagraph 15MS(1)(e)(ii),  
(2)(e)(ii) or (3)(e)(ii), the conduct that is the subject of the  
offence was authorised by leave or by an order under  
section 15MM;
  - (d) whether, for the purposes of subparagraph 15MS(1)(e)(iii),  
(2)(e)(iii) or (3)(e)(iii), the conduct that is the subject of the  
offence was permitted under section 15MR.
- (2) In any proceedings, a certificate given under this section is *prima  
facie* evidence of the matters certified in it.

**15MU Reports about witness identity protection certificates**

- (1) As soon as practicable after the end of each financial year, the chief officer of a law enforcement agency must submit to the Minister a report about witness identity protection certificates given by the chief officer during that year.
- (2) The report must include the following:
  - (a) the number of witness identity protection certificates given;
  - (b) on what basis the chief officer was satisfied about the matters mentioned in paragraph 15ME(1)(b) for each certificate;
  - (c) if disclosure of an operative's identity to a presiding officer was required by section 15ML—details of the proceeding in relation to which disclosure was required and details of the things that the presiding officer required the operative to do under that section;
  - (d) if leave was given or an order made under section 15MM in a proceeding in which a witness identity protection certificate for an operative was filed—details of the proceeding that relate to the leave or order;
  - (e) if leave was given for joinder of a person as a respondent to proceedings under section 15MN—details of the person who was joined and who appeared on their behalf;
  - (f) if leave was given for an adjournment under section 15MP—details of whether an appeal was made against the decision under that section;
  - (g) if a witness identity protection certificate was cancelled under section 15MQ—the reasons why the certificate was cancelled;
  - (h) if a permission was given under section 15MR—the reasons why the permission was given;
  - (i) any other information relating to witness identity protection certificates and the administration of this Part that the Minister considers appropriate.
- (3) A report must not include information that discloses, or may lead to the disclosure of, an operative's identity, or where the operative lives, unless the witness identity protection certificate for the operative has been cancelled.

- (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 day on which the Minister receives the report.

## **Division 3—Mutual Recognition under Corresponding Laws**

### **15MW Recognition of witness identity protection certificates under corresponding laws**

The following provisions apply, with any necessary changes, to a corresponding witness identity protection certificate as if it were a witness identity protection certificate given under section 15ME:

- (a) section 15MH (filing and notification);
- (b) section 15MI (leave for non-compliance);
- (c) section 15MJ (effect of witness identity protection certificate);
- (d) section 15MK (orders to protect operative's identity etc.);
- (e) section 15ML (disclosure of operative's identity to presiding officer);
- (f) section 15MM (disclosure of operative's identity etc. despite certificate);
- (g) section 15MN (application for leave—joinder as respondent);
- (h) section 15MO (directions to jury);
- (i) section 15MP (adjournment for appeal decision);
- (j) section 15MS (disclosure offences);
- (k) section 15MT (evidentiary certificates).

## **Division 4—General**

### **15MX Delegation**

- (1) Except as provided by this section (and despite any other Act or law to the contrary), the functions of a chief officer under this Part may not be delegated to any other person.
- (2) A chief officer may delegate any of the chief officer's functions under this Part (except this power of delegation) to a senior officer of the law enforcement agency.
- (3) In this section:

*senior officer* means:

- (a) in relation to the Australian Federal Police—a Deputy Commissioner, an Assistant Commissioner, or a person occupying an equivalent or higher rank in the Australian Federal Police; and
- (b) in relation to Customs—a Deputy Chief Executive Officer of Customs, or a person occupying an equivalent or higher position in Customs; and
- (c) in relation to the ACC, either of the following:
  - (i) the Executive Director Operational Strategies, the Executive Director Intelligence Strategies, or a person occupying an equivalent or higher position in the ACC;
  - (ii) a person occupying a position prescribed by the regulations; and
- (d) in relation to the Australian Taxation Office—an Assistant Commissioner, or a person occupying an equivalent or higher position in the Australian Taxation Office; and
- (e) in relation to a Commonwealth agency specified in the regulations for the purposes of the definition of *law enforcement agency*—an officer of the agency specified in the regulations to be a senior officer of the agency.

## **Part IAD—Protection of children in proceedings for sexual offences**

### **Division 1—Introduction**

#### **15Y Proceedings to which this Part applies**

- (1) This Part applies to any proceedings for:
  - (b) an offence against section 71.8 of the *Criminal Code* (Sexual assault of United Nations and associated personnel); or
  - (c) an offence against Division 270 of the *Criminal Code* (Slavery, sexual servitude and deceptive recruiting); or
  - (caa) an offence against Division 271 of the *Criminal Code* (trafficking in persons, trafficking in children, debt bondage); or
  - (cab) an offence against Division 272 of the *Criminal Code* (child sex offences outside Australia); or
  - (cac) an offence against Division 273 of the *Criminal Code* (offences involving child pornography material or child abuse material outside Australia); or
  - (ca) an offence against Subdivision B or C of Division 471 of the *Criminal Code* (offences relating to use of postal or similar service involving sexual activity with person under 16); or
  - (cba) an offence against Subdivision D or F of Division 474 of the *Criminal Code* (offences relating to use of carriage service involving sexual activity with person under 16); or
  - (cb) an aggravated offence against Subdivision C of Division 12 of Part 2 of the *Migration Act 1958*.
  - (d) a sexual offence specified in the regulations; or
  - (e) an offence that includes the commission of, or the intention to commit, an offence of a kind referred to in one of the preceding paragraphs of this subsection; or
  - (f) an offence of:
    - (i) attempting to commit; or
    - (ii) conspiring to commit; or
    - (iii) inciting the commission of;



an offence of a kind referred to in one of the preceding paragraphs of this subsection.

- (2) This Part also applies to any proceedings, including committal proceedings or proceedings of a similar kind, connected with proceedings of a kind referred to in subsection (1).

### **15YA Definitions**

In this Part, unless the contrary intention appears:

**child** means a person who is under 18.

**child complainant**, in relation to a proceeding, means a child who is, or is alleged to be, a victim of an offence, of a kind referred to in subsection 15Y(1), to which the proceeding relates. The child need not be involved in the proceeding or the initiation of the proceeding.

**child witness**, in relation to a proceeding, means a child (including a child complainant) who is a witness in the proceeding.

**closed-circuit television** includes any similar technology specified in the regulations.

**credibility** has the meaning given by the *Evidence Act 1995*.

**cross-examination** has the meaning given by the *Evidence Act 1995*.

**evidence in chief** means evidence given in examination in chief within the meaning of the *Evidence Act 1995*.

**proceeding** means a proceeding to which this Part applies under section 15Y.

## **Division 2—Admissibility of evidence**

### **15YB Evidence of sexual reputation**

- (1) Evidence of a child witness' or child complainant's reputation with respect to sexual activities is inadmissible in a proceeding, unless the court gives leave.
- (2) The court must not give leave unless satisfied that the evidence is substantially relevant to facts in issue in the proceeding.
- (3) The evidence is not to be treated as substantially relevant to facts in issue merely because of inferences it may raise as to the child witness' or child complainant's general disposition.
- (4) If the evidence is admitted, it must not be treated as relevant to the child witness' or child complainant's credibility.
- (5) This section does not apply if the child is a defendant in the proceeding.

### **15YC Evidence of sexual experience**

- (1) Evidence of a child witness' or child complainant's experience with respect to sexual activities is inadmissible in a proceeding, unless:
  - (a) the court gives leave; or
  - (b) the evidence is of sexual activities with a defendant in the proceeding.
- (2) The court must not give leave unless satisfied that:
  - (a) the evidence is substantially relevant to facts in issue in the proceeding; or
  - (b) if the evidence relates to the credibility of a child witness and is to be adduced in cross-examination of the child—the evidence has substantial probative value.
- (3) The evidence is not to be treated as being substantially relevant to facts in issue merely because of inferences it may raise as to the child witness' or child complainant's general disposition.

- (4) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:
- (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
  - (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.
- (5) This section does not apply if the child is a defendant in the proceeding.

**15YD Leave under this Division**

- (1) An application for leave under this Division:
- (a) must be in writing; and
  - (b) if there is a jury in the proceeding in question—must be made in the jury’s absence; and
  - (c) must not be determined before the court has considered such submissions and other evidence as it thinks necessary for determining the application.
- (2) If the court gives leave under this Division, the court must:
- (a) state its reasons in writing; and
  - (b) cause those reasons to be entered in the court’s records.

## **Division 3—Cross-examination**

### **15YE Disallowing inappropriate or aggressive cross-examination**

- (1) The court may disallow a question put to a child witness in cross-examination in a proceeding if the question is inappropriate or unnecessarily aggressive.
- (2) In considering whether a question is inappropriate or unnecessarily aggressive, the court is to have regard to the child witness' personal characteristics, including his or her age, culture, mental capacity and gender.

### **15YF Unrepresented defendants—cross-examination of child complainants**

- (1) A defendant in a proceeding who is not represented by counsel is not to cross-examine a child complainant.
- (2) A person appointed by the court is to ask the child any questions that the defendant requests the person to ask the child.

### **15YG Unrepresented defendants—cross-examination of child witnesses**

- (1) A defendant in a proceeding who is not represented by counsel is not to cross-examine a child witness (other than a child complainant), unless the court gives leave.
  - (2) The court must not give leave unless satisfied that the child's ability to testify under cross-examination will not be adversely affected if the defendant conducts the cross-examination.
  - (3) In considering whether that ability will be adversely affected, the court is to have regard to any trauma that could be caused if the defendant conducts the cross-examination.
  - (4) An application for leave under this section:
    - (a) must be in writing; and
    - (b) must not be determined before the court has considered such submissions and other evidence as it thinks necessary for determining the application.
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- (5) If the court refuses leave, a person appointed by the court is to ask the child any questions that the defendant requests the person to ask the child.

**15YH Represented defendants—cross-examination of child witnesses and child complainants**

A defendant in a proceeding who is represented by counsel is not to cross-examine a child witness or a child complainant except through counsel.

## **Division 4—Special facilities for child witnesses to give evidence**

### **15YI Closed-circuit television**

- (1) A child witness' evidence in a proceeding must be given by means of closed-circuit television unless:
  - (a) the child is at least 16 and chooses not to give evidence by that means; or
  - (b) the court orders that the child is not to give evidence by that means; or
  - (c) the court is not equipped with facilities for evidence to be given by means of closed-circuit television.

Note: Section 15YL provides for alternative arrangements if a child witness does not give evidence by means of closed-circuit television.

- (2) The court must not make an order under paragraph (1)(b) unless satisfied that it is not in the interests of justice for the child witness' evidence to be given by means of closed-circuit television.
- (3) This section does not affect the operation of any law in relation to the competence of a person to give evidence.

### **15YJ Giving evidence by closed-circuit television**

- (1) If the child witness' evidence is given by means of closed-circuit television from a location outside a courtroom:
  - (a) that location is taken to be part of the courtroom in which the proceeding is being held; and
  - (b) the court may order that a court officer be present at that location; and
  - (c) the court may order that another person be present with the child:
    - (i) to act as an interpreter; or
    - (ii) to assist the child with any difficulty in giving evidence associated with a disability; or
    - (iii) to provide the child with other support.
- (2) An order under paragraph (1)(b) or (c) does not limit the operation of section 15YM.

- (3) The court may adjourn the proceeding, or a part of the proceeding, to a court or other place that is equipped with facilities for evidence to be given by means of closed-circuit television if:
- (a) the court is not equipped with facilities for evidence to be given by means of closed-circuit television; or
  - (b) the court otherwise considers it appropriate to do so.

#### **15YK Viewing evidence given by closed-circuit television**

If the child witness' evidence is given by means of closed-circuit television, the facilities used are to be operated in such a way that the people who have an interest in the proceeding can see the child, and any person present with the child, on one or more television monitors.

#### **15YL Alternative arrangements for giving evidence**

- (1) If a child witness' evidence in a proceeding is not to be given by means of closed-circuit television, the court:
- (a) must make arrangements in order to restrict contact (including visual contact) that the child may have with any defendant while giving evidence; and
  - (b) may make arrangements in order to restrict contact (including visual contact) that the child may have with members of the public while giving evidence.
- (2) The arrangements may include either of the following:
- (a) using screens;
  - (b) planning seating arrangements for people who have an interest in the proceeding, including:
    - (i) the level at which they are seated; and
    - (ii) the people in the child's line of vision.
- (3) This section does not apply if the child is at least 16 and chooses not to give evidence under the arrangements.

## **Division 5—Use of video recordings**

### **15YM Use of video recordings**

- (1) A video recording of an interview of a child witness in a proceeding may be admitted as evidence in chief if:
  - (a) a constable, or a person of a kind specified in the regulations, conducted the interview; and
  - (b) the court gives leave.
- (2) The court must not give leave if satisfied that it is not in the interest of justice for the child's evidence in chief to be given by a video recording.
- (3) An application for leave under this section:
  - (a) must be in writing; and
  - (b) must not be determined before the court has considered such submissions and other evidence as it thinks necessary for determining the application.
- (4) The child witness must be available for cross-examination and re-examination if he or she gives evidence in chief by a video recording.

Note: Division 4 provides for this evidence to be given using closed-circuit television or other arrangements.

### **15YN Admissibility of evidence given using video recordings**

- (1) The admissibility of the evidence given by video recording is not affected by the fact that it is evidence of previous representations that the child witness made in the interview that was being recorded.
- (2) Evidence given by video recording under section 15YM is not admissible if the court is satisfied that:
  - (a) any defendant in the proceeding (other than the child witness if the child is a defendant); or
  - (b) the defendant's lawyer (if any);was not given a reasonable opportunity to listen to and view the recording.



- (3) The court may refuse to admit the whole or part of the contents of a recording adduced as evidence under section 15YM.

## Division 6—Miscellaneous

### 15YO Adults accompanying child witnesses

- (1) A child witness may choose an adult to accompany the child while the child is giving evidence in a proceeding (including while giving evidence by closed-circuit television).
- (2) The adult so chosen may accompany the child as mentioned in subsection (1), unless the court determines that it is not appropriate for the adult to accompany the child.
- (3) The court may permit more than one adult to accompany the child if the court considers it in the interests of justice to do so.
- (4) An adult accompanying the child under this section must not:
  - (a) prompt the child or otherwise influence the child's answers; or
  - (b) disrupt the questioning of the child.
- (5) Any words spoken by an adult accompanying the child under this section must be able to be heard by:
  - (a) the judge; and
  - (b) if there is a jury in the proceeding—the members of the jury.

### 15YP Exclusion of people from the courtroom

The court may order that some or all of the members of the public be excluded from the courtroom in which a child witness is giving evidence in a proceeding.

### 15YQ Warnings etc. not to be given about children's evidence

If there is a jury in a proceeding in which a child witness has given or will give evidence, the judge is not to warn the jury, or suggest to the jury in any way:

- (a) that the law regards children as an unreliable class of witness; or
- (b) that the law requires greater or lesser weight to be given to evidence that is given by closed-circuit television or alternative arrangements under Division 4; or

- (c) that the law requires greater or lesser weight to be given to evidence that is given by a video recording under Division 5; or
- (d) that the law requires greater or lesser weight to be given to evidence because an adult accompanies the child under section 15YO.

**15YR Publication identifying child witnesses or child complainants**

- (1) A person commits an offence if:
  - (a) the person publishes any matter; and
  - (b) the person does not have the leave of the court to publish the matter; and
  - (c) the matter:
    - (i) identifies another person (who is not a defendant in the proceeding) as a child witness or a child complainant in relation to the proceeding; or
    - (ii) is likely to lead to the other person being identified as such a child witness or child complainant.

Penalty: Imprisonment for 12 months, or 60 penalty units, or both.

- (2) This section does not apply if the publication is in:
  - (a) an official publication in the course of, and for the purpose of, the proceeding; or
  - (b) a document prepared for use in particular legal proceedings (whether or not the legal proceedings are a proceeding within the meaning of this Part).

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (3) The court may give leave to a person to publish the matter.
- (4) In deciding whether to give leave, the court is to have regard to:
  - (a) any trauma to the child witness or child complainant that the publication could cause; and
  - (b) any damage to the reputation of the child witness or child complainant that the publication could cause; and
  - (c) whether the publication is:

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- (i) for the purpose of supplying transcripts of the proceedings to persons with a genuine interest in the proceedings; or
  - (ii) for genuine research purposes.
- (5) Leave may be given after the proceedings have finished. For this purpose, the court need not be constituted by the same judicial officers who constituted the court in the proceedings.
- (6) An application for leave under this section:
  - (a) must be in writing; and
  - (b) must not be determined before the court has considered such submissions and other evidence as it thinks necessary for determining the application.

**15YS General powers of a court**

- (1) The power of a court to control the conduct of a proceeding is not affected by this Part, except so far as this Part provides otherwise expressly or by necessary intendment.
- (2) In particular, the powers of a court to control the questioning of witnesses are not affected.
- (3) The power of a court to give leave under this Part includes the power to give such leave subject to conditions.

**15YT Video link evidence provisions relating to child sex offences outside Australia unaffected**

Nothing in this Part affects the operation of:

- (a) Subdivision D of Division 272 of the *Criminal Code* (child sex offences outside Australia—video link evidence); or
- (b) Subdivision D of Division 273 of the *Criminal Code* (offences involving child pornography material or child abuse material outside Australia—video link evidence).

## **Part IAE—Video link evidence in proceedings for terrorism and related offences etc.**

### **15YU Proceedings to which this Part applies**

#### *Criminal proceedings*

- (1) This Part applies to any proceedings for:
- (a) an offence against subsection 34L(4) of the *Australian Security Intelligence Organisation Act 1979*; or
  - (b) an offence against section 49 of the *Aviation Transport Security Act 2004*; or
  - (c) an offence against section 21 of the *Charter of the United Nations Act 1945*; or
  - (d) an offence against Subdivision A of Division 72 of the *Criminal Code*; or
  - (e) an offence against Part 5.3 of the *Criminal Code*; or
  - (f) an offence against Part 5.4 of the *Criminal Code*; or
  - (g) an offence against section 24AA or 24AB of this Act; or
  - (h) an offence against Division 1 of Part 2 of the *Crimes (Aviation) Act 1991*; or
  - (i) an offence against section 8 of the *Crimes (Biological Weapons) Act 1976*; or
  - (j) an offence against the *Crimes (Foreign Incursions and Recruitment) Act 1978*; or
  - (k) an offence against section 8 of the *Crimes (Hostages) Act 1989*; or
  - (l) an offence against the *Crimes (Internationally Protected Persons) Act 1976*; or
  - (m) an offence against section 6 of this Act that relates to an offence mentioned in any of the above paragraphs.

Note: For other ancillary offences, see section 11.6 of the *Criminal Code*.

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*Other proceedings*

- (2) This Part also applies to:
- (a) any proceedings, including committal proceedings or proceedings of a similar kind, connected with proceedings covered by subsection (1); and
  - (b) proceedings under the *Proceeds of Crime Act 2002* in relation to an offence referred to in subsection (1).

*Timing of proceedings*

- (3) It is immaterial whether proceedings covered by subsection (1) or (2) were instituted before or after the commencement of this Part.

*Extended meaning of **prosecutor** and **defendant***

- (4) This Part has effect, in relation to a proceeding under the *Proceeds of Crime Act 2002*, as if:
- (a) the Director of Public Prosecutions were the prosecutor; and
  - (b) each other party to the proceeding were a defendant in the proceeding.

**15YV When court may take evidence by video link**

*Application by prosecutor*

- (1) In a proceeding, the court must:
- (a) direct; or
  - (b) by order, allow;
- a witness to give evidence by video link if:
- (c) both:
    - (i) the prosecutor applies for the direction or order; and
    - (ii) the court is satisfied that the prosecutor gave the court reasonable notice of his or her intention to make the application; and
  - (d) the witness is not a defendant in the proceeding; and
  - (e) the witness is available, or will reasonably be available, to give evidence by video link; and
  - (f) the facilities required by section 15YY are available or can reasonably be made available;

unless the court is satisfied that giving the direction or making the order would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.

*Application by defendant*

- (2) In a proceeding, the court must:
- (a) direct; or
  - (b) by order, allow;
- a witness to give evidence by video link if:
- (c) both:
    - (i) a defendant in the proceeding applies for the direction or order; and
    - (ii) the court is satisfied that the defendant gave the court reasonable notice of his or her intention to make the application; and
  - (d) the witness is not a defendant in the proceeding; and
  - (e) the witness is available, or will reasonably be available, to give evidence by video link; and
  - (f) the facilities required by section 15YY are available or can reasonably be made available;

unless the court is satisfied that it would be inconsistent with the interests of justice for the evidence to be given by video link.

*Definition*

- (3) In this section:

***substantial adverse effect*** means an effect that is adverse and not insubstantial, insignificant or trivial.

## **15YW Observers**

*Observer*

- (1) The court may, in a section 15YV direction or order, provide that the witness can give evidence under the direction or order only if, when the witness is giving evidence by video link, there is physically present, at the place where the evidence is given, a person specified in the direction or order for the purposes of this section.

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- (2) If a section 15YV direction or order is in force, the court may vary the direction or order so as to provide that, after the variation, the witness can give evidence under the direction or order only if, when the witness is giving evidence by video link, there is physically present, at the place where the evidence is given, a person specified in the direction or order for the purposes of this section.

*Substitution of observer*

- (3) If:
- (a) a direction or order is in force under section 15YV; and
  - (b) the direction or order specifies a person for the purposes of this section;
- the court may vary the direction or order so as to substitute another specified person.

*Who can be an observer*

- (4) A person specified for the purposes of this section may be:
- (a) an Australian diplomatic officer; or
  - (b) an Australian consular officer; or
  - (c) any other person.
- (5) The court must not specify a person for the purposes of this section unless the court is satisfied that the person is:
- (a) independent of the prosecutor; and
  - (b) independent of each defendant in the proceeding; and
  - (c) in a position to give a report to the court about what the person observes in relation to the giving of evidence by the witness; and
  - (d) reasonably available to observe the giving of evidence by the witness; and
  - (e) an appropriate person to be specified for the purposes of this section.
- (6) For the purposes of this section, the mere fact that a person is an Australian diplomatic officer or Australian consular officer does not mean that the person is not independent of the prosecutor.



*Report of observer*

- (7) If:
- (a) a direction or order is in force under section 15YV; and
  - (b) the direction or order specifies a person for the purposes of this section;
- the court may:
- (c) direct or allow the specified person to give the court a report, in such form and by such time as the court requires, about what the person observed in relation to the giving of evidence by the witness; and
  - (d) make such use of the report as the court considers appropriate for the purpose of deciding whether evidence given by the witness under the section 15YV direction or order should be admitted as evidence in the proceeding.

*Definitions*

- (8) In this section:

*Australian consular officer* has the same meaning as in the *Consular Fees Act 1955*.

*Australian diplomatic officer* has the same meaning as in the *Consular Fees Act 1955*.

**15YX Adjourment after a section 15YV direction or order etc.**

*Court gives a direction or makes an order*

- (1) If:
- (a) a court gives a section 15YV direction or makes a section 15YV order; and
  - (b) the prosecutor applied for the direction or order;
- a defendant in the proceeding may apply to the court for an adjourment of the proceeding to allow time for the defendant to:
- (c) decide whether to appeal against the direction or order; and
  - (d) if the defendant decides to do so—make the appeal.
- (2) If:
- (a) a court gives a section 15YV direction or makes a section 15YV order; and

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- (b) a defendant in the proceeding applied for the direction or order;

the prosecutor may apply to the court for an adjournment of the proceeding to allow time for the prosecutor to:

- (c) decide whether to:
  - (i) appeal against the direction or order; or
  - (ii) withdraw the proceeding; and
- (d) if the prosecutor decides to do so—make the appeal or withdrawal.

*Court refuses to give a direction or make an order*

- (3) If:

- (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
  - (b) the prosecutor applied for the direction or order;
- the prosecutor may apply to the court for an adjournment of the proceeding to allow time for the prosecutor to:
- (c) decide whether to:
    - (i) appeal against the refusal; or
    - (ii) withdraw the proceeding; and
  - (d) if the prosecutor decides to do so—make the appeal or withdrawal.

- (4) If:

- (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
  - (b) a defendant in the proceeding applied for the direction or order;
- the defendant may apply to the court for an adjournment of the proceeding to allow time for the defendant to:
- (c) decide whether to appeal against the refusal; and
  - (d) if the defendant decides to do so—make the appeal.

*Grant of adjournment*

- (5) If an application is made under this section, the court must grant the adjournment.

Note: For appeals, see section 15YZD.

### **15YY Technical requirements for video link**

- (1) A witness can give evidence under a section 15YV direction or order only if:
  - (a) the courtroom or other place where the court is sitting (the *courtroom point*); and
  - (b) the place where the evidence is given (the *witness point*);are equipped with video facilities that:
  - (c) enable appropriate persons at the courtroom point to see and hear the witness give the evidence; and
  - (d) enable appropriate persons at the witness point to see and hear appropriate persons at the courtroom point.

- (2) In subsection (1):

*appropriate persons* means such persons as the court considers appropriate.

### **15YZ Direction to jury**

- (1) If:
  - (a) a proceeding involves a jury; and
  - (b) a witness gives evidence under a section 15YV direction or order; and
  - (c) the evidence is admissible in the proceeding;the judge must give the jury such direction as the judge thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the court is sitting.
- (2) Disregard subsection (1) in determining:
  - (a) the directions (if any) that should be given by a judge in proceedings to which this Part does not apply; and
  - (b) the weight that should be given to evidence given by video link in proceedings to which this Part does not apply.

### **15YZA Application of laws about witnesses**

- (1) A person who gives evidence under a section 15YV direction or order is taken to give it at the courtroom or other place where the court is sitting.

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- (2) Subsection (1) has effect, for example, for the purposes of laws relating to evidence, procedure, contempt of court and perjury.

**15YZB Administration of oaths and affirmations**

An oath or affirmation to be sworn or made by a witness who is to give evidence under a section 15YV direction or order may be administered either:

- (a) by means of the video link, in as nearly as practicable the same way as if the witness were to give the evidence at the courtroom or other place where the court is sitting; or
- (b) as follows:
  - (i) on behalf of the court and as directed by it;
  - (ii) by a person (whether an Australian official or not) authorised by the court;
  - (iii) at the place where the witness is to give the evidence.

**15YZC Expenses**

A court may make such orders as are just for payment of expenses incurred in connection with giving evidence under a section 15YV direction given, or a section 15YV order made, by the court.

**15YZD Appeals against section 15YV directions or orders etc.**

*Court gives a direction or makes an order*

- (1) If:
  - (a) a court gives a section 15YV direction or makes a section 15YV order; and
  - (b) the prosecutor applied for the direction or order;a defendant in the proceeding may appeal against the direction or order.
- (2) If:
  - (a) a court gives a section 15YV direction or makes a section 15YV order; and
  - (b) a defendant in the proceeding applied for the direction or order;the prosecutor may appeal against the direction or order.

*Court refuses to give a direction or make an order*

- (3) If:
- (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
  - (b) the prosecutor applied for the direction or order;
- the prosecutor may appeal against the refusal.
- (4) If:
- (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
  - (b) a defendant in the proceeding applied for the direction or order;
- the defendant may appeal against the refusal.

*Jurisdiction*

- (5) A court that has jurisdiction to hear and determine appeals from a judgment, order or direction in the proceeding has jurisdiction to hear and determine any appeal under this section.

**15YZE Other laws about evidence not affected**

This Part does not prevent any other law about taking evidence of a witness from applying for the purposes of a proceeding.

**15YZF Saving of other laws**

This Part is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

## Part IB—Sentencing, imprisonment and release of federal offenders

### Division 1—Interpretation

#### 16 Interpretation

- (1) In this Part, unless the contrary intention appears:

***aggregate***, in relation to 2 or more sentences or terms of imprisonment, or in relation to the unserved portions of such sentences or terms, means the total effective sentence or term of imprisonment imposed, or remaining unserved, as the case may be, having regard to whether the sentences or terms are to be served cumulatively, partly cumulatively or concurrently.

Examples demonstrating meaning of ***aggregate***

*Example 1:* The aggregate of 3 sentences, each of 2 years, to be served concurrently, is 2 years.

*Example 2:* The aggregate of 3 sentences, each of 2 years, where 2 sentences are to be served concurrently and one is to be served cumulatively, is 4 years.

*Example 3:* The aggregate of a one year unserved portion of a sentence, a 2 year unserved portion of another sentence, to be served concurrently with the first sentence, and a 2 year sentence to be served cumulatively, is 4 years.

***federal offence*** means an offence against the law of the Commonwealth.

***federal offender*** means a person convicted of a federal offence.

***federal sentence*** means a sentence imposed for a federal offence.

***fit to be tried*** includes fit to plead.

***law***, in relation to the Commonwealth, a State or a Territory, includes the common law, and any Imperial Act or order, that comprises a part of that law.

***licence*** means a licence granted under section 19AP.

***licence period***, in relation to a person who is released on licence, means:

- (a) where the person has not been given a federal life sentence—the period commencing on the day of release on licence and ending:
  - (i) if the last day of any federal sentence that is, on the day of the release, being served or to be served, after deducting any remission or reduction that is applicable, occurs earlier than 5 years after the day of release on licence—at the end of that last day; or
  - (ii) in any other case—at the end of the day that occurs 5 years after the day of release on licence; and
- (b) where the person has been given a federal life sentence—the period commencing on the day of release on licence and ending at the end of the day specified in the licence as the day on which the licence period ends.

***maximum penalty***, in relation to an offence at common law, means imprisonment for life.

***non-parole period***, in relation to a sentence or sentences of imprisonment, means that part of the period of imprisonment for that sentence or those sentences during which the person is not to be released on parole, whether that part of the period is fixed or recommended by a court or fixed by operation of law.

***offence*** means a federal offence, a State offence or a Territory offence.

***offender*** means a federal offender, a State offender or a Territory offender.

***parole*** includes probation.

***parole officer*** means:

- (a) an officer of a State, the Australian Capital Territory, the Northern Territory or Norfolk Island in respect of whom there applies:
  - (i) an arrangement in force under paragraph 21F(1)(b); or
  - (ii) an arrangement having a substantially similar effect in force under section 3B; or

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- (b) a person appointed or engaged under the *Public Service Act 1999* in respect of whom an appointment under subsection 21F(3) is in force.

***parole order*** means an order under subsection 19AL(1) or (2).

***parole period***, in relation to a person who is released on parole under section 19AL, means:

- (a) where the person has not been given a federal life sentence—the period commencing on the day of release on parole and ending:
  - (i) if the last day of any federal sentence that is, on the day of the release, being served or to be served, after deducting any remission or reduction that is applicable, occurs earlier than 5 years after the day of release on parole—at the end of that last day; or
  - (ii) in any other case—at the end of the day that occurs 5 years after the day of release on parole; and
- (b) where the person has been given a federal life sentence—the period commencing on the day of release on parole and ending at the end of the day specified in the parole order as the day on which the parole period ends.

***pre-release period***, in relation to a recognizance release order made in respect of a federal sentence or sentences, means the period of imprisonment specified in that order as the period of imprisonment in respect of that sentence or those sentences after service of which the offender may be released on the giving of security in accordance with that order.

***prescribed authority*** means:

- (a) a person who holds office as a Magistrate of a State, the Australian Capital Territory, the Northern Territory or Norfolk Island and in respect of whom an arrangement in force under paragraph 21F(1)(a) is applicable; or
- (b) a person who holds office as a Magistrate of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island); or
- (c) unless an arrangement has been entered into under paragraph 21F(1)(a) in respect of persons holding office as Magistrates of the Australian Capital Territory—a person who holds office as a Magistrate of the Australian Capital Territory.



**prison** includes gaol, lock-up or other place of detention.

**recognizance release order** means an order made under paragraph 20(1)(b).

**released on licence** means released from prison under section 19AP.

**released on parole** means released from prison under section 19AL.

**sentence**, in sections 16B to 19AZD, means a sentence of imprisonment.

**State** includes the Australian Capital Territory and the Northern Territory.

**State offence** means an offence against the law of a State.

**State offender** means a person convicted of a State offence.

**State sentence** means a sentence imposed for a State offence.

**supervision period**, in relation to a person who is released on parole or on licence, means:

- (a) where the person has not been given a federal life sentence—the period commencing on the day of release on parole or licence and ending at the end of a day specified in the parole order or licence as the day on which the supervision period ends, being a day not later than:
  - (i) if the last day of any federal sentence of imprisonment that is, on the day of the release, being served or to be served, after deducting any remission or reduction that is applicable, occurs earlier than 3 years after the day of release on parole or licence—that last day; or
  - (ii) in any other case—the day that occurs 3 years after the day of release on parole or licence; and
- (b) where the person has been given a federal life sentence—the period commencing on the day of release on parole or licence and ending at the end of the day specified in the parole order or licence as the day on which the supervision ends, being a day not later than the day on which the parole period or licence period ends.

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***Territory*** does not include the Australian Capital Territory or the Northern Territory.

***Territory offence*** means an offence against the law of a Territory.

***Territory offender*** means a person convicted of a Territory offence.

***Territory sentence*** means a sentence imposed for a Territory offence.

***unfit to be tried*** includes unfit to plead.

- (2) In this Part, expressions in the plural do not imply that expressions in the singular do not include the plural.

## **Division 2—General sentencing principles**

### **16A Matters to which court to have regard when passing sentence etc.**

- (1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
- (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
  - (a) the nature and circumstances of the offence;
  - (b) other offences (if any) that are required or permitted to be taken into account;
  - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
  - (d) the personal circumstances of any victim of the offence;
  - (e) any injury, loss or damage resulting from the offence;
  - (f) the degree to which the person has shown contrition for the offence:
    - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
    - (ii) in any other manner;
  - (fa) the extent to which the person has failed to comply with:
    - (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*; or
    - (ii) any obligation under a law of the Commonwealth; or
    - (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
  - (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;

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- (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
  - (j) the deterrent effect that any sentence or order under consideration may have on the person;
  - (k) the need to ensure that the person is adequately punished for the offence;
  - (m) the character, antecedents, age, means and physical or mental condition of the person;
  - (n) the prospect of rehabilitation of the person;
  - (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.
- (2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:
- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
  - (b) aggravating the seriousness of the criminal behaviour to which the offence relates.
- (2B) In subsection (2A):
- criminal behaviour*** includes:
- (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
  - (b) any fault element relating to such a physical element.
- (3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.
- (4) For the purposes of a reference in this section to a family, the members of a person's family are taken to include the following (without limitation):
- (a) a de facto partner of the person;

- (b) someone who is the child of the person, or of whom the person is the child, because of the definition of *child* in section 3;
- (c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family.

### **16B Court to have regard to other periods of imprisonment required to be served**

In sentencing a person convicted of a federal offence, a court must have regard to:

- (a) any sentence already imposed on the person by the court or another court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and
- (b) any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory.

### **16BA Taking other offences into account**

- (1) Where a person is convicted of a federal offence or federal offences, and the court before which the person is convicted is satisfied that:
  - (a) there has been filed in the court a document in, or to the effect of, the form prescribed for the purposes of this section;
  - (b) the document contains a list of other federal offences, or offences against the law of an external Territory that is prescribed for the purposes of this section, which the person convicted is believed to have committed;
  - (c) the document has been signed:
    - (i) by the Director of Public Prosecutions;
    - (ii) for and on behalf of the Director of Public Prosecutions, by a person authorized by the Director of Public Prosecutions, by instrument in writing, to sign documents under this subsection; or
    - (iii) by a person appointed under section 69 of the *Judiciary Act 1903* to prosecute indictable federal offences; and by the person convicted;

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- (d) a copy of the document has been given to the person; and  
(e) in all the circumstances it is proper to do so;
- the court may, with the consent of the prosecutor and before passing sentence on the person, ask him or her whether he or she admits his or her guilt in respect of all or any of the offences specified in the list and wishes them to be taken into account by the court in passing sentence on him or her for the offence or offences of which he or she has been convicted.
- (2) Subject to subsection (3), if the person admits his or her guilt in respect of all or any of the offences specified in the list and wishes to have them taken into account by the court in passing sentence on him or her for the offence or offences of which he or she has been convicted, the court may, if it thinks fit, in passing sentence on him or her for the offence or offences of which he or she has been convicted, take into account all or any of the offences in respect of which the person has admitted his or her guilt.
- (3) The court shall not take into account under this section any indictable offence that it would not have jurisdiction to try even if the defendant consented to the court hearing and determining proceedings for the offence or the prosecutor requested the court to hear and determine those proceedings.
- (3A) Subsection (3) does not prevent a court from taking into account an indictable offence where the court has jurisdiction to sentence a person charged with that offence.
- (4) Where the court takes into account under this section all or any of the offences in respect of which the person has admitted his or her guilt, the sentence passed on him or her for any of the offences of which he or she has been convicted shall not exceed the maximum penalty that the court would have been empowered to impose on him or her for the offence if no offence had been so taken into account.
- (5) Where an offence is taken into account under this section, the court may make such orders with respect to reparation, restitution, compensation, costs and forfeiture as it would have been empowered to make if the person had been convicted before the court of the offence, but shall not otherwise impose any separate punishment for the offence.

- (6) Where the court makes an order under subsection (5) in respect of an offence taken into account under this section, there shall be such rights of appeal in respect of the order as there would have been if the order had been an order made upon the conviction of the person for that offence.
  - (7) An order made under subsection (5) in respect of an offence taken into account under this section lapses, by force of this subsection, if the conviction or each conviction, as the case may be, in respect of which the offence was taken into account is quashed or set aside.
  - (8) Where an offence is taken into account under this section, the court shall certify, upon the document filed in the court, the offence taken into account and the conviction or convictions in respect of which the offence was taken into account and thereafter no proceedings shall be taken or continued in respect of the offence unless the conviction or each conviction, as the case may be, in respect of which the offence has been taken into account has been quashed or set aside.
  - (9) An admission of guilt made under and for the purposes of this section is not admissible in evidence in any proceedings taken or continued in respect of the offence in respect of which the admission was made or in respect of any other offence specified in the list contained in the document filed in the court.
  - (10) An offence taken into account under this section shall not, by reason of its so being taken into account, be regarded for any purpose as an offence of which a person has been convicted.
  - (11) In or in relation to any criminal proceeding, reference may lawfully be made to, or evidence may lawfully be given of, the fact that an offence was taken into account under this section in passing sentence for an offence for which a person was convicted if, in or in relation to that proceeding:
    - (a) reference may lawfully be made to, or evidence may lawfully be given of, the fact that the person was convicted of the last-mentioned offence; and
    - (b) had the person been convicted of the offence so taken into account, reference could lawfully have been made to, or evidence could lawfully have been given of, the fact that the person had been convicted of that offence.
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- (12) The fact that an offence was taken into account under this section may be proved in the same manner as the conviction or any of the convictions, as the case may be, in relation to which it was taken into account may be proved.

**16C Fines**

- (1) Subject to subsection (2), before imposing a fine on a person for a federal offence, a court must take into account the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account.
- (2) Nothing in subsection (1) prevents a court from imposing a fine on a person because the financial circumstances of the offender cannot be ascertained by the court.

**16D No corporal punishment**

- (1) A court must not impose any form of corporal punishment for a federal offence.
- (2) A person serving a federal sentence must not be subjected to any form of corporal punishment.



## **Division 3—Sentences of imprisonment**

### **16E Commencement of sentences**

- (1) Subject to subsections (2) and (3), the law of a State or Territory relating to the commencement of sentences and of non-parole periods applies to a person who is sentenced in that State or Territory for a federal offence in the same way as it applies to a person who is sentenced in that State or Territory for a State or Territory offence.
- (2) Where the law of a State or Territory has the effect that a sentence imposed on a person for an offence against the law of that State or Territory or a non-parole period fixed in respect of that sentence:
  - (a) may be reduced by the period that the person has been in custody for the offence; or
  - (b) is to commence on the day on which the person was taken into custody for the offence;the law applies in the same way to a federal sentence imposed on a person in that State or Territory or to a non-parole period fixed in respect of that sentence.
- (3) Where the law of a State or Territory does not have the effect mentioned in subsection (2), a court (including a federal court) in that State or Territory that imposes a federal sentence on a person or fixes a non-parole period in respect of such a sentence must take into account any period that the person has spent in custody in relation to the offence concerned.

### **16F Court to explain sentence**

- (1) Where a court imposes a federal sentence on a person and fixes a non-parole period in respect of the sentence, it must explain or cause to be explained to the person, in language likely to be readily understood by the person, the purpose and consequences of fixing that non-parole period including, in particular, an explanation:
  - (a) that service of the sentence will entail a period of imprisonment of not less than the non-parole period and, if a parole order is made, a period of service in the community,

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- called the parole period, to complete service of the sentence;  
and
- (b) that, if a parole order is made, the order will be subject to conditions; and
  - (c) that the parole order may be amended or revoked; and
  - (d) of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions.
- (2) Where a court imposes a federal sentence on a person and makes a recognizance release order in respect of that sentence, it must explain or cause to be explained to the person, in language likely to be readily understood by the person, the purpose and consequences of making the recognizance release order including, in particular, an explanation:
- (a) that service of the sentence will entail a period of imprisonment equal to the pre-release period (if any) specified in the order and a period of service in the community equal to the balance of the sentence; and
  - (b) of the conditions to which the order is subject; and
  - (c) of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions; and
  - (d) that any recognizance given in accordance with the order may be discharged or varied under section 20AA.

**17A Restriction on imposing sentences**

- (1) A court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.
- (2) Where a court passes a sentence of imprisonment on a person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, the court:
  - (a) shall state the reasons for its decision that no other sentence is appropriate; and
  - (b) shall cause those reasons to be entered in the records of the court.

- (3) The failure of a court to comply with the provisions of this section does not invalidate any sentence.
- (4) This section applies subject to any contrary intention in the law creating the offence.

### **17B Restriction on imposing sentences for certain minor offences**

- (1) If:
  - (a) a person is convicted of one or more section 17B offences relating to property, money or both, whose total value is not more than \$2,000; and
  - (b) the person has not previously been sentenced to imprisonment for any federal, State or Territory offence; the court convicting the person is not to pass a sentence of imprisonment for that offence, or for any of those offences, unless the court is satisfied that there are exceptional circumstances that warrant it.
- (2) In calculating the total value for the purposes of paragraph (1)(a), a section 17B offence which the court, with the consent of the person charged, has taken into account in passing sentence on the person for another federal offence (whether a section 17B offence or not) is taken to be an offence of which the person is convicted.
- (3) In this section:

*section 17B offence* means an offence against section 29 of this Act, an offence against section 131.1, 132.1, 132.6, 132.7, 134.1, 134.2, 135.1, 135.2, 135.4, 145.4 or 145.5 of the *Criminal Code* or an offence against a provision of a federal law prescribed for the purposes of this section.

### **18 Sentence of imprisonment**

- (1) Where imprisonment is imposed in respect of any offence against any law of the Commonwealth it may (unless the contrary intention appears in the law) be imposed either with or without hard labour.
- (2) Where under the law of a State or Territory a convicted person may in particular cases be imprisoned in a particular kind or class of prison, a person convicted of an offence against the law of the

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Commonwealth may, in corresponding cases, be imprisoned in the kind or class of prison appropriate to the circumstances.

**19 Cumulative, partly cumulative or concurrent sentences**

- (1) Where a person who is convicted of a federal offence or federal offences is at the time of that conviction or those convictions, serving, or subject to, one or more federal, State or Territory sentences, the court must, when imposing a federal sentence for that federal offence, or for each of those federal offences, by order direct when the federal sentence commences, but so that:

- (a) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and
- (b) if a non-parole period applies in respect of any State or Territory sentences—the first federal sentence to commence after the end of that non-parole period commences immediately after the end of the period.

- (2) Where:

- (a) a person is convicted of 2 or more federal offences at the same sitting; and
- (b) the person is sentenced to imprisonment for more than one of the offences;

the court must, by order, direct when each sentence commences, but so that no sentence commences later than the end of the sentences the commencement of which has already been fixed or of the last to end of those sentences.

- (3) Where:

- (a) a person is convicted of a federal offence or offences, and a State or Territory offence or offences, at the same sitting; and
- (b) the person is sentenced to imprisonment for more than one of the offences;

the court must, by order, direct when each federal sentence commences but so that:

- (c) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and
- (d) if a non-parole period applies in respect of any State or Territory sentences—the first federal sentence to commence

after the end of that non-parole period commences immediately after the end of the period.

- (4) For the purpose of fixing the commencement of a sentence under this section, a reference in this section to a sentence the commencement of which has already been fixed includes a reference to another sentence imposed at the same time as the first-mentioned sentence.

### **19A Detention of person in State or Territory prisons**

A federal offender who is ordered by a court or a prescribed authority to be detained in prison in a State or Territory, may be detained in any prison in that State or Territory and may be removed from one prison to another prison in that State or Territory as if the person were detained as a State offender or Territory offender.

### **19AA Remissions and reductions of sentences**

- (1) A law of a State or Territory that provides for the remission or reduction of State or Territory sentences (other than such part of the law as relates to the remission or reduction of non-parole periods of imprisonment or of periods of imprisonment equivalent to pre-release periods of imprisonment in respect of recognizance release orders) applies in the same way to the remission or reduction of a federal sentence in a prison of that State or Territory, being a sentence imposed after the commencement of this section.
- (2) Where a law of a State or Territory provides that a person is to be taken to be serving a State or Territory sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked, the law:
- (a) is, for the purposes of subsection (1), to be taken to be providing for the remission or reduction of sentences; and
  - (b) applies to any calculation of the part of a federal sentence remaining to be served at the time of a federal offender's release under a federal parole order or licence as if the sentence were a State or Territory sentence.

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- (3) Where a federal offender who is released on parole or licence and whose parole order or licence has subsequently been revoked does not get the benefit of subsection (2) in calculating the part of any federal sentence of imprisonment remaining to be served at the time of release:
- (a) a court fixing a new non-parole period in respect of such a person under section 19AR; or
  - (b) a prescribed authority fixing a non-parole period in respect of such a person under section 19AW;
- must have regard to the period of time spent by the person on parole or licence before that parole order or licence is revoked or is to be taken to have been revoked.
- (4) A law of a State or Territory that provides for the remission or reduction, by reason of industrial action taken by prison warders, of the non-parole period of a State or Territory sentence applies in the same way to the remission or reduction:
- (a) of a federal non-parole period to be served in a prison in that State or Territory; and
  - (b) of a federal pre-release period to be served in that State or Territory.

## **Division 4—The fixing of non-parole periods and the making of recognizance release orders**

### **19AB When court must fix non-parole period or make a recognizance release order**

- (1) Subject to subsection (3), where:
  - (a) a person is convicted of a federal offence, or of 2 or more federal offences at the same sitting; and
  - (b) a court imposes on the person a federal life sentence, or a federal sentence that exceeds, or federal sentences that, in the aggregate, exceed 3 years; and
  - (c) at the time the sentence or sentences are imposed, the person is not already serving or subject to a federal sentence;the court must either:
  - (d) fix a single non-parole period in respect of that sentence or those sentences; or
  - (e) make a recognizance release order.
- (2) Subject to subsection (3), where:
  - (a) while a person is in prison and is serving or subject to a federal sentence, a further federal sentence is imposed on the person; and
  - (b) the result is that the person is to serve or to complete a federal life sentence or federal sentences the unserved portions of which, in the aggregate, exceed 3 years; and
  - (c) at the time the further federal sentence is imposed, the person is not already subject to a non-parole period or recognizance release order in respect of a federal sentence;the court imposing the further sentence must either:
  - (d) fix a single non-parole period in respect of all federal sentences the person is to serve or complete; or
  - (e) make a recognizance release order.
- (3) Where, but for this subsection, a court would be required by this section to fix a non-parole period, or make a recognizance release order, in respect of a person, the court may decline to do either if, having regard to the nature and circumstances of the offence or

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offences concerned and to the antecedents of the person, the court is satisfied that neither is appropriate.

- (4) Where the court decides that neither a non-parole period nor a recognizance release order is appropriate, the court must:
- (a) state its reasons for so deciding; and
  - (b) cause the reasons to be entered in the records of the court.

**19AC When court must fix a recognizance release order**

- (1) Subject to subsections (3) and (4), where:
- (a) a person is convicted of a federal offence, or of 2 or more federal offences at the same sitting; and
  - (b) the court imposes on the person a federal sentence that does not exceed, or federal sentences that, in the aggregate, do not exceed, 3 years; and
  - (c) at the time the sentence or sentences are imposed the person is not already serving or subject to a federal sentence;
- the court must make a recognizance release order in respect of that sentence or those sentences and must not fix a non-parole period.
- (2) Subject to subsections (3) and (4), where:
- (a) while a person is in prison and is serving or subject to a federal sentence, a further federal sentence is imposed on the person; and
  - (b) the result is that the person is to serve or to complete federal sentences the unserved portions of which do not exceed, in the aggregate, 3 years; and
  - (c) at the time the further federal sentence is imposed, the person is not already subject to a recognizance release order in respect of a federal sentence;
- the court imposing the further sentence must make a recognizance release order in respect of all federal sentences to be served or completed by the person and must not fix a non-parole period.
- (3) Where:
- (a) the federal sentence or federal sentences referred to in paragraph (1)(b); or
  - (b) the unserved portions of the federal sentences referred to in paragraph (2)(b);
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in the aggregate, do not exceed 6 months, the court is not required to make a recognizance release order.

- (4) Where, but for this subsection, a court would be required by this section to make a recognizance release order in respect of a person, the court may decline to do so if, having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the person, the court is satisfied that such an order is not appropriate.
- (5) Where the court decides that a recognizance release order is not appropriate, the court must:
  - (a) state its reasons for so deciding; and
  - (b) cause the reasons to be entered in the records of the court.

### **19AD Persons already subject to a non-parole period**

- (1) Where:
  - (a) a non-parole period (in this section called the *existing non-parole period*) has been fixed in respect of a federal sentence or federal sentences; and
  - (b) while the offender is serving the existing non-parole period, a court imposes a further federal sentence on the person;this section applies.
- (2) Where this section applies, the court must, after considering the relevant circumstances, including:
  - (a) the existing non-parole period; and
  - (b) the nature and circumstances of the offence or offences concerned; and
  - (c) the antecedents of the person;do one of the following things:
  - (d) make an order confirming the existing non-parole period;
  - (e) fix a new single non-parole period in respect of all federal sentences the person is to serve or complete;
  - (f) where the court decides that, in the circumstances, a non-parole period is not appropriate—cancel the existing non-parole period and decline to fix a new non-parole period.

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- (3) Where, under paragraph (2)(e), the court fixes a new single non-parole period, it:
  - (a) is to be treated as having superseded the existing non-parole period; and
  - (b) must not be such as to allow the person to be released on parole earlier than would have been the case if the further sentence had not been imposed.
- (4) Where this section applies, the court must not make a recognizance release order.
- (5) Where, under paragraph (2)(f), the court declines to fix a new non-parole period, the court must:
  - (a) state its reasons for deciding that a non-parole period is not appropriate; and
  - (b) cause the reasons to be entered in the records of the court.

**19AE Persons already subject to recognizance release order**

- (1) Where:
  - (a) a person is subject to a recognizance release order (in this section called the *existing recognizance release order*) made in respect of a federal sentence or federal sentences; and
  - (b) before the person is released under that order, the court imposes a further federal sentence on the person;this section applies.
- (2) Where this section applies, the court must, after considering the relevant circumstances, including:
  - (a) the existing recognizance release order; and
  - (b) the nature and circumstances of the offence or offences concerned; and
  - (c) the antecedents of the person;do one of the following things:
  - (d) make an order confirming the existing recognizance release order;
  - (e) make a new recognizance release order in respect of all federal sentences the person is to serve or complete;
  - (f) where, as a result of the further federal sentence being imposed, the person is to serve or to complete a federal life

- sentence or federal sentences the unserved portions of which, in the aggregate, exceed 3 years and the court decides that it is appropriate to fix a non-parole period—fix a single non-parole period in respect of all federal sentences the person is to serve or complete;
- (g) where the court decides that, in the circumstances, neither a recognizance release order nor a non-parole period is appropriate—cancel the existing recognizance release order and decline to make a new recognizance release order.
- (3) Where, under paragraph (2)(e), the court makes a new recognizance release order, that order:
- (a) is to be treated as having superseded the existing recognizance release order; and
  - (b) must not be such as to allow the person to be released earlier than would have been the case if the further sentence had not been imposed.
- (4) Where, under paragraph (2)(f), the court fixes a single non-parole period, it:
- (a) is to be treated as having superseded the existing recognizance release order; and
  - (b) must not be such as to allow the person to be released on parole earlier than he or she would have been released if the further sentence had not been imposed.
- (5) Where, under paragraph (2)(g), the court declines to make a new recognizance release order, the court must:
- (a) state its reasons for deciding that neither a recognizance release order nor a non-parole period is appropriate; and
  - (b) cause the reasons to be entered in the records of the court.

**19AF Non-parole period or pre-release periods not to exceed remitted sentence**

- (1) Where a court is required to fix a non-parole period or make a recognizance release order in respect of a federal sentence or sentences, the court must fix a non-parole period that ends, or make a recognizance release order such that the pre-release period ends, not later than the end of the sentence, or of the last to be served of the sentences, as reduced by any remissions or reductions under section 19AA.
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- (2) This section does not restrict the length of the non-parole period or the pre-release period in respect of a life sentence or sentences that include such a sentence.

**19AG Non-parole periods for sentences for certain offences**

- (1) This section applies if a person is convicted of one of the following offences (each of which is a *minimum non-parole offence*) and a court imposes a sentence for the offence:
- (a) an offence against section 24AA;
  - (b) a terrorism offence;
  - (c) an offence against Division 80 or 91 of the *Criminal Code*.

Note: A sentence for a minimum non-parole offence is a federal sentence, because such an offence is a federal offence.

- (2) The court must fix a single non-parole period of at least  $\frac{3}{4}$  of:
- (a) the sentence for the minimum non-parole offence; or
  - (b) if 2 or more sentences have been imposed on the person for minimum non-parole offences—the aggregate of those sentences.

The non-parole period is in respect of all federal sentences the person is to serve or complete.

- (3) For the purposes of subsection (2):
- (a) a sentence of imprisonment for life for a minimum non-parole offence is taken to be a sentence of imprisonment for 30 years for the offence; and
  - (b) it does not matter:
    - (i) whether or not the sentences mentioned in that subsection were imposed at the same sitting; or
    - (ii) whether or not the convictions giving rise to those sentences were at the same sitting; or
    - (iii) whether or not all the federal sentences mentioned in that subsection are for minimum non-parole offences.
- (4) If the person was subject to a recognizance release order, the non-parole period supersedes the order.
- (5) Sections 19AB, 19AC, 19AD, 19AE and 19AR have effect subject to this section.

Note: The effects of this include preventing a court from:

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- (a) making a recognizance release order under paragraph 19AB(1)(e) or (2)(e), 19AE(2)(e) or 19AR(2)(e); or
- (b) confirming (under paragraph 19AD(2)(d)) a pre-existing non-parole period; or
- (c) confirming (under paragraph 19AE(2)(d)) a recognizance release order; or
- (d) declining (under subsection 19AB(3) or 19AC(1) or (2) or paragraph 19AD(2)(f)) to fix a non-parole period.

**19AH Failure to fix non-parole period or make recognizance release order**

- (1) Where a court fails to fix, or properly to fix, a non-parole period, or to make, or properly to make, a recognizance release order, under this Act:
  - (a) that failure does not affect the validity of any sentence imposed on a person; and
  - (b) the court must, at any time, on application by the Attorney-General, the Director of Public Prosecutions or the person, by order, set aside any non-parole period or recognizance release order that was not properly fixed or made and fix a non-parole period or make a recognizance release order under this Act.
- (2) A court shall not, for the purposes of subsection (1), be taken to have failed to fix a non-parole period in respect of a sentence or sentences in respect of which it has made a recognizance release order or to have failed to make a recognizance release order in respect of a sentence or sentences in respect of which it has fixed a non-parole period.
- (3) Application under subsection (1) to the court that has sentenced a person may be dealt with by that court whether or not it is constituted in the way in which it was constituted when the person was sentenced.

**19AJ Court may only fix non-parole periods or make recognizance release orders for federal sentences of imprisonment**

This Division does not authorise a court to fix a single non-parole period, or make a recognizance release order, in respect both of

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federal sentences of imprisonment and State or Territory sentences of imprisonment.

**19AK Possible deportation no impediment to fixing non-parole period**

Where a person is convicted of a federal offence, a court is not precluded from fixing a non-parole period in respect of the sentence imposed for that offence merely because the person is, or may be, liable to be deported from Australia.

## **Division 5—Conditional release on parole or licence**

### **19AL Release on parole**

- (1) Subject to section 19AM, where there has been imposed on a person a federal sentence of, or federal sentences aggregating, more than 3 years but less than 10 years and a non-parole period has been fixed in relation to the sentence or sentences, the Attorney-General must, by order in writing, direct that the person be released from prison on parole:
    - (a) at the end of the non-parole period; or
    - (b) if the Attorney-General considers that in all the circumstances it would be appropriate to do so, on a specified day, not being earlier than 30 days before the end of the non-parole period.
  - (2) Subject to section 19AM, where there has been imposed on a person a federal life sentence or a federal sentence of, or federal sentences aggregating, 10 years or more and a non-parole period has been fixed in relation to the person in respect of the sentence or sentences, the Attorney-General must, by order in writing:
    - (a) direct that the person be released from prison on parole:
      - (i) at the end of the non-parole period; or
      - (ii) if the Attorney-General considers that in all the circumstances it would be appropriate to do so, on a specified day, not being earlier than 30 days before the end of the non-parole period; or
    - (b) direct that the person is not to be released on parole at, or at any time before, the end of the non-parole period.
  - (3) An order directing that a person not be released at, or at any time before, the end of the non-parole period:
    - (a) must not be made later than 3 months before the end of the non-parole period; and
    - (b) must include a statement of reasons why the order was made; and
    - (c) if the Attorney-General proposes to reconsider, at a later time, the question of the release of the person on parole—must indicate when the Attorney-General proposes to reconsider the question;
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and a copy of the order must be given to the person within 14 days after it was made.

- (4) A parole order in relation to a federal sentence:
- (a) if the sentence is imprisonment for life in respect of that federal offence or any of those federal offences—must specify the day on which the parole period ends, being a day not earlier than 5 years after the person is released on parole; and
  - (b) if it is proposed that, for any part of the parole period, the person should be subject to supervision—must specify the day on which the supervision period ends, being a day fixed in accordance with the requirements of the definition of *supervision period* in subsection 16(1).
- (5) A parole order directing that a person be released from prison is sufficient authority for the release if, and only if, the person indicates, in writing, his or her acceptance of the conditions to which the order is subject by certifying to that effect either on the original parole order or on a copy of that order.

**19AM Person not to be released on parole if still serving State or Territory sentence**

- (1) Where:
- (a) at the time when a federal non-parole period (not being in respect of a life sentence) ends, the offender is serving, or is to serve, a State or Territory sentence (other than a life sentence for which a non-parole period has not been fixed); and
  - (b) if a federal parole order were made at that time, the parole period would end while the offender would still be imprisoned in respect of the State or Territory offence;
- the parole order must not be made.
- (2) Where:
- (a) at the time when a federal non-parole period (not being in respect of a life sentence) ends, the offender is serving, or is to serve, a State or Territory sentence (other than a life sentence for which a non-parole period has not been fixed); and



- (b) if a federal parole order were made at that time, the parole period would end after the offender was released, or released on parole, in respect of the State or Territory offence; the Attorney-General must make the parole order, but it does not take effect before the offender is eligible to be so released.
- (3) Where, at the time when a federal non-parole period in respect of a life sentence, or sentences that include a life sentence, ends, the offender is serving, or is to serve, a State or Territory sentence (other than a life sentence for which a non-parole period has not been fixed), the Attorney-General must not make a parole order such that the parole period would end while the offender would still be imprisoned in respect of the State or Territory offence.
- (4) Where, at the time when a federal non-parole period ends, the offender is serving, or is to serve, a State or Territory life sentence for which a non-parole period has not been fixed, a federal parole order must not be made.

#### **19AN Parole order is subject to conditions**

- (1) A parole order under section 19AL:
- (a) is subject to the condition that the offender must, during the parole period, be of good behaviour and not violate any law; and
  - (b) if, under subsection 19AL(4), the day on which a supervision period ends is fixed in the parole order—is subject to the condition that the offender must, during the supervision period, be subject to the supervision of a parole officer or other person specified in the order and obey all reasonable directions of that officer or other person; and
  - (c) is subject to such other conditions (if any) as the Attorney-General specifies in the order.
- (2) The Attorney-General may, at any time before the end of the parole period, by order in writing, amend a parole order by varying or revoking a condition of the parole order or by imposing additional conditions in the parole order.
- (3) An amendment of the parole order does not have effect until notice in writing of the amendment is given to the offender, being notice given before the end of the parole period.

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**19AP Release on licence**

- (1) Where a person is serving a federal sentence (whether or not a non-parole period has been fixed, or a recognizance release order made, in relation to that sentence), the Attorney-General may grant a licence under this subsection for the person to be released from prison.
- (2) A person who is serving a federal sentence of imprisonment (whether or not a non-parole period has been fixed, or a recognizance release order made, in relation to that sentence), or another person acting on that person's behalf, may apply to the Attorney-General for a licence under this subsection for the first-mentioned person to be released from prison.
- (3) An application under subsection (2) must:
  - (a) be in writing; and
  - (b) specify the exceptional circumstances relied on to justify the grant of the licence.
- (4) The Attorney-General must not grant a licence under this section unless he or she is satisfied that exceptional circumstances exist which justify the grant of the licence.
- (5) The Attorney-General is not required to consider an application under subsection (2) in respect of a person if an application has been made under that subsection in respect of that person within one year before the first-mentioned application.
- (6) A licence in relation to a person:
  - (a) if the person is subject to a federal life sentence—must specify the day on which the licence period ends, being a day not earlier than 5 years after the person is released on licence; and
  - (b) if it is proposed that, for any part of the licence period, the person should be subject to supervision—must specify the day on which the supervision period ends, being a day fixed in accordance with the requirements of the definition of *supervision period* in subsection 16(1).

- (7) A licence:
- (a) is subject to the condition that the offender must, during the licence period, be of good behaviour and not violate any law; and
  - (b) if, under subsection (6), the day on which a supervision period ends is fixed in the licence—is subject to the condition that the offender must, during the supervision period, be subject to the supervision of a person specified in the licence and obey all reasonable directions of that person; and
  - (c) is subject to such other conditions (if any) as the Attorney-General specifies in the licence.
- (8) The Attorney-General may, at any time before the end of the licence period, by order in writing, amend a licence by varying or revoking a condition of a licence or by imposing additional conditions on a licence or by any or all of those means.
- (9) An amendment of a licence does not have effect until notice of the amendment is given to the offender, being notice given before the end of the licence period.
- (10) A licence directing that the offender be released from prison is sufficient authority for the release.

### **19AQ When parole order or licence automatically revoked**

- (1) Where a person to whom a parole order relates is sentenced to life imprisonment or to a sentence of, or sentences aggregating, more than 3 months in respect of a federal, State or Territory offence committed during the parole period, the parole order is to be taken to have been revoked upon the imposition of the sentence or sentences.
- (2) If, at the time of imposition of the sentence or sentences, the federal parole period has already ended, the parole order is to be taken to have been revoked as from the time immediately before the end of the parole period.
- (3) Where a person to whom a licence relates is sentenced to life imprisonment or to a sentence of, or sentences aggregating, more than 3 months in respect of a federal, State or Territory offence committed during the licence period, the licence is to be taken to

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have been revoked upon the imposition of the sentence or sentences.

- (4) If, at the time of imposition of the sentence or sentences, the licence period has already ended, the licence is to be taken to have been revoked as from the time immediately before the end of the licence period.
- (5) Where the parole order or licence relating to a person is revoked under subsection (1) or (3), the person becomes liable to serve that part of the sentence or each sentence for a federal offence that the person had not served at the time of his or her release under that order or licence, subject to the operation of subsection 19AA(2) and subject (except in the case of a life sentence) to any further remission or reduction of that sentence.
- (6) This section does not apply where the sentence or each sentence referred to in subsection (1) or (3) is a suspended sentence.

**19AR Fixing of non-parole period etc. where parole or licence automatically revoked**

- (1) Where:
  - (a) a person who is serving or is to serve a federal sentence or federal sentences is released on parole or licence under this Act; and
  - (b) the person is later sentenced to life imprisonment or to a term of imprisonment of, or terms of imprisonment aggregating, more than 3 years in respect of a federal offence or federal offences committed during the parole period or licence period; and
  - (c) under section 19AQ, because of the imposition of the sentence or sentences referred to in paragraph (b) (in this subsection called the *new sentence or sentences*):
    - (i) the parole order or licence is to be taken to have been revoked; and
    - (ii) the person becomes liable to serve that part of each of the sentences referred to in paragraph (a) (in this subsection called the *outstanding sentence or sentences*) that the person had not served at the time of release;

the court imposing the new sentence or sentences must fix a single new non-parole period in respect of the new sentence or sentences and the outstanding sentence or sentences having regard to the total period of imprisonment that the person is liable to serve.

(2) Where:

- (a) a person who is serving or is to serve a federal sentence or federal sentences is released on parole or licence under this Act; and
- (b) the person is later sentenced to a term of imprisonment of, or terms of imprisonment aggregating, 3 years or less in respect of a federal offence or federal offences committed during the parole period or licence period; and
- (c) under section 19AQ, because of the imposition of the sentence or sentences referred to in paragraph (b) (in this subsection called the *new sentence or sentences*):
  - (i) the parole order or licence is to be taken to have been revoked; and
  - (ii) the person becomes liable to serve that part of each of the sentences referred to in paragraph (a) (in this subsection called the *outstanding sentence or sentences*) that the person had not served at the time of release;

then:

- (d) if one of the outstanding sentences is a sentence of life imprisonment or the new sentence or sentences and the unserved part of the outstanding sentence or sentences aggregate more than 3 years—the court imposing the new sentence or sentences must fix a single new non-parole period in respect of the new sentence or sentences and the outstanding sentence or sentences; and
- (e) if the new sentence or sentences and the unserved part of the outstanding sentence or sentences aggregate 3 years or less—the court imposing the new sentence or sentences must not fix a non-parole period but may make a recognizance release order in respect of the new sentence or sentences and the outstanding sentence or sentences;

and, in doing so, the court must have regard to the total period of imprisonment that the person is liable to serve.

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- (3) Where:
- (a) a person who is serving or is to serve a federal sentence or federal sentences is released on parole or licence under this Act; and
  - (b) the person is later sentenced to a term or terms of imprisonment in respect of one or more State or Territory offences committed during the parole period or licence period; and
  - (c) under section 19AQ, because of the imposition of the sentence or sentences referred to in paragraph (b) (in this subsection called the *new sentence or sentences*):
    - (i) the parole order or licence is to be taken to have been revoked; and
    - (ii) the person becomes liable to serve that part of each of the sentences referred to in paragraph (a) (in this subsection called the *outstanding sentence or sentences*) that the person had not served at the time of release;
- then:
- (d) if one of the outstanding sentences is a life sentence or the unserved part of the outstanding sentence or sentences is or aggregates more than 3 years—the court imposing the new sentence or sentences must fix a single new non-parole period in respect of the outstanding sentence or sentences; and
  - (e) if the unserved part of the outstanding sentence or sentences is or aggregates 3 years or less—the court imposing the new sentence or sentences must not fix a non-parole period but may make a recognizance release order in respect of the outstanding sentence or sentences.
- (4) Where, but for this subsection, the court would be required by subsection (1), (2) or (3) to fix a non-parole period, the court is not required to do so if it is satisfied, having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the offender, that it is not appropriate to do so.
- (5) Where a court decides, under this section, that it is inappropriate either to fix a non-parole period, or to make a recognizance release order, the court:
- (a) must state its reasons for so deciding; and

- (b) must cause these reasons to be entered in the records of the court.
- (6) Without limiting, by implication, the application of any other provision of Division 4, sections 19AF, 19AJ and 19AK apply, according to their terms, in relation to the fixing of non-parole periods or the making of recognizance release orders under this section in the same way as they apply to the fixing of such periods or the making of such orders under Division 4.
- (7) Without limiting, by implication, the application of any other provision of Division 4, section 19AH applies, according to its terms, in relation to the failure to fix, or properly to fix, non-parole periods or the failure to make, or properly to make, recognizance release orders under this section in the same way as it applies to such failures in relation to the fixing of such periods or the making of such orders under Division 4.

**19AS Court to issue warrant of detention where person required to serve balance of sentence**

- (1) Where:
- (a) a person who is serving or is to serve a federal sentence or federal sentences is released on parole or licence under this Act; and
  - (b) under section 19AQ, because of the imposition of one or more federal, State or Territory sentences (in this subsection called the *new sentence or sentences*):
    - (i) that parole order or licence is to be taken to have been revoked; and
    - (ii) the person becomes liable to serve that part of each of the sentences referred to in paragraph (a) (in this subsection called the *outstanding sentence or sentences*) that he or she had not served at the time of release;
- then:
- (c) the court imposing the new sentence or sentences must issue a warrant authorising the person to be detained in prison to undergo imprisonment for the unserved part of the outstanding sentence or sentences; and

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- (d) the person must begin to serve the unserved part of the outstanding sentence or of the first to be served of the outstanding sentences on the day that the new sentence is, or the new sentences are, imposed; and
  - (e) the unserved part of the outstanding sentence or of each of the outstanding sentences must be served in the State or Territory where the new sentence is, or the new sentences are, imposed.
- (2) Where the court fails to issue a warrant under paragraph (1)(c), the Director of Public Prosecutions may apply to that court for such a warrant.

**19AT What happens when later conviction is quashed?**

- (1) Where:
- (a) a person who is serving or is to serve a federal sentence or sentences of imprisonment is released on parole or licence under this Act; and
  - (b) under section 19AQ, because of the imposition of one or more federal, State or Territory sentences (in this subsection called the *new sentence or sentences*):
    - (i) that parole order or licence is to be taken to have been revoked; and
    - (ii) the person becomes liable to serve that part of each of the sentences referred to in paragraph (a) (in this subsection called the *outstanding sentence or sentences*) that he or she had not served at the time of release;
- then:
- (c) if the person appeals against the conviction or each conviction giving rise to a new sentence and is granted bail, pending the hearing of the appeal or appeals:
    - (i) this Act has effect, pending the hearing of that appeal or those appeals, as if the revoked order or licence had not been revoked and as if any warrant for the detention of the person issued under section 19AS were of no effect; and
    - (ii) the person must be released from prison on the day the person is granted bail; and



- (d) if the appeal court sets aside the conviction or each of the convictions and the person concerned is granted bail or bail is extended pending a retrial of the offence or offences concerned:
    - (i) this Act has effect, or continues to have effect, pending the completion of the retrial, as if the revoked order or licence had not been revoked and as if any warrant for the detention of the person issued under section 19AS were of no effect; and
    - (ii) if the person had not already been released from prison under paragraph (c), the person is to be released on the day the person is granted bail or bail is extended; and
  - (e) if the conviction or each conviction appealed against is quashed on appeal or the person is found, on a retrial, not to be guilty of the offence or each of the offences:
    - (i) this Act has effect, or continues to have effect, as if the revoked order or licence had not been revoked and as if any warrant for the detention of the person issued under section 19AS were of no effect; and
    - (ii) if the person had not already been released from prison under paragraph (c) or (d), the person must be released from prison on the day the conviction or each conviction is quashed on appeal or the person is found, on a retrial not to be guilty of the offence or offences; and
  - (f) if paragraph (c), (d) or (e) applies—the unserved part of the outstanding sentence or sentences shall (except in the case of an outstanding sentence of life imprisonment) be reduced by the period spent in prison after the day the new sentence is or the new sentences are imposed and before the day of the person's release on bail or, if the person is not so released, before the resolution of the appeal.
- (2) If the appeal against the conviction or each conviction giving rise to a new sentence is unsuccessful, section 19AS applies, with effect from the day the appeal proceedings are completed, as if the new sentence or new sentences were imposed on that day by the court to which the appeal was made.
- (3) Nothing in subsection (1) prevents a person from being detained in prison under any other law.
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**19AU Attorney-General may revoke parole order or licence**

- (1) The Attorney-General may, by instrument in writing, revoke a parole order or licence at any time before the end of the parole period or licence period:
  - (a) if the offender has, during that period, failed to comply with a condition of the order or licence; or
  - (b) if there are reasonable grounds for suspecting that the offender has, during that period, so failed to comply;and the instrument of revocation must specify the condition that was breached or is suspected of having been breached.
- (2) Before revoking a parole order or a licence, the Attorney-General must, subject to subsection (3), by notice in the prescribed form, notify the person to whom the order or licence relates of:
  - (a) the condition of the order or licence alleged to have been breached; and
  - (b) the fact that the Attorney-General proposes to revoke the order or licence at the end of 14 days after the day the notice is issued unless the person, within that period, gives the Attorney-General written reasons why the order or licence should not be revoked and those reasons are accepted by the Attorney-General.
- (3) Subsection (2) does not apply where:
  - (a) the person's whereabouts are and remain, after reasonable inquiries on behalf of the Attorney-General, unknown to the Attorney-General; or
  - (b) there are circumstances of urgency that, in the opinion of the Attorney-General, require the parole order or licence to be revoked without notice being given to the person; or
  - (c) the person has left Australia; or
  - (d) in the opinion of the Attorney-General it is necessary, in the interests of the administration of justice, to revoke the parole order or licence without giving notice to the person.

**19AV Arrest of person whose parole order or licence revoked by Attorney-General**

- (1) A constable may, without warrant, arrest a person whose parole order or licence has been revoked by the Attorney-General.

- (2) The Attorney-General or the Director of Public Prosecutions may, in relation to a person whose parole order or licence has been revoked by the Attorney-General, apply to a prescribed authority for a warrant in the form prescribed for the purposes of this subsection for the arrest of the person.
- (3) A person who is arrested under subsection (1) or (2), must, as soon as practicable after that arrest, be brought before a prescribed authority in the State or Territory in which the person is arrested.

**19AW Where person on parole or licence notified of revocation**

- (1) Where a prescribed authority before whom a person is brought under section 19AV because of an order revoking a parole order or licence is satisfied:
  - (a) that the person is the person named in that revocation order; and
  - (b) that the person was notified by the Attorney-General of the proposal to make the revocation order; and
  - (c) that the revocation order is still in force;the prescribed authority must issue a warrant, in the prescribed form:
  - (d) authorising any constable to take the person to a specified prison in the State or Territory in which the person was arrested; and
  - (e) directing that the person be detained in prison in that State or Territory to undergo imprisonment for the unserved part of the sentence, or of each sentence, of imprisonment (in this section called the *outstanding sentence or sentences*) that the person was serving or had yet to serve at the time of his or her release; and
  - (f) subject to subsection (3), fixing a non-parole period in respect of the outstanding sentence or sentences.
- (2) If the prescribed authority cannot complete the hearing under subsection (1) immediately, the prescribed authority may issue a warrant for the remand of the person in custody pending completion of the hearing.

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- (3) The prescribed authority is not required to fix a non-parole period under paragraph (1)(f) if:
  - (a) the prescribed authority considers it inappropriate to do so because of the nature of the breach of the conditions of the order or licence that led to its revocation; or
  - (b) the unserved part of the outstanding sentence or sentences is, or aggregates, 3 months or less.
- (4) Where a prescribed authority issues a warrant, the prescribed authority must specify in the warrant the particulars of the unserved part of each outstanding sentence and, if a non-parole period is fixed, particulars of that period.
- (5) A non-parole period fixed under this section has effect as if it had been fixed by a court in respect of the outstanding sentence or sentences and section 19AL applies in relation to that non-parole period according to its terms.
- (6) Where a person brought before a prescribed authority under section 19AV is dealt with in accordance with this section, the unserved part of any outstanding sentence or sentences that the person was serving or had yet to serve at the time of his or her release, is to be reduced by any period of remand under subsection (2).

**19AX Where person on parole or licence not notified of revocation**

- (1) Where a prescribed authority before whom a person is brought under section 19AV because of an order revoking a parole order or licence is satisfied that the person so brought is the person named in that revocation order but is not satisfied that the person was notified by the Attorney-General of the proposal to make that revocation order, the prescribed authority must:
  - (a) immediately notify the Attorney-General that the person has been brought before that prescribed authority; and
  - (b) order that the person be detained in custody until the Attorney-General orders that the revocation order be rescinded or until the completion of proceedings under subsection 19AW(1) as applied by subsection (6) of this section.

- (2) Where the Attorney-General is notified that a person has been brought before a particular prescribed authority, the Attorney-General must, as soon as practicable, notify the person, in writing, of the conditions of the parole order or licence alleged to have been breached and request that the person give him or her, within 14 days of notification of those reasons, a written submission stating why that parole order or licence should not have been revoked.
- (3) If, within 14 days of a person receiving notification under subsection (2), the person fails to make a written submission to the Attorney-General, the Attorney-General must, as soon as practicable after the end of that period, notify the prescribed authority of a decision not to rescind the revocation order.
- (4) If, within 14 days of notification under subsection (2), the person makes a written submission to the Attorney-General, the Attorney-General must decide, as soon as practicable after receiving that submission, and on the basis of that submission and any other material the Attorney-General considers to be relevant, whether or not to rescind the revocation order and must, as soon as practicable after so deciding, inform the prescribed authority and the person, in writing, of the decision.
- (5) If the prescribed authority is notified of a decision to rescind the revocation order, the prescribed authority must immediately order the person to be released from prison.
- (6) If the prescribed authority is notified of a decision not to rescind the revocation order made in respect of the person, subsection 19AW(1) applies to the person so as to authorise the issue of a warrant as if the prescribed authority had been satisfied of the matters referred to in paragraphs 19AW(1)(a), (b) and (c) and subsections 19AW(3), (4), (5) and (6) apply to that person according to their terms.

**19AY Appeals in respect of warrants issued under subsection 19AW(1) or that subsection as applied**

- (1) Where a prescribed authority issues a warrant in respect of a person under subsection 19AW(1), or under that subsection as applied by section 19AX, the person may appeal to the Supreme

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Court of the State or Territory in which the person was arrested against:

- (a) the issue of the warrant; or
  - (b) the calculation, for the purposes of the warrant, of the unserved part of any outstanding sentence; or
  - (c) the fixing, for the purposes of the warrant, of a non-parole period or the refusal to fix such a period.
- (2) An appeal may be begun by lodging a notice of appeal with the court within 21 days after the day on which the warrant to which the appeal relates was issued.
- (3) An appeal is to be by way of rehearing, but the court may have regard to any evidence given before the prescribed authority.
- (4) The court may, on the application of the person making the appeal, order the release of the person from prison pending the disposal of the appeal, on such conditions as the court determines, and, upon the court's so doing, the warrant appealed against shall not, unless the person breaks a condition of his or her release, be executed or further executed before the appeal is disposed of.
- (5) The court must:
- (a) if the appeal is against the issue of the warrant—either confirm or revoke the warrant; or
  - (b) if the appeal is against the calculation of the unserved part of any outstanding sentence—either confirm the warrant or vary the warrant, so far as it relates to that calculation, as specified in the order; or
  - (c) if the appeal is against the fixing of a non-parole period or the refusal to fix such a period—either confirm the warrant or vary the warrant, if it fixes a non-parole period, as specified in the order.
- (6) Where a warrant is revoked under paragraph (5)(a), the person to whom the warrant relates, if the court has not already ordered the person's release under subsection (4), is to be released from prison immediately.
- (7) In this section:

*outstanding sentence* has the same meaning as in section 19AW.

### **19AZ Evidence before prescribed authority**

- (1) A prescribed authority exercising any powers under this Division may take evidence on oath or affirmation and for that purpose may administer an oath or affirmation.
- (2) A prescribed authority exercising any powers under this Division may summon a person to appear before the prescribed authority to give evidence and to produce such documents and articles (if any) as are referred to in the summons.
- (3) A summons under this section shall be served in the same manner as a summons to a witness to appear before a court of summary jurisdiction in the State or Territory where the summons under this section is issued.

### **19AZA Disobedience of summons etc.**

- (1) A person who has been served with a summons to appear before a prescribed authority must not fail to appear in obedience to the summons.

Penalty: 10 penalty units.

- (2) A person who has been served with a summons to produce a document or article to a prescribed authority shall not fail to produce the document or article.

Penalty: 10 penalty units.

- (3) A person who appears before a prescribed authority shall not refuse to be sworn or make an affirmation or refuse to produce documents or articles, or to answer questions, that he or she is required by the prescribed authority to produce or answer.

Penalty: 10 penalty units.

- (4) Subsections (1), (2) and (3) do not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

- (5) Subsections (1) and (2) are offences of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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**19AZB Can person be released on parole or licence if earlier parole order or licence revoked?**

A parole order may be made or a licence granted, even if a previous parole order or licence has been revoked.

**19AZC Effect of parole order and licence on sentence**

- (1) Where a parole order is made, or a licence is granted, in relation to a person:
  - (a) until the parole period or licence period ends without the parole order or licence being revoked, or until the person is otherwise discharged from imprisonment, the person is to be taken to be still under sentence and not to have served the part of any sentence that remained to be served at the beginning of the parole period or licence period; and
  - (b) if the parole period or licence period ends without the parole order or licence being revoked, the person is to be taken to have served the part of any sentence that remained to be served at the beginning of the parole period or licence period and to have been discharged from imprisonment.
- (2) Where a parole order or licence in relation to a person is, under subsection 19AQ(2) or (4), to be taken to have been revoked as from the time immediately before the end of the parole period or licence period, subsection (1) has effect as if the parole period or the licence period had not ended without the parole order or the licence being revoked.

**19AZD State and Territory laws providing for leave of absence, pre-release etc. to apply to federal offenders**

- (1) A law of a State or Territory providing for a State or Territory offender to be granted leave of absence from prison, including leave of absence granted by order of a court, applies to a federal offender who is serving a sentence in that State or Territory as if the federal offender were a State or Territory offender serving an equivalent State or Territory sentence in that State or Territory.
- (2) A law of a State or Territory providing for a State or Territory offender imprisoned in that State or Territory to be released:



- (a) up to 24 hours before the time at which his or her sentence would otherwise have ended; or
  - (b) where the release day falls on a Saturday, a Sunday or a day which is a public holiday—on the last day before such a day which is not a Saturday, a Sunday or a public holiday;
- applies to a federal offender who is serving a sentence in that State or Territory as if the federal offender were a State or Territory offender serving an equivalent State or Territory sentence in that State or Territory.
- (3) A law of a State or Territory providing for a State or Territory offender to be released from prison under a pre-release permit scheme (however called) that is prescribed for the purposes of this subsection, applies to a federal offender who is serving a sentence in that State or Territory, subject to any conditions relating to eligibility to participate that are specified in the regulations that prescribe that scheme, as if the federal offender were a State or Territory offender serving an equivalent State or Territory sentence in that State or Territory.

### **19B Discharge of offenders without proceeding to conviction**

- (1) Where:
  - (a) a person is charged before a court with a federal offence or federal offences; and
  - (b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:
    - (i) the character, antecedents, age, health or mental condition of the person;
    - (ii) the extent (if any) to which the offence is of a trivial nature; or
    - (iii) the extent (if any) to which the offence was committed under extenuating circumstances;that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation;the court may, by order:
  - (c) dismiss the charge or charges in respect of which the court is so satisfied; or

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- (d) discharge the person, without proceeding to conviction in respect of any charge referred to in paragraph (c), upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with the following conditions:
- (i) that he or she will be of good behaviour for such period, not exceeding 3 years, as the court specifies in the order;
  - (ii) that he or she will make such reparation or restitution, or pay such compensation, in respect of the offence or offences concerned (if any), or pay such costs in respect of his or her prosecution for the offence or offences concerned (if any), as the court specifies in the order (being reparation, restitution, compensation or costs that the court is empowered to require the person to make or pay):
    - (A) on or before a date specified in the order; or
    - (B) in the case of reparation or restitution by way of money payment or in the case of the payment of compensation or an amount of costs—by specified instalments as provided in the order; and
  - (iii) that he or she will, during a period, not exceeding 2 years, that is specified in the order in accordance with subparagraph (i), comply with such other conditions (if any) as the court thinks fit to specify in the order, which conditions may include the condition that the person will, during the period so specified, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed.
- (1A) However, the court must not take into account under subsection (1) any form of customary law or cultural practice as a reason for:
- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
  - (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

(1B) In subsection (1A):

*criminal behaviour* includes:

- (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
  - (b) any fault element relating to such a physical element.
- (2) Where a court proposes to discharge a person in pursuance of an order made under subsection (1), it shall, before making the order, explain or cause to be explained to the person, in language likely to be readily understood by him or her:
- (a) the purpose and effect of the proposed order;
  - (b) the consequences that may follow if he or she fails, without reasonable cause or excuse, to comply with the conditions of the proposed order; and
  - (c) that any recognizance given in accordance with the order may be discharged or varied under section 20AA.
- (2A) A person is not to be imprisoned for a failure to pay an amount required to be paid under an order made under this section.
- (3) Where a charge or charges against a person is or are dismissed, or a person is discharged, in pursuance of an order made under subsection (1):
- (a) the person shall have such rights of appeal on the ground that he or she was not guilty of the offence or offences concerned with which he or she was charged as he or she would have had if the court had convicted him or her of the offence or offences concerned; and
  - (b) there shall be such rights of appeal in respect of the manner in which the person is dealt with for the offence or offences concerned as there would have been if:
    - (i) the court had, immediately before so dealing with him or her, convicted him or her of the offence or offences concerned; and
    - (ii) the manner in which he or she is dealt with had been a sentence or sentences passed upon that conviction.
- (4) Where a person is discharged in pursuance of an order made under subsection (1), the court shall, as soon as practicable, cause the

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order to be reduced to writing and a copy of the order to be given to, or served on, the person.

**20 Conditional release of offenders after conviction**

- (1) Where a person is convicted of a federal offence or federal offences, the court before which he or she is convicted may, if it thinks fit:
- (a) by order, release the person, without passing sentence on him or her, upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with the following conditions:
    - (i) that he or she will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order;
    - (ii) that he or she will make such reparation or restitution, or pay such compensation, in respect of the offence or offences (if any), or pay such costs in respect of his or her prosecution for the offence or offences (if any), as the court specifies in the order (being reparation, restitution, compensation or costs that the court is empowered to require the person to make or pay):
      - (A) on or before a date specified in the order; or
      - (B) in the case of reparation or restitution by way of money payment or in the case of the payment of compensation or an amount of costs—by specified instalments as provided in the order;
    - (iii) that he or she will pay to the Commonwealth such pecuniary penalty (if any) as the court specifies in the order (being a penalty not exceeding the maximum amount of the penalty that, in accordance with subsection (5), the court may specify in respect of the offence or offences) on or before a date specified in the order or by specified instalments as provided in the order; and
    - (iv) that he or she will, during a period, not exceeding 2 years, that is specified in the order, comply with such other conditions (if any) as the court thinks fit to specify in the order, which conditions may include the condition that the person will, during the period so specified, be

subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed; or

- (b) sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released, upon giving security of the kind referred to in paragraph (a) either forthwith or after he or she has served a specified period of imprisonment in respect of that offence or those offences that is calculated in accordance with subsection 19AF(1).
- (2) Where a court proposes to release a person by order made under paragraph (1)(a), it shall, before making the order, explain or cause to be explained to the person, in language likely to be readily understood by him or her:
- (a) the purpose and effect of the proposed order;
  - (b) the consequences that may follow if he or she fails, without reasonable cause or excuse, to comply with the conditions of the proposed order; and
  - (c) that any recognizance given in accordance with the order may be discharged or varied under section 20AA.
- (2A) A person is not to be imprisoned for a failure, under an order made under subsection (1), to pay an amount by way of reparation, restitution or compensation or an amount in respect of costs.
- (3) Where a person is released in pursuance of an order made under subsection (1) without sentence being passed on him or her, there shall be such rights of appeal in respect of the manner in which the person is dealt with for the offence or each offence in respect of which the order is made as there would have been if the manner in which he or she is dealt with had been a sentence passed upon his or her conviction for that offence.
- (4) Where an order is made under subsection (1) in respect of a person, the court shall, as soon as practicable, cause the order to be reduced to writing and a copy of the order to be given to, or served on, the person.
- (5) The maximum amount of the penalty that a court may specify in respect of the offence or each offence in an order made under subsection (1) in relation to a person is:
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- (a) where the offence is punishable by a fine—the amount of the maximum fine that the court is empowered to impose on the person for the offence; or
  - (b) where the offence is not punishable by a fine:
    - (i) if the court is not a court of summary jurisdiction—300 penalty units; or
    - (ii) if the court is a court of summary jurisdiction—60 penalty units.
- (6) Paragraph (1)(b) does not apply in relation to a minimum non-parole offence mentioned in section 19AG, or offences that include one or more such minimum non-parole offences. This subsection has effect despite subsection (1) and sections 19AB, 19AC, 19AE and 19AR (which permit or require a court to make a recognizance release order in certain circumstances).

Note: If the court sentences the person to imprisonment for a minimum non-parole offence, it must fix a non-parole period under section 19AG.

**20A Failure to comply with condition of discharge or release**

- (1) Where a person has been discharged in pursuance of an order made under subsection 19B(1), or released in pursuance of an order made under subsection 20(1), and information is laid before a magistrate alleging that the person has, without reasonable cause or excuse, failed to comply with a condition of the order, the magistrate may:
  - (a) issue a summons directing the person to appear, on a date, at a time and at a place fixed in the summons, before the court by which the order was made; or
  - (b) if the information is laid on oath and the magistrate is of the opinion that proceedings against the person by summons might not be effective—issue a warrant for the apprehension of the person.
- (1A) Subsection (1) does not apply to a failure by a person to comply with a condition of an order (other than a failure constituted by the commission by the person of an offence) unless the information is laid before the end of the period for which the person is required by the order to give security to be of good behaviour.

- (2) Where:
- (a) a person who is served with a summons issued under subsection (1) fails to attend before the court as required by the summons; or
  - (b) a person who has been admitted to bail under subsection (4) fails to attend before the court as required by the conditions of his or her bail;
- the court may, on proof of the service of the summons or of the admission of the person to bail, as the case may be, issue a warrant for the apprehension of the person.
- (3) A warrant issued under subsection (1) or (2) shall authorize the apprehension of the person, the bringing of the person before the court as soon as practicable after his or her apprehension and the detention of the person in custody until he or she is released by order of the court or in accordance with subsection (4).
- (4) Where a person is apprehended in pursuance of a warrant issued under subsection (1) or (2) and the court before which he or she is to be brought is not sitting at the time of his or her arrest, the person shall be brought before a magistrate, who may:
- (a) admit the person to bail, on such recognizance (with or without sureties) as the magistrate thinks fit and on the condition that the person appears, on such date, at such time and at such place as the magistrate specifies, before that court; or
  - (b) direct that the person be kept in custody in accordance with the warrant.
- (5) Where, in accordance with this section, a person who has been discharged in pursuance of an order made under subsection 19B(1), or released in pursuance of an order made under subsection 20(1), appears or is brought before the court by which the order was made, the court (whether or not constituted by the judge or magistrate who made the order), if it is satisfied that the person has, without reasonable cause or excuse, failed to comply with a condition of the order, may:
- (a) in the case of a person who has been discharged in pursuance of an order made under subsection 19B(1):
    - (i) revoke the order, convict the person of the offence or offences in respect of which the order was made and, subject to subsection (6), deal with the person, for that

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offence or those offences, in any manner in which he or she could have been dealt with for that offence or those offences if the order had not been made; or

(ii) take no action; or

(b) in the case of a person who has been released in pursuance of an order made under paragraph 20(1)(a):

(i) without prejudice to the continuance of the order, impose a pecuniary penalty not exceeding 10 penalty units on the person;

(ii) revoke the order and, subject to subsection (6), deal with the person, for the offence or offences in respect of which the order was made, in any manner in which he or she could have been dealt with for that offence or those offences if the order had not been made and he or she was before the court for sentence in respect of the offence or offences; or

(iii) take no action; or

(c) in the case of a person who has been released by an order made under paragraph 20(1)(b):

(ia) impose on the person a monetary penalty of not more than \$1000; or

(ib) subject to subsection (5A), amend the order so as to extend the period for which the person is required to give security to be of good behaviour; or

(ic) revoke the order and make an order under section 20AB; or

(i) revoke the order and deal with the person for the offence or offences in respect of which the order was made by ordering that the person be imprisoned for that part of each sentence of imprisonment fixed under paragraph 20(1)(b) that the person had not served at the time of his or her release; or

(ii) take no action.

(5A) The court may not, under subparagraph (5)(c)(ib), extend a period so that the period as extended would be more than 5 years.

(5B) If a court, under subparagraph (5)(c)(ib), amends an order made in respect of a person under paragraph 20(1)(b), the security given by the person under that subsection is, by this section, taken to be a



security that the person will be of good behaviour for the period stated in the order as amended.

- (6) Where a person who has been discharged in pursuance of an order made under subsection 19B(1), or released in pursuance of an order made under subsection 20(1), is dealt with under subsection (5) for the offence or offences in respect of which the order was made, the court, in so dealing with the person, shall, in addition to any other matters that the court considers should be taken into account, take into account:
- (a) the fact that the order was made;
  - (b) anything done under the order; and
  - (c) any other order made in respect of the offence or offences.
- (7) Where a person who has been discharged in pursuance of an order made under subsection 19B(1), or released in pursuance of an order made under subsection 20(1), is dealt with under subsection (5) for the offence or offences in respect of which the order was made, the court may, in addition to dealing with him or her for that offence or those offences, order that any recognizance entered into by him or her, or by a surety for him or her, shall be estreated and any other security given by or in respect of him or her shall be enforced.
- (8) Where a person who has been discharged in pursuance of an order made under subsection 19B(1), or released in pursuance of an order made under subsection 20(1), is dealt with under subsection (5) for the offence or offences in respect of which the order was made, there shall be such rights of appeal in respect of the manner in which the person is dealt with for that offence or those offences as there would have been if:
- (a) in the case of a person who has been discharged in pursuance of an order made under subsection 19B(1)—the manner in which he or she is dealt with had been a sentence or sentences passed upon his or her conviction for the offence; or
  - (b) in the case of a person who has been released in pursuance of an order made under subsection 20(1):
    - (i) the court had, immediately before so dealing with him or her, convicted him or her of the offence or offences; and

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- (ii) the manner in which he or she is dealt with had been a sentence or sentences passed upon that conviction.
- (9) A pecuniary penalty imposed on a person by virtue of subparagraph (5)(b)(i) shall, for the purposes of the laws of the Commonwealth, and of the States and Territories, with respect to the enforcement and recovery of fines ordered to be paid by offenders, be deemed to be a fine imposed on the person upon his or her conviction for an offence against the law of the Commonwealth.

**20AA Power to discharge or vary conditions of recognizance**

- (1) Where a person has entered into a recognizance in pursuance of an order made under subsection 19B(1) or 20(1), any of the following persons may apply to the court by which the order was made for the discharge of the recognizance or for a variation of its terms:
- (a) an authorized person;
  - (b) the person who entered into the recognizance;
  - (c) a surety for the person who entered into the recognizance;
  - (d) a probation officer appointed in accordance with the order (in this section referred to as a *probation officer*).
- (2) Where an application is made under subsection (1) for the discharge of a recognizance, the court (whether or not constituted by the judge or magistrate who made the order in pursuance of which the recognizance was entered into) may, if it is satisfied that notice as required by subsection (5) or (6) has been given and that the conduct of the person who entered into the recognizance has been such as to make it unnecessary that he or she should remain bound by the recognizance, discharge the recognizance.
- (3) Where an application is made under subsection (1) for a variation of the terms of a recognizance, the court (whether or not constituted by the judge or magistrate who made the order in pursuance of which the recognizance was entered into) may, if it is satisfied that notice as required by subsection (5) or (6) has been given and it thinks fit to do so, vary the terms of the recognizance in all or any of the following ways:
- (a) by extending or reducing the duration of the recognizance;
  - (b) by altering the conditions of the recognizance;
  - (c) by inserting additional conditions in the recognizance;

- (d) by reducing any liability to make reparation or restitution, by reducing any instalment of any reparation or restitution or by reducing the amount of, or of any instalment of, any costs, compensation or penalty; or
  - (e) by altering the manner in which any reparation, restitution, compensation, costs or penalty, or any instalment or any reparation, restitution, compensation, costs or penalty, is or are to be made or paid.
- (4) The court shall not extend the duration of a recognizance beyond:
- (a) in the case of a recognizance entered into in pursuance of an order made under subsection 19B(1)—the period of 3 years from the date on which the recognizance was entered into; or
  - (b) in the case of a recognizance entered into in pursuance of an order made under subsection 20(1)—the period of 5 years from the date on which the recognizance was entered into.
- (5) Where an application is made under subsection (1) by an authorized person, the authorized person shall cause notice of the application and the date, time and place fixed for the hearing of the application, to be served on the person who entered into the recognizance in relation to which the application is made and:
- (a) if that person has a surety in respect of the recognizance—on the surety; and
  - (b) if that person has a probation officer in respect of the recognizance—on the probation officer.
- (6) Where an application is made under subsection (1) by a person other than an authorized person, the person making the application shall cause notice of the application, and of the date, time and place fixed for the hearing of the application, to be served on the Director of Public Prosecutions or, if the Director of Public Prosecutions has not established an office in the State or Territory in which the application is made, on the Director of Legal Services, in that State or Territory, in the Attorney-General's Department, and:
- (a) if the application is made by the person who entered into the recognizance and that person has a surety—on the surety;
  - (b) if the application is made by a surety in respect of the recognizance—on the person who entered into the recognizance; or

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- (c) if the application is made by a probation officer in respect of the recognizance—on the person who entered into the recognizance and, if that person has a surety in respect of the recognizance, on the surety.
  - (7) Where notice of an application under subsection (1) is served on a surety, the surety is entitled to appear on the hearing of the application and seek to be released from his or her liability as a surety in respect of the recognizance.
  - (8) Subject to subsections (9) and (10), where under this section a court varies the terms of a recognizance, a person who is a surety in respect of the recognizance, and is not released by the court from his or her liability, continues to be liable as a surety in respect of the recognizance as so varied.
  - (9) Where under this section a court varies the terms of a recognizance in respect of which a person is a surety:
    - (a) if the recognizance is varied by extending its duration—the surety ceases to be liable after the expiration of the period for which he or she agreed to be liable when he or she became a surety;
    - (b) if the recognizance is varied by altering a condition—the surety is not liable in respect of non-compliance with that condition as altered; and
    - (c) if the recognizance is altered by the addition of a condition—the surety is not liable in respect of non-compliance with the additional condition;unless he or she agrees to be liable in respect of the recognizance as so varied.
  - (10) Where under this section a court varies the terms of a recognizance in respect of which a person is a surety by altering a condition, the court shall give directions as to the extent (if any) to which the surety is to continue to be liable in respect of the condition as it existed before the alteration, and the surety continues to be liable in respect of the condition to that extent but not otherwise.
  - (11) Where under this section a court varies the terms of a recognizance:
    - (a) corresponding variations shall, by force of this subsection, be deemed to have been made to the conditions of the order in pursuance of which the recognizance was entered into; and
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- (b) section 20A applies to and in relation to the order, in respect of acts or things done or omitted to be done after the variation, as if references in that section to the conditions of the order were references to the conditions of the order as so deemed to be varied.
- (12) In this section, **authorized person** means the Attorney-General, the Director of Public Prosecutions or a person appointed under section 69 of the *Judiciary Act 1903* to prosecute indictable offences against the laws of the Commonwealth.

### **20AB Additional sentencing alternatives**

- (1) Where under the law of a participating State or a participating Territory a court is empowered in particular cases to pass a sentence or make an order known as a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention or an attendance order, or to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section, in respect of a State or Territory offender, such a sentence or order may in corresponding cases be passed or made by that court or any federal court in respect of a person convicted before that first-mentioned court, or before that federal court in that State or Territory, of a federal offence.
- (1A) Where the law of a participating State or a participating Territory requires that before passing a sentence, or making an order, of the kind referred to in subsection (1) a court must first pass another sentence or make another order (whether or not that other sentence or other order is suspended upon the making of the first-mentioned sentence or order), then, a court is not required, before passing or making that first-mentioned sentence or order in respect of a person convicted by that court for a federal offence, to pass that other sentence or make that other order.
- (1B) A court is not precluded from passing a sentence, or making an order, under subsection (1) only because the court is empowered under section 20AC, in relation to a person who has failed to comply with such a sentence or order, to take action that is, or may be, inconsistent with action that, under the law of a participating State or participating Territory, a court of that State or Territory is

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empowered to take for such a failure by a State or Territory offender.

- (2) Where a court proposes to pass a sentence, or make an order, under subsection (1), it shall, before passing the sentence or making the order, explain or cause to be explained to the person in respect of whom it is proposed to pass the sentence or make the order, in language likely to be readily understood by him or her:
  - (a) the purpose and effect of the proposed sentence or order;
  - (b) the consequences that may follow if he or she fails, without reasonable cause or excuse, to comply with the proposed sentence or order or with any requirements made in relation to the proposed sentence or order by or under the provisions of the laws of the relevant State or Territory that will apply in relation to the proposed sentence or order by virtue of subsection (3); and
  - (c) if the proposed sentence or order may be revoked or varied under those provisions—that the proposed sentence or order may be so revoked or varied.
- (3) Where a sentence or order referred to in subsection (1) is passed or made under that subsection in respect of a person convicted in a State or Territory of a federal offence, the provisions of the laws of the State or Territory with respect to such a sentence or order that is passed or made under those laws shall, so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth, apply, by virtue of this subsection, to and in relation to the sentence or order passed or made under subsection (1).
- (4) Where a court passes a sentence, or makes an order, under subsection (1) in respect of a person convicted of an offence against the law of the Commonwealth, the court may also do all or any of the following:
  - (a) impose any fine or other pecuniary penalty that the court is empowered to impose on the person for the offence;
  - (b) make any order requiring the person to make reparation or restitution, or pay compensation, in respect of the offence that the court is empowered to make;
  - (c) make any other order that the court is empowered to make.

- (5) Where a court passes a sentence, or makes an order, under subsection (1) in respect of a person, the court shall, as soon as practicable, cause the sentence or order to be reduced to writing and a copy of the sentence or order to be given to, or served on, the person.
- (6) Subsection (1) does not permit a court (including a federal court) to pass a sentence, or make an order, that involves detention or imprisonment, in respect of the conviction of a person before the court of a minimum non-parole offence mentioned in section 19AG.

Note: If the court sentences the person to imprisonment for the minimum non-parole offence, it must fix a non-parole period under section 19AG.

### **20AC Failure to comply with sentence passed, or order made, under subsection 20AB(1)**

- (1) In this section, *the applied provisions*, in relation to a sentence passed or an order made under subsection 20AB(1), means the provisions of the laws of a State or Territory that apply to and in relation to the sentence or order by virtue of subsection 20AB(3).
- (2) Where a sentence has been passed, or an order has been made, under subsection 20AB(1) in respect of a person and information is laid before a magistrate, whether before or after the expiration of the period for which the sentence or order is to operate or operated, alleging that the person has, without reasonable cause or excuse, failed to comply with the sentence or order or with any requirements made in relation to the sentence or order by or under the applied provisions, the magistrate may:
  - (a) issue a summons directing the person to appear, on a date, at a time and at a place fixed in the summons, before the court by which the sentence was passed or the order was made; or
  - (b) if the information is laid on oath and the magistrate is of the opinion that proceedings against the person by summons might not be effective—issue a warrant for the apprehension of the person.
- (3) Where:
  - (a) a person who is served with a summons issued under subsection (2) fails to attend before the court as required by the summons; or

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- (b) a person who has been admitted to bail under subsection (5) fails to attend before the court as required by the condition of his or her bail;
- the court may, on proof of the service of the summons or of the admission of the person to bail, as the case may be, issue a warrant for the apprehension of the person.
- (4) A warrant issued under subsection (2) or (3) shall authorize the apprehension of the person, the bringing of the person before the court as soon as practicable after his or her apprehension and the detention of the person in custody until he or she is released by order of the court or in accordance with subsection (5).
- (5) Where a person is apprehended in pursuance of a warrant issued under subsection (2) or (3) and the court before which he or she is to be brought is not sitting at the time of his or her arrest, the person shall be brought before a magistrate, who may:
- (a) admit the person to bail, on such recognizance (with or without sureties) as the magistrate thinks fit, on the condition that the person appears, on such date, at such time and at such place as the magistrate specifies, before that court; or
  - (b) direct that the person be kept in custody in accordance with the warrant.
- (6) Where, in accordance with this section, a person in respect of whom a sentence has been passed, or an order has been made, under subsection 20AB(1) appears or is brought before the court by which the sentence was passed or the order was made, the court (whether or not constituted by the judge or magistrate who passed the sentence or made the order), if it is satisfied that the person has, without reasonable cause or excuse, failed to comply with the sentence or order or with any requirements made in relation to the sentence or order by or under the applied provisions, may:
- (a) without prejudice to the continuance of the sentence or order, impose a pecuniary penalty not exceeding 10 penalty units on the person;
  - (b) revoke the sentence or order and, subject to subsection (7), deal with the person, for the offence in respect of which the sentence was passed or the order was made, in any manner in which he or she could have been dealt with for that offence if the sentence had not been passed or the order had not been



made and he or she was before the court for sentence in respect of the offence; or

- (c) take no action.
- (7) Where a person in respect of whom a sentence has been passed, or an order has been made, under subsection 20AB(1) is dealt with under subsection (6) for the offence in respect of which the sentence was passed or the order was made, the court, in so dealing with the person, shall, in addition to any other matters that the court considers should be taken into account, take into account:
- (a) the fact that the sentence was passed or the order was made;
  - (b) anything done under the sentence or order; and
  - (c) any fine or other pecuniary penalty imposed, and any other order made, for or in respect of the offence.
- (8) Where a person in respect of whom a sentence has been passed, or an order has been made, under subsection 20AB(1) is dealt with under subsection (6) for the offence in respect of which the sentence was passed or the order was made, there shall be such rights of appeal in respect of the manner in which the person is dealt with for that offence as there would have been if:
- (a) the court had, immediately before so dealing with him or her, convicted him or her of the offence; and
  - (b) the manner in which he or she is dealt with had been a sentence passed upon that conviction.
- (9) Nothing in this section shall be taken to prevent a sentence passed, or an order made, under subsection 20AB(1) being revoked or varied under the applied provisions otherwise than for a failure to comply with the sentence or order or with any requirements made in relation to the sentence or order by or under the applied provisions.
- (10) A pecuniary penalty imposed on a person by virtue of paragraph (6)(a) shall, for the purposes of the laws of the Commonwealth, and of the States and Territories, with respect to the enforcement and recovery of fines ordered to be paid by offenders, be deemed to be a fine imposed on the person upon his or her conviction for a federal offence.

## Division 6—Unfitness to be tried

### 20B Consequences of preliminary finding that person unfit to be tried

- (1) Where, in proceedings for the commitment of a person for trial of a federal offence on indictment, being proceedings begun after this section commences, the question of the person's fitness to be tried in respect of the offence, is raised by the prosecution, the person or the person's legal representative, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial.
- (2) If the court to which the proceedings have been referred finds the person charged to be fit to be tried, the court must remit the proceedings to the magistrate and proceedings for the commitment must be continued as soon as practicable.
- (3) Where a court:
  - (a) to which proceedings have been referred under subsection (1); or
  - (b) before which a person appears in proceedings for trial of a federal offence on indictment, being proceedings begun after this section commences;finds the person charged unfit to be tried, the court must determine whether there has been established a prima facie case that the person committed the offence concerned.
- (4) Where a magistrate refers proceedings to a court under subsection (1), the magistrate may order the person charged to be detained in prison or in hospital for so long only as is reasonably necessary to allow the court to which the person is referred to determine whether it will make an order under subsection (2) remitting the person to the magistrate, an order under section 20BA dismissing the charge or an order under section 20BB detaining the person in prison or hospital or granting the person bail.
- (5) Where a court finds a person, other than a person in respect of whom proceedings have been referred to it by a magistrate under subsection (1), to be unfit to be tried, the court may order the person to be detained in prison or hospital for so long only as is

reasonably necessary to allow the court to determine whether it will make an order under section 20BA dismissing the charge or an order under section 20BB detaining the person in prison or hospital or granting the person bail.

- (6) For the purposes of subsection (3), a prima facie case is established if there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial in relation to the offence.
- (7) In proceedings to determine whether, for the purposes of subsection (3), a prima facie case has been established:
  - (a) the person may give evidence or make an unsworn statement; and
  - (b) the person may raise any defence that could properly be raised if the proceedings were a trial for that offence; and
  - (c) the court may seek such other evidence, whether oral or in writing, as it considers likely to assist in determining the matter.

**20BA Upon determining prima facie case, court to dismiss charge or to determine fitness within 12 months**

- (1) Where the court determines that there has not been established a prima facie case that the person committed the offence, the court must, by order, dismiss the charge against the person and, if the person is in custody, order the release of the person from custody.
- (2) Where the court determines that there has been established a prima facie case that the person committed the offence, but the court is of the opinion, having regard to:
  - (a) the character, antecedents, age, health or mental condition of the person; or
  - (b) the extent (if any) to which the offence is of a trivial nature; or
  - (c) the extent (if any) to which the offence was committed under extenuating circumstances;that it is inappropriate to inflict any punishment, or to inflict any punishment other than a nominal punishment, the court must, by order, dismiss the charge and, if the person is in custody, order the release of the person from custody.

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- (3) Where the court orders that the person be released from custody, the person must be released accordingly.
- (4) Where the court determines that there has been established a prima facie case that the person committed the offence, but the court does not dismiss the charge under subsection (2), the court must, as soon as practicable after making that first-mentioned determination, determine whether, on the balance of probabilities, the person will become fit to be tried, within the period of 12 months after the day the person was found to be unfit to be tried.
- (5) A court must not make a determination under subsection (4) unless the court has obtained, and considered, written or oral evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner.
- (6) Nothing in subsection (5) prevents a court from obtaining written or oral evidence from such other persons, bodies or organisations as the court considers appropriate.

**20BB Persons found by a court to be likely to be fit within 12 months**

- (1) Where a court determines, under subsection 20BA(4), that a person charged with a federal offence who was found unfit to be tried will become fit to be tried within a period of 12 months after that finding, the court must, at the time of making that determination, also determine:
  - (a) whether the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital; and
  - (b) if so—whether the person objects to being detained in a hospital.
- (2) Where a court has made a determination under subsection (1), the court must:
  - (a) where the court has determined that the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital and that the person does not object to being detained in a hospital—order that the person be taken to and detained in a hospital, or continue to be detained in a hospital, as the case requires; or

- (b) otherwise:
    - (i) order that the person be taken to and detained in a place other than a hospital (including a prison); or
    - (ii) grant the person bail on condition that the person live at an address or in a place specified by the court;for a period ending:
    - (c) when the person becomes fit to be tried; or
    - (d) when, as soon as practicable after the end of the 12 months referred to in subsection (1), the court makes an order under subsection 20BC(2) or (5) as applied under subsection (4);whichever happens first.
  - (3) Where a court determines, under subsection 20BA(4), that a person charged with a federal offence who was found unfit to be tried will become fit to be tried within 12 months after that finding then, if the person becomes fit within that period:
    - (a) if the person had been indicted on the charge before being found unfit—the proceedings on the indictment must be continued as soon as practicable; and
    - (b) if proceedings for the commitment of the person had been referred to the court under section 20B—those proceedings must be continued as soon as practicable as if they had not been so referred.
  - (4) Where a court determines, under subsection 20BA(4), that a person who was found unfit to be tried will become fit to be tried, within 12 months after that finding but the person does not become fit within that period, then, at the end of that period, subsections 20BC(2) and (5) apply as if the court had originally determined, at that time, that the person would not become fit to be tried and had made, under subsection 20BC(1), a further determination of the kind that it made under subsection (1) of this section.
  - (5) Where subsections 20BC(2) and (5) apply in relation to a person in the circumstances set out in subsection (4), then:
    - (a) in an order under subsection 20BC(2) as so applied the court must, in fixing the period of detention, have regard to any period of detention already served under paragraph (2)(a) or (b) of this section; and
    - (b) in an order under subsection 20BC(5) as so applied the court must:
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- (i) in the case of a person already on bail—order, in lieu of the person’s release from custody, the continuance of the person’s release on bail; and
  - (ii) in fixing the period of the person’s release for which conditions apply, have regard to any period of detention already served under paragraph (2)(a) or (b) of this section.
- (6) Where a court determines, under subsection 20BA(4), that a person who was found unfit to be tried will become fit to be tried within 12 months after that finding but the person does not become fit within that period, the finding that there is, on the balance of probabilities, a prima facie case for the commission of the offence charged acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence.

**20BC Persons found by a court not to be likely to be fit within 12 months**

- (1) Where a court determines, under section 20BA, that a person who was found unfit to be tried will not become fit to be tried within 12 months after that finding, the court must, at the time of making that determination, also determine:
- (a) whether the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital; and
  - (b) if so—whether the person objects to being detained in a hospital.
- (2) Where a court has made a determination under subsection (1), the court must:
- (a) if the court has determined that the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital and that the person does not object to being detained in a hospital—order that the person be taken to and detained in a hospital, or continue to be detained in a hospital, as the case requires; or
  - (b) otherwise—order that the person be detained in a place other than a hospital, including a prison;
- for a period specified in the order, not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.

- (3) The Attorney-General may, at any time, by order in writing, vary the hospital or other place of detention at which a person is detained under this section.
- (4) Where, for urgent medical or security reasons, it becomes necessary to do so, an officer of the State or Territory in which a person is detained under this section may vary the hospital or other place of detention of that person but, where the officer does so, the officer must forthwith notify the Attorney-General, in writing, of the variation and of the reasons for the variation.
- (5) Despite subsection (2), the court may, if in the court's opinion it is more appropriate to do so than to make an order under subsection (2), order the person's release from custody either absolutely or subject to conditions to apply for such period as the court specifies in the order, not exceeding 3 years.
- (6) The conditions may include:
  - (a) a condition that the person remain in the care of a responsible person nominated in the order; and
  - (b) a condition that the person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability and, where appropriate, for treatment; and
  - (c) any other condition that the court thinks fit.
- (7) Where a person has been released from custody subject to conditions, the person or the Director of Public Prosecutions may, at any time, apply to the court to vary those conditions.
- (8) Where a court determines, under subsection 20BA(4), that a person who was found unfit to be tried will not become fit to be tried, within 12 months after the finding, the finding that there is, on the balance of probabilities, a prima facie case for the commission of the offence charged acts as a stay against any proceedings, or any further proceedings, against the person, in respect of the offence.

### **20BD Review by Attorney-General**

- (1) Where a court makes an order under subsection 20BC(2), the Attorney-General must, at least once in each period of 6 months after the day the person is detained under the order, consider whether or not the person should be released from detention.
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- (2) In considering whether the person should be released from detention the Attorney-General:
  - (a) must obtain and consider:
    - (i) a report from a duly qualified psychiatrist or psychologist; and
    - (ii) a report from another duly qualified medical practitioner; and
  - (b) may obtain and consider such other reports as the Attorney-General considers necessary; and
  - (c) must take into account any representations made to the Attorney-General by the person or on the person's behalf.

**20BE Attorney-General may order release**

- (1) The Attorney-General may, after considering under subsection 20BD(1) whether or not the person should be released from detention, order that the person be released from detention.
- (2) The Attorney-General must not order a person's release from detention unless the Attorney-General is satisfied that the person is not a threat or danger either to himself or herself or to the community.
- (3) An order:
  - (a) must be in writing; and
  - (b) remains in force for such period as is specified in the order (being a period equal to the balance of the period fixed by the court for detention under subsection 20BC(2)) or for a period of 5 years, whichever is the lesser; and
  - (c) is subject to such conditions (if any) as are specified in the order.
- (4) Without limiting the generality of paragraph (3)(c), the conditions that may be specified in the order may include all or any of the following:
  - (a) a condition that the person reside at an address specified in the order;
  - (b) a condition that the person present himself or herself for such medical or psychiatric treatment as is specified in the order at such times as are specified in the order;



- (c) a condition that the person undertake such medical or mental health therapy as is specified in the order;
- (d) a condition that the person undertake such social, vocational or educational counselling as is specified in the order;
- (e) a condition that the person participate in such programs relating to financial management, behaviour modification or inter-personal relationships as are specified in the order.

### **20BF Release order may be revoked**

- (1) The Attorney-General may, by instrument in writing, revoke an order made under subsection 20BE(1) (in this section called a **release order**) at any time while that release order remains in force:
  - (a) if the person concerned has, during that period, failed, without reasonable excuse, to comply with a condition of the order; or
  - (b) if there are reasonable grounds for suspecting that the person has, during that period, failed, without reasonable excuse, so to comply;and, where the Attorney-General does so, the instrument of revocation must specify the condition of the order that the person has breached or is suspected of having breached.
- (2) Before revoking a release order, the Attorney-General must make all such enquiries and call for all such reports as are reasonably necessary for the purpose of determining whether the circumstances referred to in paragraph (1)(a) or (b) apply.
- (3) Where a release order in relation to a person is revoked:
  - (a) a constable may arrest the person without warrant; or
  - (b) the Attorney-General or the Director of Public Prosecutions may apply to a prescribed authority for a warrant for the arrest of the person.
- (4) A person who is arrested under subsection (3) must, as soon as practicable after that arrest, be brought before a prescribed authority in the State or Territory in which the person is arrested.
- (5) Subject to subsection (6), where a prescribed authority in a State or Territory before whom a person is brought under subsection (4) is satisfied that:

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- (a) the person is the person named in the instrument revoking the release order; and
  - (b) the release order has been revoked and the revocation is still in force;
- the prescribed authority must issue a warrant:
- (c) authorising any constable to take the person to a specified prison or hospital in the State or Territory; and
  - (d) directing that the person be detained in prison or in hospital in that State or Territory for such part of the period fixed by the court to be the period of detention under subsection 20BC(2) as had not elapsed at the time of the making of the release order.
- (6) If the prescribed authority in the State or Territory before whom the person is brought under subsection (4) cannot complete the hearing under subsection (5) immediately, the prescribed authority may issue a warrant for the remand of the person in a prison or hospital in the State or Territory pending completion of the hearing.
  - (7) The Attorney-General may, at any time, by order in writing, vary the prison or hospital at which a person is detained under this section.
  - (8) Where for urgent medical or security reasons it becomes necessary to do so, an officer of the State or Territory in which a person is detained may vary the prison or hospital at which the person is detained but, where the officer does so, the officer must forthwith notify the Attorney-General, in writing, of the variation and of the reasons for that variation.

**20BG Attorney-General to review detention of persons taken back into detention**

- (1) Where, under subsection 20BF(5), a prescribed authority directs that a person be detained in prison or in a hospital, the Attorney-General must, as soon as practicable after the person is so detained, consider (in this section called the *initial consideration*) whether or not the person should be released from detention and must, while the person is in detention, reconsider the matter at least once in each period of 6 months after the initial consideration.

- (2) Subsection 20BD(2) and, subject to the modification set out in subsection (3), section 20BE, apply in relation to an initial consideration and to any reconsideration under subsection (1).
- (3) For the purposes of applying section 20BE, subsection 20BE(1) has effect as if the reference in that subsection to subsection 20BD(1) were a reference to subsection (1) of this section.

**20BH State or Territory mental health authorities to be notified of certain releases**

Where a person detained by authority of an order under subsection 20BC(2) or a warrant under subsection 20BF(5) for a specified period in a State or Territory is due to be released because the period of that person's detention has ended, the Attorney-General must notify the mental health authorities of the State or Territory of the proposed release of the person.

**20BI Appeals against some Victorian jury findings of unfitness to be tried**

- (1) This section applies if:
  - (a) in proceedings for a federal offence in the Trial Division of the Supreme Court of Victoria or in the County Court of Victoria, a question arises whether the accused is fit to stand trial; and
  - (b) a jury finds that the accused is unfit.

*Right to appeal*

- (2) The accused may appeal to the Court of Appeal of Victoria against the finding:
  - (a) on a ground involving only one or more questions of law alone; or
  - (b) on a ground involving one or more questions of fact alone, or one or more questions of mixed law and fact, if the judge before whom the accused came for trial certifies the ground is fit for appeal; or
  - (c) on any ground if the Court of Appeal gives leave.

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*Decision on appeal*

- (3) The Court of Appeal must allow the appeal if the court thinks that:
  - (a) the finding should be set aside because it is unreasonable or cannot be supported having regard to the evidence; or
  - (b) the order of the Supreme Court or County Court giving effect to the finding should be set aside because of a wrong decision on a question of law; or
  - (c) there was a miscarriage of justice.
- (4) Otherwise, the Court of Appeal must dismiss the appeal.
- (5) Despite subsection (3), the Court of Appeal may dismiss the appeal if the Court of Appeal thinks that no substantial miscarriage of justice has occurred.

*Consequences if appeal allowed*

- (6) If the Court of Appeal allows the appeal:
  - (a) the accused may be tried for the federal offence; and
  - (b) the Court of Appeal may make orders for the custody or bail of the accused.

*Rules of court*

- (7) Rules of court for the Court of Appeal of Victoria may make provision relating to appeals under subsection (2) and proceedings relating to orders under paragraph (6)(b).

*Relationship with the rest of this Division*

- (8) This Division has effect subject to this section.

## **Division 7—Acquittal because of mental illness**

### **20BJ Acquittal where person mentally ill**

- (1) Where a person has been charged with a federal offence on indictment and the person is acquitted because of mental illness at the time of the offence, the court must order that the person be detained in safe custody in prison or in a hospital for a period specified in the order, not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.
- (2) The Attorney-General may, at any time, by order in writing, vary the prison or hospital at which a person is detained under subsection (1).
- (3) Where, for urgent medical or security reasons it becomes necessary to do so, an officer of the State or Territory in which a person is detained under this section may vary the prison or hospital at which the person is detained but, where the officer does so, the officer must forthwith notify the Attorney-General, in writing, of the variation and of the reasons for the variation.
- (4) Despite subsection (1), the court may, if in the court's opinion it is more appropriate to do so than to make an order under subsection (1), order the person's release from custody either absolutely or subject to conditions to apply for such period as the court specifies in the order, not exceeding 3 years.
- (5) The conditions may include:
  - (a) a condition that the person remain in the care of a responsible person nominated in the order; and
  - (b) a condition that the person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability and, where appropriate, for treatment.
- (6) Where a person has been released from custody subject to conditions, the person or the Director of Public Prosecutions may, at any time, apply to the court to vary those conditions.

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**20BK Review by Attorney-General**

- (1) Where, under subsection 20BJ(1), a court orders that a person be detained in safe custody in prison or in a hospital, the Attorney-General must, as soon as practicable after the person is so detained, consider (in this section called the *initial consideration*) whether or not the person should be released from detention and must, while the person is in detention, reconsider the matter at least once in each period of 6 months after the initial consideration.
- (2) In considering whether a person should be released from custody the Attorney-General:
  - (a) must obtain and consider:
    - (i) a report from a duly qualified psychiatrist or psychologist; and
    - (ii) a report from another duly qualified medical practitioner; and
  - (b) may obtain and consider such other reports as the Attorney-General considers necessary; and
  - (c) must take into account any representations made to the Attorney-General by the person or on the person's behalf.

**20BL Attorney-General may order release**

- (1) The Attorney-General may, after considering under subsection 20BK(1) whether or not the person should be released from custody, order that the person be released from custody.
- (2) The Attorney-General must not order a person's release from detention unless the Attorney-General is satisfied that the person is not a threat or danger either to himself or herself or to the community.
- (3) An order:
  - (a) must be in writing; and
  - (b) remains in force for such a period as is specified in the order (being a period equal to the balance of the period fixed by the court for detention in safe custody under subsection 20BJ(1)) or for a period of 5 years, whichever is the lesser; and
  - (c) is subject to such conditions (if any) as are specified in the order.

- (4) Without limiting the generality of paragraph (3)(c), the conditions that may be specified in the order may include all or any of the following:
- (a) a condition that the person reside at an address specified in the order;
  - (b) a condition that the person present himself or herself for such medical or psychiatric treatment as is specified in the order at such times and places as are specified in the order;
  - (c) a condition that the person undertake such medical or mental health therapy as is specified in the order;
  - (d) a condition that the person undertake such social, vocational or educational counselling as is specified in the order;
  - (e) a condition that the person participate in such programs relating to financial management, behaviour modification or inter-personal relationships as are specified in the order.

#### **20BM Release order may be revoked**

- (1) The Attorney-General may, by instrument in writing, revoke an order made under subsection 20BL(1) (in this section called a **release order**) at any time while that release order remains in force:
- (a) if the person concerned has, during that period, failed, without reasonable excuse, to comply with a condition of the order; or
  - (b) if there are reasonable grounds for suspecting that the person has, during that period, failed, without reasonable excuse, so to comply;
- and, where the Attorney-General does so, the instrument of revocation must specify the condition of the order that the person has breached or is suspected of having breached.
- (2) Before revoking a release order, the Attorney-General must make all such enquiries and call for all such reports as are reasonably necessary for the purpose of determining whether the circumstances referred to in paragraph (1)(a) or (b) apply.
- (3) Where a release order in relation to a person is revoked:
- (a) a constable may arrest the person without warrant; or
  - (b) the Attorney-General or the Director of Public Prosecutions may apply to a prescribed authority for a warrant for the arrest of the person.

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- (4) A person who is arrested under subsection (3) must, as soon as practicable after that arrest, be brought before a prescribed authority in the State or Territory in which the person is arrested.
- (5) Subject to subsection (6), where a prescribed authority in a State or Territory before whom a person is brought under subsection (4) is satisfied that:
  - (a) the person is the person named in the instrument revoking the release order; and
  - (b) the release order has been revoked and the revocation is still in force;the prescribed authority may issue a warrant:
  - (c) authorising any constable to take the person to a specified prison or hospital in the State or Territory; and
  - (d) directing that the person be detained in prison or in hospital in the State or Territory for such part of the period fixed by the court to be the period of detention in safe custody under subsection 20BJ(1) as had not elapsed at the time of the making of the release order.
- (6) If the prescribed authority in the State or Territory before whom the person is brought under subsection (4) cannot complete the hearing under subsection (5) immediately, the prescribed authority may issue a warrant for the remand of the person in a prison or hospital in the State or Territory pending completion of the hearing.
- (7) The Attorney-General may, at any time, by order in writing, vary the prison or hospital at which a person is detained under this section.
- (8) Where, for urgent medical or security reasons it becomes necessary to do so, an officer of the State or Territory in which the person is detained may vary the prison or hospital at which the person is detained but, where the officer does so, the officer must forthwith notify the Attorney-General, in writing, of the variation and of the reasons for that variation.



**20BN Attorney-General to review detention of persons taken back into detention**

- (1) Where, under subsection 20BM(5), a prescribed authority directs that a person be detained in prison or in a hospital, the Attorney-General must, as soon as practicable after the person is so detained, consider (in this section called the *initial consideration*) whether or not the person should be released from detention and must, while the person is in detention, reconsider the matter at least once in each period of 6 months after the initial consideration.
- (2) Subsection 20BK(2) and, subject to the modification in subsection (3), section 20BL, apply in relation to an initial consideration and a reconsideration under subsection (1).
- (3) For the purposes of applying section 20BL, subsection 20BL(1) has effect as if the reference in that subsection to subsection 20BK(1) were a reference to subsection (1) of this section.

**20BP State or Territory authorities to be notified of certain releases**

Where a person detained by authority of an order under subsection 20BJ(1) or a warrant under subsection 20BM(5) for a specified period in a State or Territory is due to be released because the period of the person's detention has ended, the Attorney-General must notify the mental health authorities of that State or Territory of the proposed release of the person.

**Division 8—Summary disposition of persons suffering from mental illness or intellectual disability**

**20BQ Person suffering from mental illness or intellectual disability**

- (1) Where, in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, it appears to the court:
  - (a) that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and
  - (b) that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under this Division than otherwise in accordance with law;the court may, by order:
  - (c) dismiss the charge and discharge the person:
    - (i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or
    - (ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or
    - (iii) unconditionally; or
  - (d) do one or more of the following:
    - (i) adjourn the proceedings;
    - (ii) remand the person on bail;
    - (iii) make any other order that the court considers appropriate.
- (2) Where a court makes an order under paragraph (1)(c) in respect of a person and a federal offence with which the person has been charged, the order acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence.

- (3) Where a court makes an order under subsection (1) in respect of a person and a federal offence with which the person has been charged, the court must not make an order under section 19B, 20, 20AB or 21B in respect of the person in respect of the offence.

**20BR Means by which court may be informed**

For the purposes of this Division, a court of summary jurisdiction may inform itself as the court thinks fit, but not so as to require the person charged to incriminate himself or herself.

**Division 9—Sentencing alternatives for persons suffering from mental illness or intellectual disability**

**20BS Hospital orders**

- (1) Where a person is convicted in a State or Territory, on indictment, of a federal offence and the court before which the person is convicted is satisfied that:
  - (a) the person is suffering from a mental illness within the meaning of the civil law of that State or Territory; and
  - (b) the illness contributed to the commission of the offence by the person; and
  - (c) appropriate treatment for the person is available in a hospital in that State or Territory; and
  - (d) the proposed treatment cannot be provided to the person other than as an inmate of a hospital in the State or Territory;the court may, without passing sentence on the person, make an order (in this section called a *hospital order*) that the person be detained in a hospital specified in the order for a period specified in the order for the purposes of receiving treatment specified in the order.
- (2) A court must not make a hospital order unless, but for the mental illness of the person, the court would have sentenced the person to a term of imprisonment.
- (3) A court must not specify a period of detention in a hospital that is longer than the period of imprisonment to which the person would have been sentenced had the hospital order not been made.
- (4) Where the court orders a person to be detained in a hospital for a specified period, the court may fix a lesser period of detention during which the person is not to be eligible to be released from the hospital.
- (5) Before reaching an opinion on the matters specified in subsection (1) in relation to a person, the court must obtain and consider the reports of 2 duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness.

- (6) A court may make a hospital order in respect of a person even if the person is serving a federal sentence at the time when, under the order, the person is to begin to be detained in hospital and, where a hospital order is made in such circumstances:
- (a) the hospital order is sufficient authority for the person to be detained outside the prison during the period of involuntary hospitalisation under the order; and
  - (b) the person is to be treated, for the purposes of that sentence, as serving that sentence during the period of involuntary hospitalisation under the order; and
  - (c) if the person is still liable to serve a part of that sentence when the hospital order ends or is discharged, the person is to be returned for that purpose to the prison where he or she was serving that sentence before the making of the order.
- (7) Subsection (4) does not enable a court, in the case of a person who is serving a federal sentence at the time when the hospital order begins, to fix a lesser period of detention ending:
- (a) if a non-parole period has been fixed in respect of the sentence—before the end of that non-parole period; and
  - (b) otherwise—before the end of that sentence.

#### **20BT Lesser periods of imprisonment fixed under hospital orders**

- (1) Where a lesser period of detention is fixed under subsection 20BS(4) in relation to a person detained in hospital under a hospital order, the Attorney-General must, at the end of the lesser period, obtain and consider the reports of 2 duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness so as to determine whether or not to release the person from the detention.
- (2) Unless:
- (a) either of the reports of the psychiatrists recommends that the person not be released because of a continuing need for hospital treatment; or
  - (b) the person continues, at the end of the lesser period of detention, to be required to serve a federal sentence of imprisonment that the person was serving at the time when the hospital order began;

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the Attorney-General must order the person to be released on such conditions (including conditions relating to release into the care of another person specified in the order) for the balance of the period of the hospital order as the Attorney-General considers appropriate having regard to the reports and to such other matters as he or she considers relevant.

- (3) Sections 20BM and 20BN apply in relation to a person released from involuntary hospitalisation by order under subsection (2) as if:
- (a) the order under that subsection were a release order made under subsection 20BL(1); and
  - (b) the references in each of those sections to detention in a prison or a hospital were references only to detention in a hospital; and
  - (c) the reference in subsection 20BM(5) to the period of detention in safe custody under subsection 20BJ(1) were a reference to the period of detention in a hospital specified in the order under subsection 20BS(1).

**20BU Discharge of hospital orders**

- (1) Where a person is subject to a hospital order, the person or the Director of Public Prosecutions may, at any time while the order is in force, apply to the court that imposed the order to discharge the order and to impose such other sentence as the court thinks appropriate, being a sentence that could have been imposed when the order was made.
- (2) The court must not discharge a hospital order unless the court is satisfied:
  - (a) that the person has sufficiently recovered from mental illness no longer to require involuntary hospitalisation; or
  - (b) that the mental illness will not respond or respond further to hospital treatment.
- (3) Where the court discharges a hospital order and imposes another sentence instead of the order:
  - (a) the new sentence must commence on the date of commencement of the order; and
  - (b) the length of the new sentence must not exceed the length of the order; and

- (c) if the sentence is a sentence of imprisonment—the person concerned is to be treated as having served that part of the sentence during which he or she was subject to involuntary hospitalisation.
- (4) Before reaching an opinion on the matters specified in subsection (2) in relation to a person, the court:
  - (a) must obtain and consider the reports of 2 duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness; and
  - (b) if the person has been released, under section 20BR, into the care of another person for the balance of the hospital order—must obtain and consider the report of that other person; and
  - (c) may obtain and consider such other information as it thinks relevant.
- (5) An application under subsection (1) to the court that made a hospital order may be dealt with by that court whether or not it is constituted in the way in which it was constituted when the order was made.

#### **20BV Psychiatric probation orders**

- (1) Where a person is convicted in a State or Territory of a federal offence and the court is satisfied that:
  - (a) the person is suffering from a mental illness within the meaning of the civil law of that State or Territory; and
  - (b) the illness contributed to the commission of the offence by the person; and
  - (c) appropriate psychiatric treatment for the person is available in a hospital or other place in the State or Territory; and
  - (d) the person consents to the order being made;the court may, without passing sentence on the person, make an order (in this section called a ***psychiatric probation order***) that the person reside at, or attend at, a specified hospital or other place for the purpose of receiving that psychiatric treatment.
- (2) The court must not make an order unless the person, or the person's legal guardian, consents to the proposed treatment.

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- (3) An order is subject to the following additional conditions:
  - (a) that the person will, during such period, not exceeding 2 years, as the court specifies in the order, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed;
  - (b) that the person will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order.
- (4) The court may, on the application of the person, of the probation officer appointed to supervise the person or of the person in charge of the hospital or other place where the treatment is being undertaken, vary the treatment that the person is to undertake.

**20BW Breach of psychiatric probation orders**

- (1) Where an order has been made under section 20BV and information is laid before a magistrate, whether before or after the end of the period referred to in paragraph 20BV(3)(a) or (b), alleging that the person has, without reasonable excuse, failed to comply with a condition of the order, the magistrate may:
  - (a) issue a summons directing the person to appear, on a date, and at a time and place, fixed in the summons, before the court by which the order was made; or
  - (b) if the information is laid on oath and the magistrate is of the opinion that proceedings against the person by summons might not be effective—issue a warrant for the arrest of the person.
- (2) Where:
  - (a) a person who is served with a summons issued under subsection (1) fails to attend before the court as required by the summons; or
  - (b) a person who has been admitted to bail under subsection (4) fails to attend before the court as required by the conditions of that bail;the court may issue a warrant for the arrest of the person.
- (3) A warrant for the arrest of a person issued under subsection (1) or (2) also authorises the bringing of the person before the court as soon as practicable after the person's arrest and the detention of the



person in custody until the person is released by order of the court or under subsection (4).

- (4) Where a person is arrested under a warrant issued under subsection (1) or (2) and the court before which the person is to be brought is not sitting at the time of the arrest, the person must be brought before a magistrate who may:
- (a) remand the person to bail on such recognizance (with or without sureties) as the magistrate thinks fit and on the condition that the person appears before the court on such date, and at such time and place, as the magistrate specifies; or
  - (b) direct that the person be kept in custody in accordance with the warrant.

### **20BX Enforcement of psychiatric probation orders**

- (1) Where a person who is subject to an order under section 20BV appears before the court by which the order was made and the court is satisfied that the person has, without reasonable excuse, failed to comply with a condition of the order, the court may:
- (a) without prejudice to the continuance of the order, impose a pecuniary penalty not exceeding 10 penalty units on the person; or
  - (b) discharge the order and make an order under section 20; or
  - (c) revoke the order and, subject to subsection (2), deal with the person for the offence in respect of which the order was made, in any way in which the person could have been dealt with for that offence if the order had not been made and the person was before the court for sentence in respect of the offence; or
  - (d) take no action.
- (2) Where a person who is subject to an order under section 20BV is dealt with under subsection (1) for the offence in respect of which the order was made, the court must, in so dealing with the person, in addition to any other matters, take into account:
- (a) the fact that the order was made; and
  - (b) anything done under the order; and
  - (c) any other order made in respect of the offence.

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- (3) Where a person who has been released in accordance with an order under section 20BV is dealt with under subsection (1) for the offence in respect of which the order was made, the person has such rights of appeal in respect of the way in which the person was dealt with for that offence as the person would have if:
  - (a) the court had, immediately before so dealing with the person, convicted the person of the offence; and
  - (b) the manner in which the person is dealt with had been a sentence passed upon that conviction.
- (4) A pecuniary penalty imposed on a person under paragraph (1)(a) is to be treated, for the purposes of the laws of the Commonwealth, and of the States and Territories, with respect to the enforcement and recovery of fines ordered to be paid by offenders, as a fine imposed on the person because of the person's conviction for an offence against a law of the Commonwealth.

**20BY Program probation orders**

- (1) Where a person is convicted in a State or Territory of a federal offence and the court before which the person is convicted is satisfied that:
  - (a) the person is suffering from an intellectual disability; and
  - (b) the disability contributed to the commission of the offence by the person; and
  - (c) an appropriate education program or treatment is available for the person in that State or Territory;the court may, without passing sentence on the person, order that the person be released, on condition that the person undertake the program or treatment specified in the order for a period specified in the order.
- (2) Subsections 20BV(2), (3) and (4) and sections 20BW and 20BX apply to a person in respect of whom an order has been made under subsection (1) of this section in the same way as they apply to a person in respect of whom an order has been made under subsection 20BV(1) and, for that purpose, references in those provisions to treatment have effect as if they were references to an education program or treatment of the kind referred to in subsection (1) of this section.

## **Division 10—Miscellaneous**

### **20C Offences by children and young persons**

- (1) A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.
- (2) Where a person under the age of 18 years is convicted of an offence against a law of the Commonwealth that is punishable by death, he or she shall not be sentenced to death but the court shall impose such other punishment as the court thinks fit.

### **21B Reparation for offences**

- (1) Where:
  - (a) a person is convicted of a federal offence; or
  - (b) an order is made under section 19B in relation to a federal offence committed by a person;the court may, in addition to the penalty, if any, imposed upon the person, order the offender:
  - (c) to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence; or
  - (d) to make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered by the person as a direct result of the offence.
- (2) A person is not to be imprisoned for a failure to pay an amount required to be paid under an order made under subsection (1).
- (3) Where:
  - (a) the court orders a federal offender to make reparation to the Commonwealth, to a public authority of the Commonwealth or to any other person by way of payment of an amount of money; and

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- (b) the clerk, or other appropriate officer, of the court signs a certificate specifying:
  - (i) the amount of money to be paid by way of reparation; and
  - (ii) the identity of the person to whom the amount of money is to be paid; and
  - (iii) the identity of the person by whom the amount is to be paid; and
- (c) the certificate is filed in a court (which may be the first-mentioned court) having civil jurisdiction to the extent of the amount to be paid;

the certificate is enforceable in all respects as a final judgment of the court in which it is filed in favour of the Commonwealth, of that public authority or of that person.

**21D Prerogative of mercy and other Commonwealth laws unaffected**

- (1) Nothing in this Part shall be construed as affecting the powers vested in the Governor-General in the exercise of the Royal prerogative of mercy.
- (2) This Part does not affect the operation of any other law of the Commonwealth, or of any law in force in a Territory, relating to the release of offenders.

**21E Director of Public Prosecutions may appeal against reductions where promised co-operation with law enforcement agencies refused**

- (1) Where a federal sentence, or a federal non-parole period, is reduced by the court imposing the sentence or fixing the non-parole period because the offender has undertaken to co-operate with law enforcement agencies in proceedings, including confiscation proceedings, relating to any offence, the court must:
  - (a) if the sentence imposed is reduced—specify that the sentence is being reduced for that reason and state the sentence that would have been imposed but for that reduction; and
  - (b) if the non-parole period is reduced—specify that the non-parole period is being reduced for that reason and state what the period would have been but for that reduction.

- (2) Where:
- (a) a federal sentence is imposed or a federal non-parole period is fixed; and
  - (b) the sentence or non-parole period is reduced because the offender has undertaken to co-operate with law enforcement agencies as described in subsection (1); and
  - (c) after sentence, the offender, without reasonable excuse, does not co-operate in accordance with the undertaking;
- the Director of Public Prosecutions may, at any time while the offender is under sentence, if the Director of Public Prosecutions is of the opinion that it is in the interests of the administration of justice to do so, appeal against the inadequacy of the sentence or of the non-parole period.
- (3) Where an appeal is begun under this section against the inadequacy of a sentence, or of a non-parole period, that was reduced because of a person's undertaking to co-operate with law enforcement agencies, the court hearing the appeal:
- (a) if it is satisfied that the person has failed entirely to co-operate in accordance with the undertaking—must substitute for the reduced sentence or reduced non-parole period the sentence, or non-parole period, that would have been imposed on, or fixed in respect of, the person but for that reduction; and
  - (b) if it is satisfied that the person has failed in part to co-operate in accordance with the undertaking—may substitute for the reduced sentence or reduced non-parole period such a sentence, or such a non-parole period, not exceeding in length the sentence that could be imposed, or the non-parole period that could be fixed, under paragraph (a), as it thinks appropriate.
- (4) In subsection (1):
- confiscation proceedings*** includes:
- (a) proceedings for freezing orders, forfeiture orders, pecuniary penalty orders, literary proceeds orders and restraining orders under the *Proceeds of Crime Act 2002*; and
  - (b) proceedings for forfeiture orders, pecuniary penalty orders and restraining orders under the *Proceeds of Crime Act 1987*; and
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- (c) proceedings for restraining orders and pecuniary penalty orders under Part XIII of the *Customs Act 1901*.

**21F Prescribed authorities and parole officers**

- (1) Subject to subsection (2), the Governor-General may arrange with the Governor of a State, the Australian Capital Territory Executive, the Administrator of the Northern Territory or the Administrator of Norfolk Island:
- (a) for the performance by persons who hold office as Magistrates in that State or Territory of the functions of a prescribed authority under this Part; and
  - (b) for the performance by officers of that State or Territory of the functions of a parole officer under this Part.
- (2) Subsection (1) does not authorise an arrangement of the kind referred to in paragraph (1)(a) to be entered into between the Governor-General and the Australian Capital Territory Executive before 1 July 1990.
- (3) The Attorney-General may appoint persons appointed or engaged under the *Public Service Act 1999* to be parole officers for the purposes of this Part.
- (4) Notice of an arrangement under subsection (1) must be published in the *Gazette*.
- (5) In this section:

*State* does not include the Australian Capital Territory or the Northern Territory.

**22 Conditions etc. that a court may impose on certain offenders**

- (1) Where a court makes a relevant order or passes a relevant sentence in respect of a person charged with, or convicted of:
- (a) an offence against a law of the Commonwealth or of a Territory, being an offence that is a serious drug offence; or
  - (b) a prescribed offence against a law of the Commonwealth or of a Territory;
- it may, at the same time or at a later time, order the person to do all or any of the following things:

- (c) to remain in Australia;
  - (d) to refrain from applying for, or obtaining, an Australian passport;
  - (e) to surrender possession of any Australian passport held by the person.
- (2) Subject to subsection (3), an order made under subsection (1) has effect during such reasonable period as is specified by the court in the order.
- (3) The court may, by order, revoke an order made under subsection (1) or vary such an order as the court sees fit.
- (4) If the court makes an order under subsection (1) or (3), the Registrar or other appropriate officer of the court, as the case requires, must, as soon as practicable, give to the Secretary to the Department administering the *Australian Passports Act 2005* a copy of the order.
- (5) If the court makes an order under paragraph (1)(e):
- (a) the passport must be given to the Registrar or other appropriate officer of the court; and
  - (b) the Registrar or officer must cause the passport to be kept in such custody as he or she thinks fit until:
    - (i) the passport is required to be released under subsection (6); or
    - (ii) the passport is cancelled or expires;whichever happens first.
- (6) If a passport surrendered under an order under paragraph (1)(e) is in force when that order ceases to have effect, the person having the custody of the passport at that time must, on the application of the person to whom it was issued, cause it to be returned to that person.
- (7) In this section:
- relevant order** means an order:
- (a) remanding a person, whether on bail or in custody; or
  - (b) suspending the sentence passed on a person upon his or her entering into a recognizance; or
  - (c) releasing the person on conditions under subsection 20(1).

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*relevant sentence* means:

- (a) a sentence of imprisonment other than a suspended sentence;  
or
- (b) a sentence under section 20AB.

*serious drug offence* means an offence:

- (a) involving, or relating to, controlled substances; and
- (b) punishable by a maximum penalty of imprisonment for 2 years or more.

**22A State orders relating to passports**

- (1) If, under a law of a State, a court makes an order requiring a person charged with, or convicted of:

- (a) a serious drug offence against a law of that State; or
- (b) such other serious offence against a law of that State as is specified in the first-mentioned law;

to surrender possession of any Australian passport held by the person, the person must surrender the passport to the Registrar, or other appropriate officer, of the court to be dealt with in accordance with that law.

- (2) In this section:

*serious drug offence* has the same meaning as in section 22.



## **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.

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- (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:

- (a) the person is arrested for a Commonwealth offence; and
- (b) the person's arrest has not ceased under subsection (3) or (4); and
- (c) the person has not been released.

**authorising officer**, in relation to an investigating official, means:

- (a) if the investigating official is a member or special member of the Australian Federal Police—a person for the time being holding office or acting as:
  - (i) the Commissioner; or
  - (ii) a Deputy Commissioner; or
  - (iii) a member or special member of the Australian Federal Police who is of the rank of superintendent or higher; or
- (b) if the investigating official is a member of the police force of a State or Territory—a person for the time being holding office or acting as:
  - (i) the Commissioner or the person holding equivalent rank; or
  - (ii) an Assistant Commissioner or a person holding equivalent rank; or
  - (iii) a superintendent or a person holding equivalent rank; of the police force of that State or Territory.

**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:

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- (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 23DB, as the case requires.

**judicial officer**, in relation to a person who is arrested, means:

- (a) a magistrate; or
- (b) a justice of the peace; or
- (c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

**protected suspect** has the meaning given by subsection (2).

**question** has the meaning given by subsection (6).

**serious Commonwealth offence** means a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months.

**tape recording** means audio recording, video recording or recording by other electronic means.

**under arrest**: a person is under arrest if:

- (a) the person is arrested for a Commonwealth offence; and
- (b) the person's arrest has not ceased under subsection (3) or (4); and
- (c) the person has not been released.

(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 a judicial officer otherwise than under any of the following provisions of the *Service and Execution of Process Act 1992*:
- (a) paragraph 83(3)(b), (4)(b), (8)(a) or (8)(b);
  - (b) subsection 83(12);
  - (c) paragraph 83(14)(a);
  - (d) subparagraph 84(4)(a)(ii) or (6)(a)(i).

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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.

### **Subdivision A—Non-terrorism offences**

#### **23C Period of investigation if arrested for a non-terrorism offence**

- (1) If a person is arrested for a Commonwealth offence (other than a terrorism offence), the following provisions apply.

**Note:** A person would not be arrested for a Commonwealth offence if, for example, the person has been released under subsection 3W(2)—see the definition of *arrested* in subsection 23B(1).

- (2) The person may, while arrested for the Commonwealth offence, 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 that the person has committed.

- (2A) Subsection (2) ceases to apply at the end of the investigation period, but that cessation does not affect any other power to detain the person.

- (3) If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period.

- (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 23DA.

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- (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 23DB.
- (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), disregard any reasonable time during which the questioning of the person is suspended, or delayed, for one or more of the following reasons:
  - (a) to allow the person to be conveyed 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) 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) 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) to allow the person to receive medical attention;
  - (e) because of the person's intoxication;
  - (f) to allow for an identification parade to be arranged and conducted;
  - (g) 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) to allow the making and disposing of an application under section 23D, 23WU or 23XB;
  - (i) to allow a constable to inform the person of matters specified in section 23WJ;
  - (j) to allow the person to rest or recuperate;
  - (k) to allow a forensic procedure to be carried out on the person by order of a magistrate under Division 5 of Part ID;
  - (l) because section 23XGD applies and the time is to be disregarded in working out a period of time for the purposes of that section.
- (7A) To avoid doubt, subsection (7) does not prevent the person being questioned during a time covered by a paragraph of subsection (7), but if the person is questioned during such a time, the time is not to be disregarded.

*Evidentiary provision*

- (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).

**23D Application may be made for extension of investigation period**

- (1) If a person is arrested for a serious Commonwealth offence (other than a terrorism offence), an investigating official may, at or before the end of the investigation period, apply to a magistrate for an extension of the investigation period.

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- (2) The application must be made before the magistrate, by telephone or in writing.
- (3) Subject to subsection (4), 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 outcome of any previous application under this section in relation to the person and the investigation period;
  - (d) the period (if any) by which the investigation period has been reduced under subsection 23C(6);
  - (e) the total amount of time (if any) that has been disregarded under subsection 23C(7) in ascertaining the investigation period under subsection 23C(4);
  - (f) the maximum amount of time by which the investigation period could be extended;
  - (g) the reasons why the investigating official believes the investigation period should be extended;
  - (h) the period by which the investigating official believes the investigation period should be extended.
- (4) Subsection (3) does not require any information to be included in the application if disclosure of that information is likely:
  - (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or
  - (b) to be protected by public interest immunity; or
  - (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
  - (d) to put at risk the safety of the community, law enforcement officers or intelligence officers.
- (5) Before the application is considered by the magistrate, the investigating official:
  - (a) must:
    - (i) if the application is to be made in writing—provide a copy of the application to the person, or to his or her legal representative; or

- (ii) otherwise—inform the person, or his or her legal representative, of all matters or information in the application (other than information of a kind mentioned in subsection (4)); and
  - (b) must inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.
- (6) If the application contains any information of a kind mentioned in subsection (4), the investigating official may remove it from any copy of the application that is provided to the person or to his or her legal representative.
- (7) The person, or his or her legal representative, may make representations to the magistrate about the application.

### **23DA Magistrate may extend investigation period**

- (1) This section applies if:
  - (a) a person is arrested for a serious Commonwealth offence (other than a terrorism offence); and
  - (b) an application has been made under subsection 23D(1) to a magistrate in respect of the person.

#### *Extension of investigation period*

- (2) Subject to subsection (3), the magistrate may extend the investigation period, by signed written instrument, if satisfied that:
  - (a) the offence is a serious Commonwealth offence (other than 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 serious Commonwealth 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.
- (3) Subject to subsection (4), the instrument 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.
  - (4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:
    - (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or
    - (b) to be protected by public interest immunity; or
    - (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
    - (d) to put at risk the safety of the community, law enforcement officers or intelligence officers.
  - (5) The magistrate 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 telephone, telex, fax or other electronic means—inform the investigating official of the matters included in the instrument.
- Note: See section 23E.
- (6) The investigating official must:
    - (a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and
    - (b) if the instrument was made as a result of an application made by telephone, telex, fax or other electronic means—inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).
  - (7) The investigation period may be extended for a period not exceeding 8 hours, and must not be extended more than once.

### **Subdivision B—Terrorism offences**

#### **23DB Period of investigation if arrested for a terrorism offence**

- (1) If a person is arrested for a terrorism offence, the following provisions apply.

Note: A person would not be arrested for a terrorism offence if, for example, the person has been released under subsection 3W(2)—see the definition of *arrested* in subsection 23B(1).

- (2) The person may, while arrested for the terrorism offence, 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 that the person has committed.
  - (3) Subsection (2) ceases to apply at the end of the investigation period, but that cessation does not affect any other power to detain the person.
  - (4) If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period.
  - (5) For the purposes of this section, but subject to subsections (7) and (9), the investigation period begins when the person is arrested, and ends at a later time 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 23DF.
  - (6) 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.
  - (7) 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.
  - (8) However, in relation to each first arrest, disregard subsection (7) for any later arrest if:
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- (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.
- (9) In ascertaining any period of time for the purposes of subsection (5) or (7), disregard any reasonable time during which the questioning of the person is suspended, or delayed, for one or more of the following reasons:
- (a) to allow the person to be conveyed 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) 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) 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) to allow the person to receive medical attention;
  - (e) because of the person's intoxication;
  - (f) to allow for an identification parade to be arranged and conducted;
  - (g) 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) to allow the making and disposing of an application under section 23DC, 23DE, 23WU or 23XB;
  - (i) to allow a constable to inform the person of matters specified in section 23WJ;

- (j) to allow the person to rest or recuperate;
  - (k) to allow a forensic procedure to be carried out on the person by order of a magistrate under Division 5 of Part ID;
  - (l) because section 23XGD applies and the time is to be disregarded in working out a period of time for the purposes of that section;
  - (m) subject to subsection (11), because the time is within a period specified under section 23DD, so long as the suspension or delay in the questioning of the person is reasonable.
- (10) To avoid doubt:
- (a) subsection (9) does not prevent the person being questioned during a time covered by a paragraph of subsection (9), but if the person is questioned during such a time, the time is not to be disregarded; and
  - (b) a period specified under section 23DD is not extended by any time covered by a paragraph of subsection (9).

*Limit on time that may be disregarded under paragraph (9)(m)*

- (11) No more than 7 days may be disregarded under paragraph (9)(m) in relation to an arrest. However:
- (a) if the person has been arrested more than once within any period of 48 hours, the 7 day period for each arrest other than the first arrest is reduced by any period or periods specified under section 23DD in relation to any earlier arrest; and
  - (b) subsection (8) applies as if the reference in that subsection to subsection (7) were a reference to this subsection.

*Evidentiary provision*

- (12) 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 (9).

**23DC Time during which suspension or delay of questioning may be disregarded—application**

- (1) This section applies if:
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- (a) a person is arrested for a terrorism offence; and
- (b) an investigation is being conducted into whether the person committed that terrorism offence or another terrorism offence.

*Application for specification of period*

- (2) At or before the end of the investigation period, an investigating official (within the meaning of paragraph (a) or (b) of the definition of that expression) may apply, in writing, to a magistrate for a period to be specified for the purpose of paragraph 23DB(9)(m).
- (3) The application must not be made unless the application is authorised, in writing, by an authorising officer.
- (4) Subject to subsection (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 outcome of any previous application under this section in relation to:
    - (i) the person and the arrest; and
    - (ii) if the person was arrested at any time during the period of 48 hours before the arrest—the person and the earlier arrest or arrests;
  - (d) the total amount of time that has been disregarded under subsection 23DB(9) in ascertaining the investigation period in relation to:
    - (i) the person and the arrest; and
    - (ii) if the person was arrested at any time during the period of 48 hours before the arrest—the person and the earlier arrest or arrests;
  - (e) 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;
- (f) the period that the investigating official believes should be specified.
- (5) Subsection (4) does not require any information to be included in the application if disclosure of that information is likely:
- (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or
  - (b) to be protected by public interest immunity; or
  - (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
  - (d) to put at risk the safety of the community, law enforcement officers or intelligence officers.
- (6) Before the application is considered by the magistrate, the investigating official must:
- (a) provide a copy of the application to the person or to his or her legal representative; and
  - (b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.
- (7) If the application contains any information of a kind mentioned in subsection (5), the investigating official may remove it from the

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copy of the application that is provided to the person or to his or her legal representative.

- (8) The person, or his or her legal representative, may make representations to the magistrate about the application.

**23DD Time during which suspension or delay of questioning may be disregarded—time specified by magistrate**

- (1) This section applies if:
- (a) a person is arrested for a terrorism offence; and
  - (b) an application has been made under subsection 23DC(2) to a magistrate in respect of the person.

*Specification of period*

- (2) The magistrate 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
  - (e) the application has been authorised by an authorising officer; and
  - (f) the person, or his or her legal representative, has been given the opportunity to make representations about the application.

*Instrument specifying period*

- (3) Subject to subsection (4), 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.
  - (4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:
    - (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or
    - (b) to be protected by public interest immunity; or
    - (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
    - (d) to put at risk the safety of the community, law enforcement officers or intelligence officers.
  - (5) The magistrate 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 telex, fax or other electronic means—inform the investigating official of the matters included in the instrument.
- Note: See section 23E.
- (6) The investigating official must:
    - (a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and
    - (b) if the instrument was made as a result of an application made by telex, fax or other electronic means—inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).

### **23DE Application may be made for extension of investigation period**

- (1) If a person is arrested for a terrorism offence, an investigating official (within the meaning of paragraph (a) or (b) of the definition of that expression) may, at or before the end of the investigation period, apply, in writing, to a magistrate for an extension of the investigation period.
  - (2) The application must not be made unless the application is authorised, in writing, by an authorising officer.
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- (3) Subject to subsection (4), 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 outcome of any previous application under this section in relation to the person and the investigation period;
  - (d) the period (if any) by which the investigation period has been reduced under subsection 23DB(7);
  - (e) the total amount of time (if any) that has been disregarded under subsection 23DB(9) in ascertaining the investigation period;
  - (f) the maximum amount of time by which the investigation period could be extended;
  - (g) the reasons why the investigating official believes the investigation period should be extended;
  - (h) the period by which the investigating official believes the investigation period should be extended.
- (4) Subsection (3) does not require any information to be included in the application if disclosure of that information is likely:
- (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or
  - (b) to be protected by public interest immunity; or
  - (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
  - (d) to put at risk the safety of the community, law enforcement officers or intelligence officers.
- (5) Before the application is considered by the magistrate, the investigating official must:
- (a) provide a copy of the application to the person or to his or her legal representative; and
  - (b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.
- (6) If the application contains any information of a kind mentioned in subsection (4), the investigating official may remove it from the
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copy of the application that is provided to the person or to his or her legal representative.

- (7) The person, or his or her legal representative, may make representations to the magistrate about the application.

### **23DF Magistrate may extend investigation period**

- (1) This section applies if:
- (a) a person is arrested for a terrorism offence; and
  - (b) an application has been made under subsection 23DE(1) to a magistrate in respect of the person.

#### *Extension of investigation period*

- (2) Subject to subsection (3), the magistrate may extend the investigation period, by signed written instrument, if satisfied that:
- (a) the offence is a terrorism offence; and
  - (b) further detention of the person is necessary to:
    - (i) preserve or obtain evidence related to the offence or to another terrorism offence; or
    - (ii) 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 application has been authorised by an authorising officer; and
  - (e) the person, or his or her legal representative, has been given the opportunity to make representations about the application.
- (3) Subject to subsection (4), the instrument 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.
- (4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:
- (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

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- (b) to be protected by public interest immunity; or
  - (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
  - (d) to put at risk the safety of the community, law enforcement officers or intelligence officers.
- (5) The magistrate 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 telex, fax or other electronic means—inform the investigating official of the matters included in the instrument.
- Note: See section 23E.
- (6) The investigating official must:
- (a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and
  - (b) if the instrument was made as a result of an application made by telex, fax or other electronic means—inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).
- (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.

**Subdivision C—Miscellaneous**

**23E Evidentiary provisions if application made by electronic means**

- (1) This section applies if a magistrate has, under paragraph 23DA(5)(b), 23DD(5)(b) or 23DF(5)(b), informed an investigating official of matters included in an instrument.
  - (2) 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 and the particulars given by him or her; and
    - (b) forward it to the magistrate.
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- (3) 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, the instrument is taken to have had no effect.
- (4) In any proceedings, if the instrument signed by the magistrate is not produced in evidence, the burden lies on the prosecution to prove that the instrument was made.

### **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

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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.

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- (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

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- (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).

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- (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.

## Part ID—Forensic procedures

### Simplified outline of operation of Part

This Part provides for forensic procedures to be carried out on:

- suspects in relation to indictable offences (Divisions 3, 4 and 5); and
- offenders in relation to prescribed and serious offences (Division 6A); and
- volunteers (Division 6B).

If the carrying out of a forensic procedure is authorised under this Part, it must be carried out in accordance with rules and procedures set out in Division 6.

If a forensic procedure covered by this Part is carried out without proper authority under this Part, evidence obtained through the procedure may be inadmissible in proceedings against the suspect (Division 7).

This Part also:

- contains offences in relation to the Commonwealth DNA database system and the National Criminal Investigation DNA Database (*NCIDD*) (Division 8A); and
- provides for the whole or a part of the Commonwealth DNA database system to be integrated with the whole or a part of one or more State/Territory DNA database systems to form part of NCIDD (Division 8A); and
- provides for the exchange of information in the Commonwealth DNA database system or a State/Territory DNA database system and the protection of the information that is exchanged (Division 11); and
- provides for the destruction of forensic material (Division 8).

## Division 1—Explanation of expressions used

### 23WA Definitions

(1) In this Part:

*Aboriginal legal aid organisation* has the same meaning as the expression has in Part IC.

*adult* means a person of or above 18 years of age.

*AFP function* means a function of the Australian Federal Police set out in section 8 of the *Australian Federal Police Act 1979*.

*appropriately qualified*, in relation to carrying out a forensic procedure, means:

- (a) having suitable professional qualifications or experience to carry out the forensic procedure; or
- (b) qualified under the regulations to carry out the forensic procedure.

*authorised applicant* for an order for the carrying out of a forensic procedure means:

- (a) if the procedure will be carried out on a suspect—the constable in charge of a police station or the investigating constable in relation to a relevant offence; or
- (b) if the procedure will be carried out on an offender—the constable in charge of a police station, the investigating constable in relation to a relevant offence or the Director of Public Prosecutions.

*child* means a person who is at least 10 years of age but under 18 years of age.

*Commissioner* means the Commissioner of the Australian Federal Police and includes a constable or staff member to whom the Commissioner has delegated the functions and powers conferred or imposed on the Commissioner under this Act.

Note: See section 23YQ for the Commissioner's power to delegate.

*Commonwealth DNA database system* is defined in section 23YDAC.

*corresponding law* is defined in section 23YUA.

*destroy* is defined in subsection (5).

*exercise a function* includes perform a duty.

*forensic material* means:

- (a) samples; or
- (b) hand prints, finger prints, foot prints or toe prints; or
- (c) photographs or video recordings; or
- (d) casts or impressions;

taken from or of a person's body by a forensic procedure.

*forensic procedure* means:

- (a) an intimate forensic procedure; or
- (b) a non-intimate forensic procedure;

but does not include any intrusion into a person's body cavities except the mouth or the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

*function* includes a power, authority or duty.

*incapable person* means an adult who:

- (a) is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or
- (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.

*in custody* is explained in subsection (2).

*indictable offence* means:

- (a) an indictable offence against a law of the Commonwealth; or
- (b) a State offence that has a federal aspect and that is an indictable offence against the law of that State.

*inform* is explained in subsection (4).

*informed consent* is explained in section 23WF.

*interview friend* is explained in section 23WB.

***intimate forensic procedure*** means the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- (b) the taking of a sample of blood;
- (c) the taking of a sample of saliva, or a sample by buccal swab;
- (d) the taking of a sample of pubic hair;
- (e) the taking of a sample by swab or washing from the external genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- (g) the taking of a dental impression;
- (h) the taking of a photograph or video recording of, or an impression or cast of a wound from, the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts.

***investigating constable*** means the constable in charge of the investigation of the commission of an offence in relation to which a forensic procedure is carried out or proposed to be carried out.

***judge*** means a State or Territory judge.

***legal representative*** of a suspect means a legal practitioner acting for the suspect.

***member of the opposite sex of a person*** is defined in subsection (7).

***member of the same sex as a person*** is defined in subsection (7).

***National Criminal Investigation DNA Database*** or ***NCIDD*** is defined in section 23YDAC.

***non-intimate forensic procedure*** means the following forensic procedures:

- (a) an examination of a part of the body other than the genital or anal area, the buttocks or, in the case of a female or a

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transgender person who identifies as a female, the breasts, that requires touching of the body or removal of clothing;

- (b) the taking of a sample of hair other than pubic hair;
- (c) the taking of a sample from a nail or under a nail;
- (d) the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- (e) the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body other than the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts;
- (f) the taking of a hand print, finger print, foot print or toe print;
- (g) the taking of a photograph or video recording of, or an impression or cast of a wound from, a part of the body other than the genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts.

**offence** does not include an offence against a law of a Territory other than the Australian Capital Territory.

Note: Subsection 3(1) provides that **Territory** does not include the Northern Territory.

**offender** means:

- (a) a serious offender; or
- (b) a prescribed offender.

**order** means:

- (a) in relation to a suspect—an order of a magistrate under section 23WS or interim order of a magistrate under section 23XA; or
- (b) in relation to an offender—an order of a judge or magistrate under section 23XWO; or
- (c) in relation to a volunteer—an order of a magistrate under section 23XWU.

**participating jurisdiction** is defined in section 23YUA.



**police station** includes:

- (a) a police station of a State or Territory; and
- (b) a building occupied by the Australian Federal Police.

**prescribed offence** means an offence under a law of the Commonwealth, or a State offence that has a federal aspect, punishable by a maximum penalty of imprisonment for life or 2 or more years.

**prescribed offender** means a person who is under sentence for a prescribed offence.

Note: For the meaning of **under sentence**, see subsection (8).

**prison medical officer** means, in relation to a prison or other place of detention, a person appointed or acting as medical officer for the prison or other place of detention.

**recognised transgender person** means a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* of New South Wales, or under the corresponding provisions of a law of another Australian jurisdiction.

**relevant offence** means:

- (a) in relation to a person who is a suspect:
  - (i) the indictable offence in relation to which the person is a suspect; or
  - (ii) any other indictable offence arising out of the same circumstances; or
  - (iii) any other indictable offence in respect of which the evidence likely to be obtained as a result of a proposed forensic procedure carried out on the suspect is likely to have probative value; or
- (b) in relation to an offender—the offence for which the offender was convicted and to which an application for an order authorising a forensic procedure relates.

**responsible person**, in relation to the Commonwealth DNA database system, means the person responsible for the care, control and management of the system.

**sample** has a meaning affected by subsection (3).

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**senior constable** means a constable of the rank of sergeant or higher.

**serious offence** means an offence under a law of the Commonwealth, or a State offence that has a federal aspect, punishable by a maximum penalty of imprisonment for life or 5 or more years.

**serious offender** means a person who is under sentence for a serious offence.

Note: For the meaning of **under sentence**, see subsection (8).

**suspect**, in relation to an indictable offence, means:

- (a) a person whom a constable suspects on reasonable grounds has committed the indictable offence; or
- (b) a person charged with the indictable offence; or
- (c) a person who has been summonsed to appear before a court in relation to the indictable offence.

**tape recording** means audio recording, video recording or recording by other electronic means.

**transgender person** is defined in subsection (6).

**volunteer** is defined in section 23XWQ.

- (2) In this Part, a person is **in custody** if he or she is in the lawful custody of a constable.
- (3) In this Part, a **sample** taken from a person includes a sample taken from the person that consists of matter from another person's body.
- (4) In this Part, a person **informs** another person of a matter if the person informs the other person of the matter, through an interpreter if necessary, in a language (including sign language or braille) in which the other person is able to communicate with reasonable fluency.

*Destroy forensic material or information*

- (5) For the purposes of this Part, a person **destroys** forensic material taken from another person by a forensic procedure, the results of the analysis of the material or other information gained from it if the person destroys any means of identifying the forensic material

or information with the person from whom it was taken or to whom it relates.

*Transgender persons*

- (6) In this Part, a reference to a person being **transgender** or a **transgender person** is a reference to a person, whether or not the person is a recognised transgender person:
- (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or
  - (b) who has identified as a member of the opposite sex by living as a member of the opposite sex; or
  - (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex;
- and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.
- (7) In this Part (other than subsection (6)), a reference:
- (a) to a **member of the opposite sex of a person** means, if the person is a transgender person, a member of the opposite sex to the sex with which the transgender person identifies; and
  - (b) to a **member of the same sex as a person** means, if the person is a transgender person, a member of the same sex as the sex with which the transgender person identifies.
- (8) For the purposes of the definitions of **prescribed offender** and **serious offender**, a person is **under sentence** in relation to a prescribed offence or a serious offence if the person:
- (a) is serving a sentence in a prison (including a gaol, lock-up or other place of detention); or
  - (b) is serving a sentence of a kind, or subject to an order of a kind, provided for in subsection 20AB(1) as a sentence or order that may be passed or made by a court, under that section, in respect of a person convicted of an offence against the law of the Commonwealth; or
  - (c) is released under a parole order made under subsection 19AL(1) or (2); or
  - (d) is released on a licence granted under section 19AP; or
  - (e) being a child or young person, is serving a sentence of a kind, or subject to an order of a kind, provided for in subsection

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20C(1) as a sentence or order that, under that section, may be imposed on the child or young person who in a State or Territory is convicted of an offence against the law of the Commonwealth; or

- (f) is subject to an order made under Division 9 of Part IB; or
- (g) is convicted and conditionally released as provided for in subsection 20(1), either:
  - (i) in the case of paragraph 20(1)(a)—without sentence being passed; or
  - (ii) in the case of paragraph 20(1)(b)—after sentence has been passed.

**23WB Interview friends**

- (1) This section lists the people who may act as an *interview friend* of a suspect, offender or volunteer for the purposes of a provision of this Part referring to an interview friend. Different people may act as interview friends of a suspect, offender or volunteer for the purposes of different provisions of this Part.
- (2) Where the suspect, offender or volunteer is a child or an incapable person, the following people may act as *interview friends*:
  - (a) a parent, guardian or other person chosen by, or acceptable to, the suspect, offender or volunteer;
  - (b) a legal practitioner acting for the suspect, offender or volunteer;
  - (c) if the suspect, offender or volunteer is an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available—a representative of an Aboriginal legal aid organisation or a person whose name is on the relevant list maintained under subsection 23J(1) who is chosen by, or acceptable to, the suspect, offender or volunteer;
  - (d) if there is no available person who is covered by paragraph (a), (b) or (c)—an independent person who is not a constable.

- (3) Where the suspect, offender or volunteer is an Aboriginal person or a Torres Strait Islander not covered by subsection (2), the following people may act as *interview friends*:
- (a) a relative or other person chosen by the suspect, offender or volunteer;
  - (b) a legal practitioner acting for the suspect, offender or volunteer;
  - (c) if there is no available person who is covered by paragraph (a) or (b)—a representative of an Aboriginal legal aid organisation, or a person whose name is included in the relevant list maintained under subsection 23J(1).
- (4) A suspect, offender or volunteer who has a legal representative may also have an interview friend who is not the suspect's, offender's or volunteer's legal representative.

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**Division 2** Authority and time limits for forensic procedures on suspects: summary of rules

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**Division 2—Authority and time limits for forensic procedures on suspects: summary of rules**

**23WC How forensic procedures may be authorised in different circumstances**

The following table shows the circumstances in which a forensic procedure may be carried out on a suspect, and shows the provisions that authorise the carrying out of the procedure.

<b>Authority for forensic procedures</b>		
<b>Suspect</b>	<b>Intimate forensic procedure</b>	<b>Non-intimate forensic procedure</b>
1 adult not in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a magistrate under Division 5
2 adult in custody	with informed consent under Division 3 by order of a magistrate under Division 5	with informed consent under Division 3 by order of a senior constable under Division 4 by order of a magistrate under Division 5
3 incapable person (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5
4 child at least 10 but under 18 (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5

**23WCA Time limits for carrying out forensic procedures**

The following table sets out in general terms the time limits that apply to the carrying out of a forensic procedure depending on the status of the suspect and the source of the authority to carry out the procedure.

**Time limits for forensic procedures**

	<b>Suspect's status</b>	<b>Procedure with suspect's consent (Division 3)</b>	<b>Procedure by order of a constable (Division 4)</b>	<b>Procedure by order of a magistrate (Division 5)</b>
1	Child or incapable person not in custody	Not applicable	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23XGB(2) (see section 23XGB).
2	Aboriginal person or Torres Strait Islander (not a child or incapable person) not in custody	Procedure must be carried out within 2 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23WLA(2) (see section 23WLA).	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23XGB(2) (see section 23XGB).
3	Suspect (not covered by item 1 or 2) not in custody	Procedure must be carried out within 4 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23WLA(2) (see section 23WLA).	Not applicable	Procedure must be carried out within 4 hours after suspect presents to investigating constable, disregarding "dead time" described in subsection 23XGB(2) (see section 23XGB).

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**Time limits for forensic procedures**

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	<b>Suspect's status</b>	<b>Procedure with suspect's consent (Division 3)</b>	<b>Procedure by order of a constable (Division 4)</b>	<b>Procedure by order of a magistrate (Division 5)</b>
4	Child or incapable person in custody	Not applicable	Not applicable	In addition to the detention period permitted under Part IC, suspect may be detained for up to 2 hours after magistrate's order or suspect's arrest, disregarding "dead time" described in subsection 23XGD(2) (see Subdivision D of Division 5).
5	Aboriginal person or Torres Strait Islander (not a child or incapable person) in custody	Suspect may be detained in accordance with Part IC, but the detention period permitted by Part IC is not extended in connection with carrying out the procedure (see subsections 23WD(3) and (4)).	Suspect may be detained in accordance with Part IC, but the detention period permitted by Part IC is not extended in connection with carrying out the procedure (see subsections 23WM(3) and (4)).	In addition to the detention period permitted under Part IC, suspect may be detained for up to 2 hours after magistrate's order or suspect's arrest, disregarding "dead time" described in subsection 23XGD(2) (see Subdivision D of Division 5).

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**Time limits for forensic procedures**

	<b>Suspect's status</b>	<b>Procedure with suspect's consent (Division 3)</b>	<b>Procedure by order of a constable (Division 4)</b>	<b>Procedure by order of a magistrate (Division 5)</b>
6	Suspect (not covered by item 4 or 5) in custody	Suspect may be detained in accordance with Part IC, but the detention period permitted by Part IC is not extended in connection with carrying out the procedure (see subsections 23WD(3) and (4)).	Suspect may be detained in accordance with Part IC, but the detention period permitted by Part IC is not extended in connection with carrying out the procedure (see subsections 23WM(3) and (4)).	In addition to the detention period permitted under Part IC, suspect may be detained for up to 4 hours after magistrate's order or suspect's arrest, disregarding "dead time" described in subsection 23XGD(2) (see Subdivision D of Division 5).

## **Division 3—Forensic procedures on suspect by consent**

### **23WD Forensic procedure may be carried out with informed consent of suspect**

- (1) A person is authorised to carry out a forensic procedure on a suspect with the informed consent of the suspect. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (2) This Division does not authorise the carrying out of a forensic procedure on a suspect who is:
  - (a) a child; or
  - (b) an incapable person.
- (3) This Division does not authorise keeping a suspect in custody, in order to carry out a forensic procedure, after the expiration of the investigation period provided for by Part IC.

Note: If it is necessary to keep a suspect in custody after the expiration of the Part IC investigation period in order to carry out a forensic procedure, an order of a magistrate under Division 5 will have to be obtained to authorise this.

- (4) Nothing in this Part or Part IC prevents the carrying out of a forensic procedure, with the informed consent of the suspect, during the investigation period provided for by Part IC. However, neither carrying out the forensic procedure, nor any delay associated with carrying out the forensic procedure, operates to extend the investigation period provided for by Part IC.

Note: By contrast, the carrying out of a forensic procedure in accordance with a magistrate's order under Division 5, and associated delays, may delay the expiration of the investigation period provided for by Part IC.

### **23WE People who cannot consent to forensic procedures**

- (1) A child cannot consent to a forensic procedure.
- (2) An incapable person cannot consent to a forensic procedure.

**23WF Informed consent to forensic procedures—general**

- (1) This section applies where:
  - (a) a constable intends to ask a suspect to consent to a forensic procedure; and
  - (b) the constable does not believe on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander.
- (2) A suspect not covered by section 23WE gives informed consent to a forensic procedure if the suspect consents after a constable:
  - (a) asks the suspect to consent to the forensic procedure under section 23WH; and
  - (b) gives the suspect a written statement setting out:
    - (i) the information that the suspect must be given under paragraphs 23WJ(1)(a), (e), (f), (g), (h), (i) and (j); and
    - (ii) the nature of the information that the suspect must be given under paragraphs 23WJ(1)(b), (c) and (d) (but not the specific information that the suspect is to be given under these paragraphs in relation to the particular forensic procedure); and
  - (c) informs the suspect about the forensic procedure in accordance with section 23WJ; and
  - (d) gives the suspect a reasonable opportunity to communicate, or attempt to communicate, with a legal practitioner of the suspect's choice and, subject to subsection (3), to do so in private.
- (3) If the suspect is in custody, the constable need not allow the suspect to communicate, or attempt to communicate, with the legal practitioner in private if the constable suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

**23WG Informed consent to forensic procedures—Aboriginal persons and Torres Strait Islanders**

- (1) This section applies where:
    - (a) a constable intends to ask a suspect to consent to a forensic procedure; and
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- (b) the constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander.
  - (2) A suspect not covered by section 23WE gives informed consent to a forensic procedure if the suspect consents after a constable:
    - (a) asks the suspect to consent to the forensic procedure under section 23WH; and
    - (b) informs the suspect about the forensic procedure in accordance with section 23WJ; and
    - (c) complies with the rest of this section.
  - (3) The constable must not ask the suspect to consent to the forensic procedure unless:
    - (a) an interview friend is present; or
    - (b) the suspect has expressly and voluntarily waived his or her right to have an interview friend present; or
    - (c) the constable is a senior constable and he or she believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in relation to the request to consent by comparison with members of the Australian community generally.
- Note: Section 23YK relates to proving a waiver under paragraph (3)(b) of this section.
- (4) Before asking the suspect to consent to a forensic procedure, the constable must:
    - (a) inform the suspect that a representative of an Aboriginal legal aid organisation will be notified that the suspect is to be asked to consent to a forensic procedure; and
    - (b) notify such a representative accordingly.
  - (5) The constable is not required to comply with subsection (4) if:
    - (a) he or she is aware that the suspect has arranged for a legal practitioner to be present while the suspect is asked to consent to the forensic procedure; or
    - (b) paragraph (3)(b) or (c) applies.
  - (6) After asking a suspect covered by paragraph (3)(b) or (c) to consent to a forensic procedure, the constable must give the suspect a reasonable opportunity to communicate, or attempt to

communicate, with a legal practitioner of the suspect's choice and, subject to subsection (8), to do so in private.

- (7) After asking a suspect not covered by paragraph (3)(b) or (c) to consent to a forensic procedure, the constable must allow the suspect to communicate with the interview friend (if any), and with the suspect's legal representative (if any), and, subject to subsection (8), to do so in private.
- (8) If a suspect covered by subsection (6) or (7) is in custody, the constable need not allow the suspect to communicate, or attempt to communicate, with a legal practitioner, or the suspect's interview friend or legal representative, in private if the constable suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.
- (9) An interview friend (other than a legal representative) of the suspect may be excluded from the presence of the constable and the suspect if the interview friend unreasonably interferes with or obstructs the constable in asking the suspect to consent to the forensic procedure, or in informing the suspect as required by section 23WJ.

### **23WH Constable may request suspect to consent to forensic procedure**

A constable may ask a suspect to undergo a forensic procedure if the constable is satisfied as required by section 23WI.

### **23WI Matters to be considered by constable before requesting consent to forensic procedure**

- (1) The constable must be satisfied on the balance of probabilities that:
  - (a) the person on whom the procedure is proposed to be carried out is a suspect; and
  - (b) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence; and
  - (c) the request for consent to the forensic procedure is justified in all the circumstances; and

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- (d) the person on whom the forensic procedure is proposed to be carried out is not a child or an incapable person.
- (2) In determining whether a request is justified in all the circumstances, the constable must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the constable must have regard to the following matters:
  - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence;
  - (b) the degree of the suspect's alleged participation in the commission of the relevant offence;
  - (c) the age, physical health and mental health of the suspect, to the extent that they are known to the constable or can reasonably be discovered by the constable (by asking the suspect or otherwise);
  - (e) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence;
  - (f) any other matter considered relevant to balancing those interests.
- (4) Without limiting the matters that the constable may take into account in considering, for the purposes of paragraph (3)(e), the intrusiveness of the forensic procedure, the constable must (where appropriate) take into account the religious beliefs of the suspect.

**23WJ Matters that suspect must be informed of before giving consent**

- (1) The constable must inform the suspect of the following matters:
  - (a) that the giving of information under this section, and the giving of consent (if any) by the suspect, is being or will be recorded by audio tape, videotape or other electronic means, or in writing, and that the suspect has a right to a copy of that record in a form provided by section 23YF;
  - (b) the purpose for which the forensic procedure is required;

- (c) the offence in relation to which the constable wants the forensic procedure carried out;
- (d) the way in which the forensic procedure is to be carried out;
- (e) that the forensic procedure may produce evidence against the suspect that might be used in a court of law;
- (f) that the forensic procedure will be carried out by an appropriately qualified person;
- (g) if relevant, the matters specified in subsection (2);
- (h) if the constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—that the suspect’s interview friend may be present while the forensic procedure is carried out;
- (i) that the suspect may refuse to consent to the carrying out of the forensic procedure;
- (ia) the effect of section 23XZ;
- (j) the consequences of not consenting, as specified in subsection (3), (4) or (5) (whichever is applicable);
- (k) that information obtained from analysis of forensic material obtained may be placed on the Commonwealth DNA database system and the rules that will apply to its disclosure and use under this Part.

*Suspect’s right to have medical practitioner or dentist present during intimate forensic procedures*

- (2) The constable must inform the suspect that the suspect may ask that a medical practitioner or dentist (depending on the kind of forensic procedure) of his or her choice be present while the forensic procedure is carried out (unless the forensic procedure is a non-intimate forensic procedure).

*Failure to consent to non-intimate forensic procedure—suspect in custody*

- (3) If the suspect is in custody and the forensic procedure is a non-intimate forensic procedure, the constable must inform the suspect that, if the suspect does not consent:
  - (a) a constable may order the carrying out of the forensic procedure under Division 4 if he or she is satisfied of the matters referred to in subsection 23WO(1); or

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- (b) an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

*Failure to consent to intimate forensic procedure—suspect in custody*

- (4) If the suspect is in custody and the forensic procedure is an intimate forensic procedure, the constable must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

*Failure to consent to forensic procedure—suspect not in custody*

- (5) If the suspect is not in custody, the constable must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

**23WK Withdrawal of consent**

If a person expressly withdraws consent to the carrying out of a forensic procedure under this Part (or if the withdrawal of such consent can reasonably be inferred from the person's conduct) before or during the carrying out of the forensic procedure, then:

- (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused; and
- (b) the forensic procedure is not to proceed except by order of a constable under Division 4 or a magistrate under Division 5.

**23WL Recording of giving of information and suspect's responses**

- (1) The constable must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the suspect's responses (if any) are tape recorded.
- (2) If tape recording the giving of the information and the suspect's responses (if any) is not practicable, the constable must ensure that a written record of the giving of the information and the suspect's responses (if any) is made, and that a copy of the record is made available to the suspect.



Note: Division 9 contains provisions about making copies of material (including copies of tapes) available to the suspect.

**23WLA Time for carrying out forensic procedure—suspect not in custody**

- (1) If a suspect who is not in custody:
  - (a) consents to a forensic procedure; and
  - (b) presents himself or herself to the investigating constable to undergo the procedure;the procedure must be carried out as quickly as reasonably possible but in any case within the following period:
  - (c) if the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—2 hours after the suspect so presents himself or herself;
  - (d) in any other case—4 hours after the suspect so presents himself or herself.
- (2) In working out any period of time for the purposes of subsection (1), the following times are to be disregarded:
  - (a) the time (if any) that is reasonably required to convey the suspect from the place where the suspect presents himself or herself to the investigating constable to the nearest premises where facilities for carrying out the procedure in accordance with this Part are available to the investigating constable;
  - (b) any time during which carrying out the procedure is suspended or delayed to allow the suspect, or someone else on the suspect's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person as provided by this Part;
  - (c) any time during which carrying out the procedure is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person to arrive at the place where the procedure is to be carried out;
  - (d) any time during which carrying out the procedure is suspended or delayed to allow the suspect to receive medical attention;

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- (e) any time during which carrying out the procedure is suspended or delayed because of the suspect's intoxication;
- (f) any reasonable time during which carrying out the procedure is suspended or delayed to allow the suspect to rest or recuperate;
- (g) any time during which carrying out the procedure is suspended or delayed at the request of the suspect.