

EXPLANATORY MEMORANDUM

CRIMINAL INVESTIGATION BILL 2005

PART 1 Preliminary matters

1. Short Title:-

Cites the short title of the Act – *Criminal Investigation Act 2005*

2. Commencement:-

The Act is to come into operation on a day, or different days, to be fixed by proclamation published in the Government Gazette.

3. Interpretation:-

This contains definitions of terms and expressions used throughout the Act. Of particular note are:

“area associated with a dwelling” means —

- (a) if the dwelling is one of 2 or more dwellings in one building, the parts of the building and any area around the building that the occupiers of the dwellings use exclusively but in common with each other; or
- (b) otherwise, the area around the dwelling that is used exclusively by the occupier, such as a driveway, garden or yard;

“dwelling” means a place or a part of a place that is ordinarily used for human habitation and it does not matter that it is from time to time uninhabited;

“frisk search” a person, means to quickly and methodically run the hands over the outside of the person’s clothing;

“officer” means a police officer or a public officer or both, as the case requires;

“photograph” includes a digital image and a moving visual record;

“place” means any land, building, structure, tent or mobile home or a part of any land, building, structure, tent or mobile home;

“private parts” of a person, means the person’s genital area, anal area, buttocks and, in the case of —

- (a) a female; or
 - (b) a male undergoing a reassignment procedure, as that term is defined in the *Gender Reassignment Act 2000* section 3;
- breasts;

“public open area” means —

(a) an area that is part of a road open to and used by the public; or

(b) an area of land —

(i) to which the public has access, whether on payment or not; and

(ii) on which there is no building, structure, tent or mobile home,

and it does not matter if the area is the whole or a part of a surveyed lot or of an unsurveyed piece of land, or, if the area is part of such a lot, there is a building, structure, tent or mobile home on some other part;

Example: under paragraph (b), an area of bush in a national park is a public open area but a building in the park is not.

4. “Reasonably Suspects” Meaning of:-

- The term “Reasonably Suspects” appears throughout the Act. This definition is based on the common law definition of “reasonable suspicion”.

5. “Thing relevant to an offence”, meaning of:

This is a new concept that relates to the majority of search and seizure powers in the Bill. It is intended to be as broad as possible in its scope to include things in any way connected to an offence or which may provide evidence relevant to an offence or alibi. The scope extends to things that are non-material or animate.

6. Other written Laws, this Act’s relationship with:

This clause ensures that this legislation does not exclude the operation of other legislation which may provide police with a power in addition to this Bill. For example, this Bill provides police with a power to use reasonable force (Clause 15); however, in some circumstances the use of stronger powers provided by sections 233 and 235 of *The Criminal Code* may be appropriate. These sections of the Criminal Code authorise in specific circumstances the use of force that may cause death or grievous bodily harm.

7. Common law, this Act’s relationship with:

The intention of this Bill is to provide comprehensive powers for police in respect to all matters that may arise. The Bill also intends to codify common law powers. This clause is intended to ensure that this legislation takes precedence over any common law.

8. Police officer’s powers as an individual not affected

This clause clarifies that the police powers in this Bill do not derogate from the powers that a police officer has as a citizen.

9. Public officers may be authorised to exercise powers

The term "officer" is used throughout the Bill. The powers in the Bill may eventually be exercised by prescribed public officers, thus making the Bill a potentially comprehensive source of investigative powers for all investigators of offences and law enforcement officers. With that possibility in mind, this clause provides that regulations may prescribe which powers may be exercised, thereby allowing for public officers to be given only those powers which are necessary and appropriate.

10. Officers' duty to identify themselves

Various clauses within this Bill require officers exercising powers to identify themselves. This clause prescribes exactly how they should do this.

11. Delegation by officers

This clause provides that an officer may delegate the performance of a function to another officer. However, where the delegation relates to a duty imposed on an officer under the Act, responsibility to ensure the performance of a duty imposed on the officer remains with the delegating officer.

12. Warrants and orders, applying for

This clause sets out the procedure for making applications to a judicial officer for warrants or orders. This clause allows for the use of copies of warrants and orders and allows applications to be made by remote communication.

Part 2 – Ancillary provisions about exercising powers

13. When powers may be exercised

This provision clarifies that police may exercise powers under this Act at any time unless it is otherwise expressly provided.

14. Assistance to exercise powers

This clause provides any person who may exercise a power under this Act with a power to authorise other persons to assist in exercising that power. This provision also allows citizens lawfully to assist authorised persons whether requested or not.

This clause replaces various existing provisions that provide police with powers or responsibilities. Section 176 of the *Criminal Code* creates an offence for a person failing to provide assistance to a police officer when he is given reasonable notice that the person is required. This offence will remain and will have application with respect to this clause.

15. Force, use of when exercising powers

This clause allows officers to use reasonable force when exercising a power under this Act. The clause also provides that, if reasonable force is used, that force may cause damage to property of another person. The purpose of that provision is to ensure that the officer using force is not personally liable for the damage, but the clause will not change the existing law in relation to compensation.

This clause is subject to section 231 *Criminal Code* 'Force Used in executing a process or in arrest' and other provisions of Chapter XXVI of the *Criminal Code*.

16. Animals, use of when exercising powers

This clause provides officers with a power to use animals to exercise any power under the legislation including the use of force. The officer in charge of the animal must take precautions against injuring any person or damaging any property.

17. Roadblocks, use of when stopping vehicles

This clause provides a power for police to set up a roadblock and stop all vehicles where it is considered necessary in order to exercise a power in another section of this Act to stop a vehicle. The term "roadblock" is not defined as it is a commonly understood term.

A senior police officer of the rank of Inspector or above must approve the setting up of a roadblock. An approval has effect for a maximum of 6 hours. There is an exception to this where the urgency and seriousness of the circumstances warrant a roadblock without the authorisation of a senior police officer. In such cases, the roadblock may only be in force for three hours without a senior police officer giving further approval to extend that time.

18 Stopping vehicles, powers in connection with

This clause clarifies how a person may stop a vehicle if empowered under this Act. The clause is broad enough to allow for any method, providing it is not likely to cause death or grievous bodily harm. By virtue of clause 6 of this Bill, if a situation exists that necessitates the use of force that may cause death or grievous bodily harm to stop a vehicle, then that force may still be excused under Chapter XXVI of the *Criminal Code*.

19. Power to enter includes power to enter some other places

This clause provides a power for an officer to enter common areas of multi-premises buildings such as apartment blocks where necessary to gain access to a place that the officer has the power to enter with or without warrant. It also provides police with a power to go through a place in order to enter a target place if the officer reasonably suspects it is necessary to do so.

20. Forensic examination of thing relevant to an offence

This clause prescribes the nature of examinations that police may carry out on things where the Act provides a power to conduct a forensic examination of the thing.

The clause provides a specific power to dismantle and destroy property if it is necessary to do so in order to conduct the examination.

The power to conduct a forensic examination is subject to issues of privilege to be determined under clause 150.

21. Gender of a person, ascertaining

This clause provides how an officer must ascertain gender where it is necessary to do so before exercising a power under this Act.

This clause mirrors section 55(7) of the *Criminal Investigation (Identifying People) Act 2002*.

22. Consent to search etc, presumption against and withdrawal

This clause provides that:

- police must presume that a person has not consented to undergo a search or forensic procedure on themselves or to allow police to search a place they occupy if the person does not reply to a request or resists the search or procedure; and
- that a person's consent once given may be withdrawn at any time before the search or procedure is completed.

This clause mirrors section 7 of the *Criminal Investigation (Identifying People) Act 2002*.

Part 3 – Citizens powers

23. Prevention of offences and violence

This provides that it is lawful for all citizens to use force to prevent violence, breaches of the peace and other offences from being committed. It also provides that it is lawful for a citizen to enter without warrant a place or vehicle in order to prevent an unlawful killing of a person. This clause replaces section 237 of the *Criminal Code*.

24. Citizen's arrest

This provides a power of arrest for all citizens for an "arrestable offence"; that is, where the statutory penalty for the offence includes imprisonment. This power requires that a citizen either arrange for a police officer to attend the scene or take the arrested suspect to a police officer as soon as practicable.

An offence is arrestable by reference to the maximum statutory penalty for the offence and not any summary conviction penalty that may be available. For example, section 378 of the *Criminal Code* (stealing) has a summary conviction penalty which does not include imprisonment for offenders where the property stolen does not exceed \$1000. This penalty does not become the 'statutory penalty for the offence' as referred to in this clause. The statutory penalty remains the 7 years which is the maximum penalty the person may be subject to, regardless of the fact that the matter may be heard summarily and a lesser penalty given on conviction.

This clause replaces the citizen arrest power that is currently contained in section 564 of *The Criminal Code*.

25. Person in command of vehicle, powers of

This clause replaces the *Criminal Code* powers in respect to persons in charge of aircraft and vessels and expands them to apply to all vehicles including buses and taxis. Under this clause, a person in charge of a vehicle may refuse entry to a person, or request a person whom

he or she reasonably suspects is carrying a thing that may be used to endanger the safety of any person onboard the vehicle to undergo a basic search. If the person submits to a basic search, then the person in charge of the vehicle may seize anything that he or she reasonably suspects may be used to endanger the safety of any person or damage the vehicle. If the person refuses to submit to a search, the person may be removed from the vehicle or prevented from entering the vehicle.

26. Detained people to be taken to be in lawful custody

This clause clarifies that a person who is being detained by a civilian is to be considered as being in lawful custody and, therefore, if the person escapes, the person can be charged with escaping lawful custody. Another intended consequence of this clause is that police will be able to exercise powers under clause 133 of this Act “Escapees, additional powers to aid recapture” when seeking the person who has escaped.

Part 4 – Miscellaneous official powers

27. Suspects and others may be ordered to move on

This clause replaces and is, apart from some minor drafting variations, identical to the move-on power current at section 50 of the *Police Act 1892*. Section 50 was inserted in February 2005 by the *Criminal Law (Simple Offences) Act 2005* as an interim measure pending the enactment of this provision in the *Criminal Investigation Bill*.

Part 5 – Entering and searching places and vehicles

Division 1 - General

28. Places with 2 or more occupiers, interpretation

This clause provides that where anything must be done in respect of an occupier and there is more than one occupier, it is sufficient to deal with one of the occupiers. This interpretation is relevant to a number of clauses that require a police officer to either seek the occupier’s consent to do something or to provide information to an occupier.

29. Entry and search with occupiers consent

This clause provides legislative backing for police to conduct searches and enter properties by consent where they would otherwise require a search warrant or other legislative power.

30. Occupier’s rights

This clause details the rights that must be afforded to an occupier of a place that police intend to enter, or have entered, under this Bill. There are exceptions to these rights where it is impractical for police to comply with them or where compliance may jeopardise the purpose of the proposed search. Despite these exceptions, as soon as practicable after entering the place, officers must identify themselves to the occupant and provide information about what statutory power is, or was used to enter the property and, in the case of a search warrant, must provide a copy of the warrant.

Division 2 – Powers without a search warrant

31. Warrant not required

Provides that the powers within this Division can be exercised without warrant.

32. Public Open Area Search

This provides that an officer may exercise all the powers of a search warrant in a public open area without having to obtain a warrant. An officer must not damage or destroy any property or dig up the ground in a public open area without the consent of the person in charge of that place, except where the purpose of digging is to remove a plant that is unlawful to possess. This clause is not intended to limit an officer's ability to do things in a public open area that may be lawfully done by any member of the public and therefore an officer need not seek consent or apply for a warrant where the damaging of the property of digging up the ground would otherwise be lawful.

33. Place of Public Entertainment, entry to prevent violence

This clause provides police with a power to enter and remain in places of public entertainment and premises licensed under the *Liquor Licensing Act 1988* in order to ensure that good order and peace are maintained. This power is a modernised version of section 42 of the *Police Act 1892*.

34. Place or vehicle, entry to prevent violence

This provides police with a power to enter private and public places or to stop and enter a vehicle in order to prevent acts involving violence or other breaches of the peace.

35. Place or vehicle, entry of to attend to dead or seriously injured person

This provides an officer with a power to enter private and public places or to stop and enter a vehicle in order to attend to a dead or seriously injured person. This clause could apply to public officers if so prescribed.

36. Place or vehicle, entry of to investigate serious event

This provides police with a power to enter private and public places or to stop and enter a vehicle in order to investigate a 'serious event' as defined.

37. Vehicle, searches of to prevent offences etc.

This clause provides police with a power to stop, enter and search or inspect a vehicle (which includes aircraft, buses, trains and vessels) to prevent the vehicle being used in the commission of an offence, to prevent damage to the vehicle, to ensure the safety of persons on or near the vehicle or to prevent a breach of the peace.

38. Vehicle, search of for things relevant to offence

This clause is an expansion of the power in section 49 of the *Police Act 1892* that enables police to stop, detain and search any vehicle that is conveying property that is reasonably suspected to stolen or unlawfully obtained. This clause allows police to search the vehicle if they suspect the vehicle contains a thing relevant to an offence, or the victim of an offence, or is itself a thing relevant to an offence (traffic crash, ram raid etc). This clause allows police to seize vehicles that have been involved in traffic accidents where the vehicle is a “thing relevant to an offence”.

Sub-clause (4) of this clause allows police to exercise this power in an area associated with a dwelling, but only where the person in charge of the vehicle does not reside in the dwelling and the vehicle is not there with the permission of a person who resides in that dwelling.

39. Place, entry of to establish protected forensic area for serious offence

This clause provides a power for a police officer to establish a protected forensic area without a search warrant. This power can only be used in a public open area if it is necessary to ensure evidence is not compromised or to protect the safety of a person in the area. The power can only be used elsewhere where it is suspected that, during the period it would take to obtain a search warrant, evidence would be disturbed or hidden or a person’s safety would be endangered.

40. Search Warrant, application for

This clause prescribes the information that must be included in an application for a search warrant that may be issued under clause 41. This clause, in conjunction with clauses 12, 42, 43 and 44, replaces section 711 of the *Criminal Code*.

The information required is similar to that which is currently required in an application for a section 711 warrant. A significant difference is the requirement for an applicant to disclose any knowledge of any previous application for a search warrant for the same place made within the previous 72 hours and the result of that application. That requirement relates to the knowledge of the applicant rather than the collective knowledge of the agency to which the applicant belongs. The purpose of this provision is to reduce the opportunity for an officer to re-apply for a warrant to a different JP when an application has been refused.

41. Search Warrant, issue of

This clause provides a power for a JP to issue a search warrant after considering the matters in clause 40. It also provides that a search warrant is to be in the prescribed form and that the JP must record the reasons why an application has been refused.

42. Search Warrant, effect of

This clause details:

- when a warrant comes into force and ceases;
- the actions that a warrant does and can authorise; and
- the limitations on a warrant's execution.

The main differences between this clause and a section 711 warrant are that this clause -

- provides a defined end date when the warrant expires, up to 30 days as allowed by a JP;
- limits the persons who may apply for a search warrant to police officers or public officers;
- provides a specific power for an officer to conduct a strip search or basic search on any person that is in the place being searched;
- provides a specific power to search for a person; and
- provides a time when the warrant ceases to be in force based on the officer satisfying the purpose of the warrant.

43. Search warrant, ancillary powers under

This clause details the ancillary powers that an officer may use in executing a search warrant.

The main differences between this clause and the current effect of a section 711 warrant are that this clause –

- provides a specific power [subject to approval by a senior officer (Sergeant and above)] that enables an officer to enter another place not subject to the warrant, but near the place to which the warrant relates, where it is necessary to:
 - prevent a person fleeing;
 - ensure evidence is not concealed or disturbed; or
 - ensure the safety of any person;
- provides express power to:
 - take equipment or facilities into a place to assist in the execution of the warrant;
 - make use of equipment, facilities or services at a target place in order to exercise any power under the warrant and, where necessary, order an occupier of the place to facilitate that use;
 - operate any equipment or device necessary to access, recover or copy a record and where the officer reasonably suspects an occupier know how to access that record; the officer may order that person to provide information or assistance that is reasonably necessary to access the record. For example an officer may request a person to enter a password or decrypt a data storage device.
- provides power to establish a ‘protected forensic area’ under clause 45; and
- provides powers of detention and search where they are necessary to maintain the safety of any person.

44. Search warrant, execution of

This clause provides that when a search warrant is executed:

- the occupier of the place must be afforded the rights detailed under clause 30;
- Part 13 of the Act applies in relation to the seizure of anything under the warrant; and
- the warrant must be endorsed with details of its execution.

Division 4 – Protected forensic areas

45. Protected forensic area, establishment of

This clause provides conditions, obligations and rights related to the establishment of a protected forensic area.

46. Protected forensic area, powers in relation to

This clause prescribes what powers may be executed where a protected forensic area has been established. These powers include –

- a power to prevent evidence being concealed or disturbed;
- a power to prevent unauthorised persons entering the area; and
- a power to remove an unauthorised person from the area.

This clause also provides a power to enable an officer, subject to the authorisation of a senior officer, to exercise any power of a search warrant prior to the warrant being obtained. The senior officer in authorising the action must be satisfied that, if such an authorisation were not given, evidence would be concealed or disturbed, or the safety of any person would be endangered.

This clause also creates two offences for ‘Unauthorised entry to a protected forensic area’ and ‘Unlawfully disturbing anything in a protected forensic area’. These offences both carry a penalty of imprisonment for 12 months and a fine of \$12000..

47. Protected forensic area, continuance of

This clause provides when a protected forensic area may continue, and when the protected forensic area must cease.

In general terms, a protected forensic area that is established during the execution of a search warrant under clause 43(2)(f) can continue to be in force until the search warrant ceases to be in force (See cl. 42 (11)).

A protected forensic area that is established in a public open area but not in accordance with a search warrant may continue to be in force until the purpose to which it was established no longer exists.

A protected forensic area that is established in an area that is not a public open area may only continue if consent is obtained from the occupier of the place or a search warrant is obtained. If consent or a warrant is not obtained, the authorisation for the protected forensic area ceases after 6 hours. If a warrant is either not sought or an application for a warrant is made and refused, anything relevant to an offence that is found in the protected forensic area is inadmissible unless the Court decides otherwise under clause 152.

48. Protected forensic area, review a need for

This clause provides a right for any person who is aggrieved by the establishment of a protected forensic area to apply to the Magistrates Court for a review of the grounds of the continuance of the area. The aggrieved person and the investigating officer have a right to be heard by the court. The investigating officer may request that information provided not be disclosed to the aggrieved person. The court may review the need for the protected forensic area and make orders that reduce the period which the area may continue, disestablish the area or mitigate the inconvenience in some other way. The court may only make an order

restricting the disclosure of information to the aggrieved person if it is satisfied that the disclosure will prejudice the safety of a person or prejudice the investigation of an offence to which the protected forensic area relates.

Part 6 – Obtaining business records

49. Interpretation

This clause provides definitions of terms used in this part.

50. Application of this Part

This clause prohibits JP's from issuing orders to produce business records in relation to an offence that may have been committed by the person the subject of the order. Its intent is to ensure that an order to produce business records is not used to obtain evidence from suspects as an alternative to a search warrant.

51. Order to produce, application for

This clause sets out the requirements of an application for an order to produce.

52. Order to produce, issue of

This clause provides the power for a JP to issue an order to produce.. The clause also sets out the information that must be included on an order and provides that the form must be prescribed. In addition, it places an obligation on a JP who refuses an application to record the reasons for refusal on the application form.

53. Order to Produce, service of

This clause provides that an order to produce is to be served as soon as is practicable after it is issued and may be served either personally, by post or, with the consent of the person to which it relates, by fax or email.

54. Order to produce, effect of

This clause creates an offence of disobeying an order to produce a business record without lawful excuse and provides a penalty of \$12 000 or 12 months imprisonment. It also precludes any action in contract or tort against a person complying with an order.

55. Produced records, powers in respect of

This clause allows for a business record that has been produced to be retained for a reasonable time and, if the record is a thing relevant to an offence, to seize and forensically examine the record.

Part 7 – Gaining access to data controlled by suspects

56. Interpretation

This provides definitions for terms used in this Part. The terms "data" and "data storage device" are intended to be as inclusive as possible.

57. Data access order, application for

This clause sets out the requirements of an application for a data access order.

58. Data access order, issue of

This clause provides power to a Magistrate to issue a data access order and details the matters that must be satisfied before the order can be granted. A Magistrate who refuses to issue the order must record the reasons for refusal on the application form.

A data access order may only be made against a person who is suspected of committing an offence attracting a penalty of 5 years imprisonment or more and who has the relevant knowledge necessary to gain access to the device.

59. Data access order, service of

This requires that a data access order be served personally upon to person to whom it applies as soon as practicable after its issue.

60. Data access order, effect of

This creates an offence for failing to obey a data access order. The maximum penalty for this offence is 5 years imprisonment as is commensurate with offences relating to the possession of child pornography. This ensures that person being investigated for such offences who disobeys an order faces a serious penalty. The Magistrates Court can promptly deal with less serious matters by hearing them summarily. The maximum penalty for a summary conviction is 2 years imprisonment and a fine of \$24,000.

Part 8 – Searching people

Division 1 - Preliminary

61. Interpretation

Provides that the definitions relevant to ‘Part 9 – Forensic Procedures on people’ are relevant to this Part.

62. “Basic Search”, meaning of

A person authorised to do a basic search can remove outer layers of clothing such as coats or jackets, frisk search the person, and use electronic devices to detect things on a person’s body.

63. “Strip search”, meaning of

An officer authorised to do strip search can remove a person's clothing and search a person’s body, including private parts, for the presence of a thing. A strip search allows for the searching of a person’s mouth but not other orifices. A strip search does not include forensic procedures.

64. Searches, ancillary powers for

This clause provides additional powers to an authorised searcher to do a basic or strip search. These powers enable the searcher to stop and detain a person for the purpose of the search, search items being carried by or under the immediate control of the person and, subject to specified restrictions, photograph the search or items found during the search. This clause also provides power for the searcher to order a person to do certain things to facilitate the search, such as to remove sharp objects from pockets. A person who fails to comply with an order given under this clause will commit an offence under clause 151.

65. How searches must be done

This requires searches to be done in accordance with Division 3.

Division 2 – General power to search people

66. Warrant not required

This provides that a warrant is not required to exercise powers under this Division.

67. Searching people for evidence or contraband

This provides a general power for police to search a person where the officer reasonably suspects the person is in possession or has under their control stolen or unlawfully obtained property, things that are unlawful to possess or any other thing that may be relevant to an offence. This clause authorises a basic or a strip search and provides power for the officer to seize and forensically examine any relevant thing found.

The clause also provides the ancillary powers to stop a vehicle or enter premises to assist in exercising these powers. The power to enter to a dwelling for this purpose is conditional on the dwelling not being the residence of the person sought and on a suspicion that the person is in or around the place without the consent of the occupant. This is intended to cover the situation where a person tries to evade police by escaping onto another person's property.

68. People in public places, search of for security purposes

This clause provides a power for police to remove persons from, or to refuse entry of persons to, a public place unless they consent to being searched. This clause applies to public places that have been prescribed for the purposes of this clause or a place declared by a police officer of the rank of Inspector or above to be a place to which this clause applies. The purpose of this clause is to enable the enforcement of restrictions on the types of things that can be taken to public venues. The clause gives power to police to seize articles; however, unless these articles are relevant to an offence or are unlawful to possess, the articles must be made available to the person for collection upon leaving the place.

Division 3 - How searches must be done

69. Basic search or strip search, rule for doing

This clause provides rules for the conduct of a basic or a strip search. It requires searchers where practicable to identify themselves and to advise of the reason for the search, and it creates an offence to obstruct the searcher. A search must be conducted as quickly as is practicable, with the minimum degree of intrusiveness necessary. The need to remove clothing must be explained and the person allowed to dress as soon as the search is completed. The searcher must provide adequate replacement of any clothing or footwear where items have been seized as a result of the search. This clause also prohibits the searcher from questioning the person during the search about any offence that the person is suspected of committing.

70. Basic search, additional rules for doing

This provides that for a basic search the searcher where practicable must be of the same sex as the person being searched, unless the searcher is a doctor or nurse.

71. Strip search, additional rules for doing

This clause provides protection to a person subjected to a strip search. This clause requires that:

- the strip search must be done by a person of the same sex and in circumstances that afford reasonable privacy;
- the searcher must not remove any more articles of clothing than is reasonably necessary, and the search must not involve any more visual inspection than is reasonably necessary; and
- in the case of a child or an incapable person, the strip search must, if practicable, be done in the presence of a responsible person (e.g. the child's parent) or some other person who may provide support to the person and represent their best interests.

Part 9 – Forensic procedures on people

Division 1 - Preliminary

72. Interpretation

This clause contains definitions of terms and expressions used in this Part. Clause 61 provides that these definitions also apply to provisions contained in Part 8 of the Act.

The following definitions are significant:

“forensic procedure” means —

- (a) a non-intimate forensic procedure;
- (b) an intimate forensic procedure; or
- (c) an internal forensic procedure;

“identifying particular” has the meaning given to that term by the *Criminal Investigation (Identifying People) Act 2002* section 11(1);

“incapable person” means a person of any age —

- (a) who is unable by reason of a mental disability (which term includes intellectual disability, a psychiatric condition, an acquired brain injury and dementia) to understand the general nature and effect of, and the reason for and the consequences of undergoing, a forensic procedure; or
- (b) who is unconscious or otherwise unable to understand a request made or information given under this Act or to communicate whether or not he or she consents to undergoing a forensic procedure;

“involved person” in connection with an offence, means a person who is not a suspect for the offence but who is reasonably suspected to have been the victim of, or to have witnessed the commission of, the offence;

“protected person” means a person who is a child or an incapable person;

“suspect” for an offence, means a person who is reasonably suspected of having committed the offence and it does not matter whether or not the person —

- (a) is under arrest for the offence;
- (b) has been charged with the offence; or
- (c) having been charged with the offence, has been granted bail.

73. Non-intimate forensic procedure, meaning of and powers for

This clause prescribes what may be done as part of a non-intimate forensic procedure.

A person authorised to do a non-intimate procedure under this Act can:

- take swabs, samples and impressions from a person's external parts other than the person's private parts;
- remove things and take samples from a person's mouth; and
- take a sample from under a person's nail.

The authorised person also has power to:

- remove any article being worn by the person other than an article covering private parts;
- search any articles that have been removed;
- search the person's external parts other than the person's private parts;
- search the person's mouth; and
- photograph any article found during the procedure in the position it was found.

74. Intimate forensic procedure, meaning of and powers for

This prescribes what may be done as part of an intimate forensic procedure.

A person authorised to do an intimate forensic procedure can:

- take swabs, samples and impressions from a person's external private parts;
- remove things attached to a person's private parts; and
- take a blood sample from a person.

The authorised person also has power to:

- remove any article being worn by the person;

- search any articles that have been removed;
- search the person's external parts:, including their external private parts;
- photograph any article found during the procedure in the position it was found; and
- do a non-intimate search.

75. Internal forensic procedure

This clause prescribes what may be done as part of an internal forensic procedure.

A person authorised to do an internal forensic procedure can;

- search a person's internal parts using x-ray, ultrasound and the like;
- take a swab from or search a person's orifices; and
- remove a thing from or take a sample of a thing in any orifice.

The authorised person also has power to:

- remove any article being worn by the person;
- search any articles that have been removed;
- search the person's external parts including the person's external private parts;
- photograph any article found during the procedure in the position it was found;
- do a non-intimate search; and
- do an intimate search.

76. Forensic procedures, purpose of

This clause limits the purposes for which a forensic procedure may be done under this Part to matters related to the search for a thing or evidence of a thing relevant to an offence. This limitation maintains the distinction between forensic procedures and 'identifying procedures' done under the *Criminal Investigation (Identifying People) Act 2002*.

If, as a result of a forensic procedure, a substance is obtained which could be used to obtain an identifying particular of the person it was taken from, the identifying particular may only be extracted if the authority to do so exists, or is obtained, under the *Criminal Investigation (Identifying People) Act 2002*.

77. How forensic procedures must be done

This clause requires that a forensic procedure must be done in accordance with Division 5.

Division 2 – Forensic procedures on volunteers

78. Interpretation

This clause contains a definition of the term "volunteer" as used in this division.

79. Volunteer for a forensic procedure to be informed

This clause requires an officer to inform a person who is willing to undergo a forensic procedure of the following:

- the purpose of the procedure;

- how the procedure will be carried out;
- that the information may be compared with or put into a database;
- that the procedure may provide evidence that could be used against the volunteer; and
- that the volunteer is not obliged to undergo the procedure and may withdraw consent at any time.

Where the volunteer is a child who has reached 10 years of age, both the child and a responsible person must be informed. Where the volunteer is a child who has not reached 10 years of age, only a responsible person must be informed.

80. When forensic procedure may be done on a volunteer

This clause provides that forensic procedures can only be done on volunteers where the volunteer and, where necessary, a responsible person have been informed in accordance with section 79 and have consented to the procedure. Where the volunteer is a child who has reached 10 years of age, both the child and a responsible person must consent. Where the volunteer is a child who has not reached 10 years of age, a responsible person must consent.

Division 3 - Forensic procedures on deceased people

81. Forensic procedures on deceased people

This clause empowers the State Coroner to authorise a forensic procedure on a deceased person, irrespective of whether it was a reportable death for the purposes of the *Coroners Act 1996*. The coroner's authorisation may be general in relation to all deceased persons. This clause is consistent with how 'identifying procedures' are authorised under the *Criminal Investigation (Identifying People) Act 2002*.

Division 4 – Forensic Procedures on victims and witnesses

This Division provides powers to conduct forensic procedures on victims and witnesses (involved persons).

82. Request to adult to undergo forensic procedures

This clause authorises an officer to request an involved person who is an adult and not a protected person to consent to a forensic procedure. The clause ensures that the person is advised of certain matters including the offence to which the request relates, the purpose permitted by the Act and that, if the person becomes a suspect, the evidence obtained may be used against the person in a Court. Where a person refuses to comply, clauses 87, 88 and 89 enable an officer to apply for a warrant compelling an involved person to submit to a forensic procedure.

83. Request for protected person to undergo forensic procedure

This clause authorises either an officer to request an involved person who is a protected person (child or incapable person) to consent to a forensic procedure. This clause ensures that a person responsible for the protected person and, where the protected person is a child who has reached 10 years of age, the protected person are advised of certain matters including the offence to which the request relates, the purpose permitted by the Act and that, if the involved

person becomes a suspect, the evidence obtained may be used against the person in a Court. Where a person refuses to comply, clauses 87, 88 and 89 enable an officer to apply for a warrant compelling an involved person to submit to a forensic procedure.

84. Request and giving of information to be recorded

This clause requires an officer to make a record of a request made under clauses 82 or 83 including the information given and the person's response.

85. Forensic procedure, when it may be done

This clause provides that a forensic procedure may be done on an involved person where the required consent is obtained. In the case of an involved person who is a child who has reached 10 years of age, both the child and the responsible person must consent. In the absence of both consents, a forensic procedure must not be done unless a FP warrant (involved person) has been issued by a magistrate under clause 89.

86. Consent may be withdrawn

This clause provides that a person who has consented to a procedure may withdraw that consent at any time before the procedure is completed. If a person withdraws consent, the procedure can only be carried out under an FP warrant issued under clause 89.

87. Officer may apply for FP warrant (involved person)

This clause authorises an officer to apply for a FP warrant to compel an involved person to undergo a forensic procedure for the purpose of searching for a thing or evidence of a thing that is relevant to a suspected offence. The clause provides an officer with the power to arrest and detain a person and take reasonable steps to ensure that evidence is not disturbed or lost while application for the FP warrant is made. An officer may apply for an FP warrant (involved person) regardless of whether an involved person has been requested to consent to the procedure.

88. FP Warrant (involved person), application for

This clause prescribes what must be contained within an application for an FP warrant (involved person). The application must include such things as the suspected offence to which the application relates and the grounds for that suspicion, the purpose of the procedure and whether it is a non-intimate, intimate or internal procedure that is sought to be conducted. If the warrant is wanted for an internal forensic procedure, the application must state what kind of procedure is proposed.

Where an application for an FP warrant is made without first requesting the person to consent, the officer must justify the reasons why a request was not made.

If an application relates to a child, the application must also contain information as to whether the applicant suspects that the child -

- is sufficiently mature to understand the general nature and effect of and the reason for, and the consequences of undergoing the procedure; and
- is willing to undergo the procedure.

and the grounds for suspecting those matters.

89. FP Warrant (involved person), issue and effect of

This clause provides:

- power to a magistrate to issue an FP warrant (involved person) upon being satisfied of the relevant matters mentioned in clause 88;
- a requirement that the Magistrate take into account such matters as the seriousness of the offence and, where the involved person is a protected person, the maturity of a child and the best interests of a protected person;
- for the minimum information that must be contained within the FP Warrant, including:
 - the name of the person and offence to which it relates;
 - what type of procedure it authorises, and the relevant thing that is sought to be obtained from the procedure; and
 - the name of the Magistrate who issues the FP Warrant.
- powers for an officer exercising the FP warrant to arrest and detain the person to which it relates and, if applicable, to do the procedure.

Division 5 – Forensic procedures on suspects

This Division provides powers to conduct forensic procedures on suspects.

90. Request for an adult to undergo forensic procedure

This clause authorises an officer to request a suspect who is an adult to consent to a forensic procedure. This clause requires the officer to advise the suspect of certain matters including the offence to which the request relates, the purpose of the forensic procedure, how the procedure will be done and that the evidence obtained may be used against the person in a Court. Where a person refuses to comply, clauses 95 to 99 enable an officer to apply for an approval or warrant compelling an involved person to submit to a forensic procedure.

91. Request for protected person to undergo forensic procedure

This clause authorises an officer to request a responsible person and, where the suspect is a child who has reached 10 years of age, the suspect to consent to a forensic procedure. This clause requires the officer to advise the person requested of certain matters including the offence to which the request relates, the purpose of the forensic procedure, how the procedure will be done, and that the evidence obtained may be used against the suspect in a Court. Where a person does not consent or withdraws, clauses 95 to 99 enable an officer to apply for an approval or warrant (as the case requires) compelling a suspect who is a protected person to submit to a forensic procedure.

92. Request and giving of information to be recorded

This clause requires an officer to make a record of a request made under clauses 90 or 91 that includes the information given and the person's response.

93. Forensic procedure, when it may be done

This clause provides that a forensic procedure may be done on an adult suspect who consents. In the case of a suspect who is a child who has reached 10 years of age, both the child and a responsible person must consent. In the case of an incapable person or a child who has not reached 10 years of age, a responsible person must consent. In the absence or withdrawal of consent, a forensic procedure must not be done unless a warrant is obtained under clauses 98 and 99.

For the purposes of this Bill, a suspect may be a child under the age of 10 even though a child of that age cannot be criminally responsible. This is so because police are obliged and entitled to investigate and solve offences even where the offender cannot be charged.

94. Consent may be withdrawn

This clause provides that a person who has consented to a procedure may withdraw that consent at any time before the procedure is completed. If a person withdraws consent, the procedure can only be done under an approval or warrant, as the case requires, provided in clauses 97 to 99.

95. Application for approval or FP warrant (suspect)

This clause authorises an officer to apply for an approval and a FP warrant (suspect) under clauses 96 and 98 respectively to compel a suspect to undergo a forensic procedure. The clause provides an officer with power to detain a person and ensure that evidence is not disturbed or lost while application for the FP warrant is made. Under this clause, an officer may apply for an FP warrant (suspect) regardless of whether a request has been made under clause 91 for consent to do a forensic procedure on a protected person.

96. Non-intimate forensic procedure on an adult, application for approval to do

This clause provides for an officer to apply to a senior officer for approval to do a non-intimate forensic procedure on an adult suspect. Under this clause, the application must also

contain certain information including the offence to which the person is suspected of committing and the grounds for such suspicion. This clause allows for an application to be made by remote communication but, where practicable, the application must be in writing.

97. Non-intimate search of adult, senior officer may approve

This clause provides power for a senior officer to approve the doing of a non-intimate forensic procedure on an adult suspect. To approve, the senior officer must be satisfied of the matters that must be provided under clause 96 and must take into account the seriousness of the offence. A senior officer must make a record of the suspect's name, the procedure that was approved, the date and time approval was given and the reasons for giving the approval.

An approval under this clause authorises a police officer to arrest and detain the suspect and to do the procedure.

98. FP warrant (suspect), application for

This clause prescribes what must be contained within an application for an FP warrant (suspect). The application must include such details as the offence which the person is suspected of committing, the purpose of the procedure and whether it is a non-intimate, intimate or internal procedure that is sought to be conducted.

An application for an FP warrant (suspect) may be made to a JP if the application is in respect of an adult but must be made to a Magistrate if the application is in respect to a protected person.

99. FP warrant (suspect), issue and effect of

This clause provides:

- power to a magistrate or JP, as the case requires, to issue an FP warrant (suspect) upon being satisfied of the relevant matters mentioned in clause 98;
- requirements that the Magistrate or JP consider the seriousness of the offence and whether doing the procedure is in the interests of justice;
- for the information that must be contained within the FP Warrant, including
 - the name of the person and offence to which it relates;
 - what type of procedure it authorises,
 - the relevant thing that is sought to be obtained from the procedure; and
 - the name of the Magistrate who issues the FP Warrant.
- powers for a police or public officer exercising the FP warrant to arrest and detain the person to which it relates and to do the procedure.

Division 6 – How forensic procedures must be done

100. General requirements

This clause provides the general requirements of how a forensic procedure must be carried out, including:

- the officer must identify himself and advise the person how the procedure will be done and if it is against the person's will, advise that it is an offence to obstruct the doing of the procedure;

- the procedure must be done as quickly as reasonably practicable and in the least intrusive manner;
- in the case of an intimate or internal procedure, a person must be afforded reasonable privacy and if clothing is removed, then no more clothing than is reasonably necessary must be removed;
- if clothing is seized as the result of any procedure, the officer must ensure that the person is left with adequate clothing and footwear, given the circumstances;
- a suspect must not be questioned about an offence while a procedure is being done, however this is not intended to prohibit an officer from asking questions in relation to things found; and
- if the forensic procedure is to be done on a protected person, the officer must arrange for a responsible person or another supportive person to be present.

This clause also clarifies an officer’s power to be able to authorise a suitably qualified person, as specified later in this part, to exercise any power to carry out a procedure.

101. Gender of people doing forensic procedures

This provision in some instances limits the gender of persons who can perform or be present at the various forensic procedures. Only persons of the same gender or a doctor, nurse etc can perform procedures of an intrusive nature. The following table illustrates the application of this clause:

Procedure	Gender that may perform procedure
Non-intimate forensic procedure	Person of either gender
Intimate forensic procedure	Doctor, Dentist or Nurse or other person of same gender
Intimate forensic procedure – Taking Blood	Qualified person of either gender
Internal forensic procedure	Doctor, Dentist or Nurse or other person of same gender
Other person present during intimate or internal forensic procedure	Where practicable it should be a person of the gender – however this does not include a person there as a support person for a protected person.

Where this part requires a person exercising a power to be of the same gender as the subject person, this clause provides for the officer authorised to exercise the power to authorise another person of that gender to exercise that power. This is subject to that other person being qualified to perform a particular procedure in accordance with clause 102.

102. Who may do a forensic procedure?

This clause provides in table form all types of forensic procedures and the type of person who is authorised to do the procedure.

103. Samples etc., how to be taken

This clause provides requirement on how certain samples should be taken, and it provides a power to make regulations to prescribe equipment to be used and to further regulate or prohibit certain methods and equipment for the taking of samples. Samples or impressions must be taken by the least painful method, and hair may be combed to locate a sample or thing, but where practicable, hair must not be uprooted.

Division 7 – Dealing with things found during a forensic procedure

104. Things found by chance during a forensic procedure

This clause codifies and expands the common law 'chance find' principle to enable an officer to seize things that were not the object of the original procedure but are suspected of being relevant to an offence. This provision enables things of this nature to be removed from the person and samples to be taken. The thing may subsequently be seized under clause 105

105. Things found may be seized etc.

This clause provides a power of seizure in relation to things found during forensic procedures, whether they are the object of the procedure or are removed as a chance find (clause 104). Whether or not an officer seizes the thing, a forensic examination may be done on it.

Division 8 – Admissibility of certain evidence

106. Evidence of refusal of consent etc

This clause ensures that a person who refuses to consent to a procedure is not prejudiced during proceedings for an offence because of that refusal. The clause prohibits evidence of a person's refusal to consent to be admissible in any proceedings except in proceedings for an offence committed during the procedure or in order to establish or rebut any allegation that the officer acted improperly.

107. Evidence of how procedure was done

This clause ensures that evidence relating to how a procedure was done is admissible in proceedings relating to the forensic procedure where it is alleged that unreasonable force was used or that the procedure was done in contravention of the Act.

Part 10 – Provisions about searches and forensic procedures on people

108. Interpretation

This clause defines 'body search' to mean a basic search or a strip search.

109. Body searches and forensic procedures may be repeated

This clause provides that an officer may request or require a person to undergo a body search or forensic procedure on more than one occasion.

110. People not obliged to do searches etc.

This clause provides that a person is not obliged to assist in or to conduct a forensic procedure or body search. Accordingly, if a person requested to conduct or assist with a procedure refuses, the person does not commit an offence.

111. Forensic information, use and destruction of

This clause provides that forensic material may be compared with information on a forensic database as defined by the *Criminal Investigation (Identifying People) Act 2002* or put in a database. The clause also prohibits the destruction of any information obtained under Part 8 or 9 except with the approval of the Commissioner of Police and creates an offence for doing so. There is a necessary implication that the Commissioner of Police has the power to destroy and approve the destruction of such information.

112. Legal protection for people carrying out searches etc

This clause provides legal protection against civil action for persons (other than police officers) exercising powers of search or conducting forensic procedures under Part 8 or 9. Police officers are given protection in the performance of their duties under section 137 of the *Police Act 1892*.

Part 11 – Interviewing suspects

This Part will replace Chapter LXA of the *Criminal Code* — ‘Videotaped interviews’. and therefore substantially mirrors the current provisions; however, there have been some minor alterations to the *Criminal Code* provisions to clarify and modernise the legislation. The term "audiovisual recording" replaces the term "videotape" as is used in the *Criminal Code*. Other minor changes are detailed in the following table showing comparisons between the old and new provisions:

<i>Criminal Investigation Bill</i>	<i>The Criminal Code</i>	<i>Comparison</i>
113 - Interpretation	570. - Interpretation	Drafting changes – no substantive change in effect.
114 – Interviews, conduct of	No like provision in the Code.	This clause is new to this Bill and has been inserted to clarify that interviews may be conducted by remote communications.
115 – Recorded interview to be made available to the suspect	570A. - Videotape of interview to be made available to the accused	Section 570A has been clarified to ensure that while a person is not entitled to a transcript; this does not prevent an authorised person from making a transcript of a recorded interview and supplying a copy to another person.
116 – Admission in serious case inadmissible unless recorded	570D. - Accused’s admissions in serious cases inadmissible unless videotaped	Section 570D(4)(c) has been changed so that the reference to "interview" is replaced with reference to "admissions" so that there will be a reasonable excuse for an absence of an audiovisual recording of an admission if the prosecution proves that the suspect

		did not consent to an audiovisual recording of the admission.
117 – Recording admitted as evidence, jury may play	570E. - Jury to be able to play videotape	No change.
118 – Recordings of interviews, possession etc, restricted	570B. - Possession etc. of videotapes of interviews restricted	Minor changes have been made to this section to allow for video records to be served by courier or picked up on behalf of the suspect, or the suspect's lawyer. It specifically makes reference to obligations under the <i>Criminal Procedure Act 2004</i> to ensure that a person who is required to be served with disclosure under that Act is exempt from this provision. Another minor change is to allow a recorded interview to be played for purposes connected with disciplinary proceedings under section 33K of the <i>Police Act 1892</i> . Another minor change is to clarify that courts and persons acting under the direction of a court are authorised persons.
119. - Recorded interview, broadcast prohibited	570C. - Broadcast of interviews prohibited	No change.
120. - Recordings, court may give directions as to supply etc.	570F. Court may give directions about videotapes	No change.
121. - Recordings to be retained by the police and CCC	570G. - Videotapes to be retained by police & 570GA. - Videotapes to be retained by the Corruption and Crime Commission	Drafting changes only.
122. – Recordings may be played for teaching purposes	570H. - Videotapes may be played for teaching purposes	Drafting changes only.

Part 12 – Arrest and related matters

Division 1 - Preliminary

123. Interpretation

This clause provides a definition for the term “unconditionally” to mean, in relation to the release of a person, released without being required to enter into, or without having entered into, a bail undertaking under the *Bail Act 1982*.

It also prescribes when a person, who is under arrest, ceases to be under arrest.

125. Proceedings by summons etc, not prevented

This clause provides that nothing in this Part prevents a person from being charged by way of a summons or prosecution notice without having first been arrested.

Division 2 – Arrest without an arrest warrant

125. Arrest warrant not required

This provides that the arrest powers under clause 126 may be exercised without an arrest warrant.

126. Arrest power for offences

This clause provides officers with a power of arrest in respect to all offences. The arrest power for less serious offences is limited to instances where an officer reasonably suspects that a failure to arrest would pose one of a number of prescribed risks. These risks include risks that:

- it will not be possible to obtain the person's name and details;
- the person will continue to commit the offence or some other offence;
- the person will endanger the safety of himself or herself or some other person; and
- the person will conceal or disturb evidence relevant to the offence.

Division 3 – Ancillary powers to making an arrest

127. Warrant not required

This provides that the powers provided to an officer under this Division may be exercised without obtaining a warrant.

128. Occupier’s rights if a place is entered

This clause provides that powers provided to an officer do not override the rights of the occupier provided by clause 30.

129. Powers exercisable on a search under this Division

This clause provides that the ancillary powers in clause 43 for use in the execution of a search warrant can also be used in conjunction with entry and search powers under this Division.

130. Places may be entered and vehicles may be stopped

This clause replaces powers contained in section 564 of *The Criminal Code* that enable police to enter a place to arrest a person who has committed an arrestable offence.

In this clause, the term "arrestable person" is defined to mean a person who can be arrested under the provisions of the Bill, or under other specified warrants, or the *Criminal Investigation (Extra-territorial Offences) Act 1987*.

Under this clause an officer may, for the purposes of arresting an arrestable person, enter a place or stop and enter a vehicle where the officer reasonably suspects the arrestable person to be. However, where a place consists of more than one dwelling (e.g. an apartment block), the officer may only enter and search places common to all the dwellings and the dwelling where the officer reasonable suspects the person to be. The power provided by this clause is restricted to a power to search for the person to be arrested. If, however, while searching for the person, an officer finds something relevant to an offence, the officer may seize the thing and, whether or not it is seized, may do a forensic examination of the thing.

131. Places and vehicles of certain arrested suspects may be searched for evidence

This clause prescribes the circumstance under which places and vehicles relating to an arrested suspect may be searched for evidence without the need of a search warrant. The term "serious offence" is defined to mean an offence punishable by 5 years imprisonment or more.

Subclause 2 provides that, following the arrest of a suspect for a serious offence, an officer may:

- enter and search the place in which the person was arrested or from which the person fled just prior to arrest; and
- stop, enter and search a vehicle that the person was in at the time of arrest or from which the person fled just prior to arrest, or which the person otherwise controls or manages.

Under that sub-clause, an officer may only search for things relevant to the serious offence for which the person is under arrest or for any victim of the serious offence.

Subclause 3 provides that, following the arrest of a suspect for a serious offence and subject to a senior officer's authorisation, an officer may enter and search any place the arrested person occupies, controls or manages. Under this part, an officer may search for anything relevant to the serious offence in relation to which the person is arrested or relevant to any other serious offence that is similar in nature or is connected with the serious offence. Similarly, an officer may also search for the victim of the serious offence or other similar or connected serious offences. An officer may also seize and forensically examine any other thing relevant to any other offence that the officer finds by chance in the course of the search.

The power to search may only be exercised where a senior officer gives a written authorisation.

The powers in this part cease when the person is released or charged with an offence, which ever happens first.

132. Escapees, additional powers to aid recapture

This clause provides a power to search for an escapee from lawful custody and to search for any thing relevant to the escapee's whereabouts and to offences committed in relation to the escape.

Division 4 – Searches of people in custody for security purposes

133. Certain people in custody may be searched

This clause provides officers with a power to conduct security searches of anyone in lawful custody except with respect to child welfare matters or to persons who fall under the *Court Security and Custodial Services Act 1999*. These exceptions have been inserted because there are already specific powers under the relevant legislation to conduct searches of persons in custody.

The purpose of a search under this clause is to locate a “security risk item” as defined by the section.

Consistent with Part 9 – ‘Forensic Procedures’, this clause has detailed requirements in relation to security risk items”. The following table details what authorisations are needed to remove certain security risk items and other chance find items where a search is done under this clause.

Circumstance	Action Authorised/Required of Officer
Security risk item not physically attached to a person's body	May remove without any further authorisation.
Security risk item physically attached to a person’s body, other than attached to the person's private parts.	May remove without further authorisation, but must comply with Part 9, Division 5 as if doing a non-intimate forensic procedure.
Security risk item physically attached to a person’s private parts.	Must obtain authorisation or consent to conduct an intimate forensic procedure under Part 9 and also comply with Part 9 Division 5 when doing the procedure.
Security risk item located in a person’s orifice, other than a person’s mouth.	Must obtain authorisation or consent to conduct an intimate forensic procedure under Part 9 and also comply with Part 9 Division 5 when doing the procedure.
Security risk item from a person's mouth, either attached or not attached physically.	May remove without any further authorisation.
A thing, other than a security risk item, relevant to an offence not physically attached to a person.	May remove and seize without further authorisation.
A thing, other than a security risk item,	Must obtain consent or authorisation under

relevant to an offence, and any other procedure that would amount to a forensic procedure under Part 9.	Part 9 and do in accordance with Part 9, Division 5.
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Any item removed under this clause that is a thing relevant to an offence may be seized and, whether or not it is seized, may be forensically examined.

Security risk items removed under this clause must be returned to the person upon release from custody unless they can otherwise be lawfully seized or they are unlawful to be possessed by the person.

Division 5 – Dealing with arrested people

134. Young Offenders Act 1994 not affected

This clause provides that clauses in this Division are in addition to and do not override provisions of the *Young Offender’s Act 1994*. This has been inserted to ensure that young offenders are afforded the rights and considerations that apply under the *Young Offender’s Act 1994*.

135. Arrested people, rights of

This clause prescribes the entitlements of any arrested person irrespective of the basis of the arrest. These include the rights

- to necessary medical treatment;
- to a reasonable degree of privacy from the mass media;
- to have the opportunity to communicate with a relative or friend; and
- to an interpreter or other qualified person where a person has difficulty understanding or is unable to communicate in spoken English.

136. Arrested suspects, rights of

This clause provides rights in addition to those in clause 136 that must be provided to arrested suspects. These are the rights

- to be informed of the offence for which they have been arrested or any other offence they are suspected of having committed;
- to be cautioned prior to being interviewed as a suspect for an offence;
- to have reasonable opportunity to communication with a lawyer;
- not to be interviewed until the services of an interpreter or other qualified person is available.

This clause provides an exception to the right to communicate with a person if the officer reasonably suspects that that communication will result in an accomplice taking steps to avoid being charged, in evidence being concealed, disturbed or fabricated, or in a person's safety being endangered.

For the purposes of this clause:

“**arrested suspect**” means a person who is under arrest having been arrested —

- (a) under section 126, under an arrest warrant or under another written law, on suspicion of having committed an offence; or
- (b) under the *Criminal Investigation (Extra-territorial Offences) Act 1987*.

137. Arrested suspects, detention of

This clause provides power for an officer, following arrest of a suspect, to detain the suspect for a reasonable time to enable the officer to:

- conduct a search of premises under clause 131, or a search of the person under clause 133;
- investigate any offence suspect of being committed by the arrested person;
- interview the suspect; and
- decide whether to charge the suspect with an offence.

This clause implements a recommendation of the *Royal Commission Into Whether There Has Been Corrupt Or Criminal Conduct By Any Western Australian Police Officer* at pp. 306-307 of Volume 2.

138. Arrested suspects, charging and releasing*

This clause prescribes the circumstances under which arrested subjects are to be released.

The following table illustrates an officer's options in relation to this clause;

Circumstance	Action that must be taken in relation to that person
Suspect not charged with an offence, whether or not they are cautioned or issued an infringement notice.	Must be released unconditionally.
Suspect charged with a simple offence.	Must be released unconditionally unless the officer considers it necessary for the person to attend Court or sub-clause 2 applies.
Suspect charged with an indictable offence that is not a serious offence (5 years or more imprisonment)	Must be released unconditionally unless the officer reasonably suspects that if the person was issued with a summons they would not comply with it or sub-clause 2 applies - see below.
Suspect is charged with a serious offence (5 years or more imprisonment)	May be detained further and granted bail, refused bailed and dealt with by a Court or dealt with under the <i>Mental Health Act</i> . This does not prevent an officer from issuing a summons for a serious offence.

In deciding whether to release a person unconditionally the officer must consider whether, if released, the suspect's safety would be endangered or the suspect would:

- commit another offence;
- continue or repeat the offence for which he or she is under arrest;
- endanger another person's safety or property; or

- interfere with witnesses or otherwise obstruct the course of justice, whether in relation to the accused or any other person.

In relation to all of the above, an officer may issue the offender with a move on notice under clause 27 before releasing them in accordance with this section.

139. Other arrested people, dealing with

This clause provides that where a person is arrested under a warrant or other process, the person must be dealt with in accordance with that warrant or process but may be dealt with under this Part in relation to another unrelated offence.

This provision would apply where the reason for arresting a person was an arrest warrant. If, after the arrest, the officer discovers grounds to arrest the person for an unrelated offence, the officer may detain the suspect in relation to the unrelated offence and consider matters under clause 141.

140. Reasonable period of detention, factors determining

This clause provides a list of considerations to be taken into account when determining a reasonable period of time under clause 138. Some of the factors that must be taken into consideration are:

- the number and complexity of the offences to be investigated;
- the time needed to interview relevant witnesses;
- the time needed to interview co-offenders;
- the time needed for a police officer to assess relevant material or to take any other steps to prepare to interview a suspect;
- time needed for the suspect to obtain medical treatment; and
- the time needed to conduct a forensic procedure, a search or an identifying procedure on the person.

141. Detention to be reviewed periodically

This clause applies to the detention of an arrested suspect but not to a person who is in custody on a warrant that requires the suspect to be kept in custody.

The clause requires a ‘detention review officer’ (DRO) to review the detention of an arrested suspect from time to time, but not more than six hours can elapse from the point of arrest to the next review or between reviews. The DRO must be of a rank of sergeant or higher and not involved in the relevant investigation. During the review, the DRO must consider whether the detention of the suspect is still justified under this Division or under any other written law. If the DRO considers that the continued detention is not justified then the DRO must cause the suspect to be released immediately.

It is the responsibility of the officer in charge of the investigation to ensure that appropriate reviews are conducted. Both the DRO and the Investigating Officer must make a record of the details of each review that has been carried out including the determination and the reasons for the determination.

A review can be conducted by remote communication.

Division 6 – Miscellaneous

142. Possession of warrant at time of arrest not necessary

This clause ensures that an officer can execute an arrest warrant without actually possessing the warrant so long as the officer reasonably suspects the warrant exists.

Part 13 – Seizing things and related matters

143. Application

This clause provides that this Part applies to any seizures made in accordance with this Act.

144. Things relevant to an offence, grounds for seizing

This clause applies where any provision of this Bill empowers an officer to seize something. This clause provides general preconditions for an officer to seize a thing relevant to an offence.

The officer must reasonably suspect that the thing relevant to the offence:

- is property that is stolen or unlawfully obtained;
- may be seized under another written law;
- is unlawful for the person to possess, either generally or at the particular time;
- is a thing that may be forfeited to the State; or
- is necessary to be seized in order to prevent it from being concealed, disturbed or lost to preserve its evidentiary value, to do a forensic examination, or to prevent it from being used in the commission of an offence.

145. Seizing things, ancillary powers

This clause provides police with a power to seize a thing that would not be practicable or convenient to move by the attaching of a notice on the thing. A person aggrieved by a notice can apply to a magistrate to have it removed.

146. Records relevant to an offence

This clause provides that where an officer may seize a record, the officer may instead reproduce the record and seize the reproduction. An officer may also copy or take extracts from a record that has already been seized.

This clause also provides that a person entitled to possess the record shall upon request be given a copy or, where practicable, be given the opportunity to take a copy of the seized record unless it would be an offence for the person to possess it. If the officer reasonably suspects that allowing the person to have access to the record may jeopardise the evidentiary value of the record, the officer is not obliged to provide such access.

147. Records, powers to facilitate seizing

This clause provides extra powers in relation to the seizing of records. Sub clause (1) provides a specific power to seize any equipment or device that may be required to gain access to, recover or reproduce the record that is relevant to the offence. This clause deems that any device or equipment needed to gain access to recover or reproduce the information is also a thing relevant to the offence to which the record is relevant and, subject to clause 145, may be seized.

Sub-clause (2) provides an officer exercising a power in clause 147(1) or (2) to seize and reproduce a record with a power to operate any device or equipment, whether seized or not, in order to gain access to, recover or reproduce a record. It also provides a power to order a person from whom a record may be seized or an employee or contractor of that person to provide any information reasonably necessary to enable the officer to seize or reproduce the record. The information may be a decryption code, for example. A failure to obey such an order would be an offence under clause 152. It is not intended that the making of an order would preclude in any way or at any time the application for, and making of, a data access order from a magistrate under Part 7.

148. Seized things, list to be supplied on request

This clause requires an officer who seizes things to provide a list of things seized to the person who had control or possession of the things or to the occupier of the place where the things were seized upon request. A general description may be provided if the things seized are so numerous to make the provision of a list impracticable.

149. Privileged material, procedure on seizure

This clause provides a procedure for dealing with seized articles that may be subject to legal professional privilege or public interest privilege. If a privilege is claimed by any person entitled to the record, or the officer seizing the record suspects that a privilege may apply, the officer must secure the record and apply to the Magistrates Court for a determination as to whether the information is privileged. The officer must deliver the record into the custody of the court. The officer and any person entitled to possession of the record may make submissions to the court. The court may have access to all of the record and may order:

- that the record be available to the officer if satisfied that the record is not privileged;
- that the record be available for collection by the person entitled to possession if the Court considers the entire record is privileged;
- that part of the record be made available to the officer, if only part is considered to be privileged; and
- to allow a forensic examination to be done on the record where it has been determined that some or all the record is privileged. An order of this nature must ensure that the privileged material remains privileged.

150. *Criminal and Found Property Disposal Act 2005* applies

This clause ensures that all property seized under this Bill is appropriately dealt with under the *Criminal and Found Property Disposal Act 2005*. This clause does not apply to forensic samples of anything taken under Part 9. Such samples may be destroyed at the discretion of the Commissioner of Police by virtue of clause 112.

Part 14 - Miscellaneous

151. Order by officer, offence not to obey

This clause creates an offence of failing to obey an order made by an officer under this Bill. Self-incrimination is not a defence to an order to provide information. The penalty for this offence is a fine of \$12,000 and imprisonment of 12 months.

152. Evidence obtained improperly

This clause provides that things relevant to an offence that have been seized or obtained in circumstances where a requirement of the Act was contravened are not admissible in criminal proceedings against a person in a court unless the person consents or a court decides otherwise under clause 153.

153. Inadmissible evidence, court may allow admission

This clause provides a power for a court to order that evidence that would otherwise be inadmissible may be admissible if the court decides that the desirability of including the evidence outweighs the undesirability of admitting the evidence. This power is based on a common law discretion.

In making this decision the court must take into account:

- any objection to the evidence being admitted by the person against whom the evidence may be given;
- the seriousness of the offence in respect of which the evidence is relevant;
- the seriousness of any contravention of this Act in obtaining the evidence;
- whether any contravention of this Act in obtaining the evidence —
 - was intentional or reckless; or
 - arose from an honest and reasonable mistake of fact;
- the probative value of the evidence;
- any other matter the court thinks fit.

154. Regulations

This clause empowers the Governor to make regulations that may be necessary to give effect to this Act.

155. Review of the Act

This clause requires the Minister to carry out a review of this Act as soon as is practicable after 5 years have expired since the Act's commencement. The clause further requires that a report on the review must be laid before each House of Parliament.