GOVERNMENT OF WESTERN AUSTRALIA

Statutory Review of the Criminal Investigation Act 2006

FINAL REPORT

June 2018
Dear Minister

Statutory Review of the Criminal Investigation Act 2006 (WA)


The Report sets out the activities undertaken by the Review Group and the Review Group's comments, views and recommendations in relation to the terms of reference.

Yours sincerely

Carol Conley
Chair

June 2018
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**Glossary**
The following abbreviations are used in the Final Report:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>Aboriginal Legal Service of Western Australia Inc</td>
<td>ALS</td>
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<tr>
<td>Animal Welfare Act 2002 (WA)</td>
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<td>Australian Law Reform Commission</td>
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<td>Authorised deposit-taking institution</td>
<td>ADI</td>
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<td>Conservation and Land Management Act 1984 (WA)</td>
<td>CALM Act</td>
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<td>CCM Act</td>
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<td>Director of Public Prosecutions (WA)</td>
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<td>SARC</td>
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<td>SCP</td>
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<td>SO Act (SA)</td>
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<td>SD Act</td>
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<td>Surveillance Devices Act 2007 (NSW)</td>
<td>SD Act (NSW)</td>
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<td>Telecommunications (Interception and Access) Act 1979 (Cth)</td>
<td>TI Act</td>
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<td>Terrorism (Extraordinary Powers) Act 2005 (WA)</td>
<td>TEP Act</td>
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<td>Water Services Act 2012 (WA)</td>
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Summary of Recommendations

**Recommendation 1**
The definition of the term "serious offence" in the CIA should not be standardised.

**Recommendation 2**
Section 10 of the CIA should not be amended to clarify the duty imposed by that section. However, the WA Police should introduce a policy that gives interpreters first preference, qualified persons second preference and other means third preference for the purposes of section 10 of the CIA.

**Recommendation 3**
Section 12 of the CIA should not be amended to require a delegation to be in writing or to require a written record to be made of a delegation.

**Recommendation 4**
Section 17 of the CIA should be amended to provide that if an animal being used by an officer under section 17 of the CIA is assaulted or obstructed, then the person who assaulted or obstructed the animal is deemed to have assaulted or obstructed the officer using the animal.

**Recommendation 5**
New offences relating to the killing, obstruction or assault of an animal being used by a public officer should not be dealt with by way of amendment to the CIA. However, the WA Police and other agencies using animals in the course of their duties should consider whether such offences should be inserted in the Criminal Code or the AW Act.

**Recommendation 6**
Provisions for the recovery of costs in relation to the treatment, care, rehabilitation, retraining or replacement of an animal that is wounded, injured or killed whilst being used in the exercise of powers under the CIA should not be included in the CIA. However, the WA Police and other agencies using animals in the course of their duties should consider whether such recovery provisions should be inserted in the Criminal Code or the AW Act or the Sentencing Act.

**Recommendation 7**
Provisions protecting public officers from civil and criminal liability in relation to the use of animals in the course of their duties should not be included in the CIA. However, the WA Police and other agencies using animals in the course of their duties should consider whether protection from liability provisions should be included in agency specific legislation (e.g. the Police Act).

**Recommendation 8**
Section 17 of the CIA should not be extended to the use of animals by public officers under other legislation.

**Recommendation 9**
No amendments are required to section 16 of the CIA in the context of the use of force to effect an arrest.

**Recommendation 10**
A provision should be inserted in Part 2 of the CIA to give officers the power to render a dangerous article safe or prevent it from being used (including by means of the destruction of that article) when exercising powers under the CIA.
Recommendation 11
A provision should be inserted in Part 2 of the CIA to facilitate the use of body worn cameras by officers.

Recommendation 12
The power to make a citizen’s arrest should remain in the CIA.

Recommendation 13
Section 27 of the CIA should be amended to give police officers the power to:
(a) order a person to remain in a place designated by the police officer, or
(b) order the person to accompany them to a police station or other place and remain in that place,
for the purpose of giving a move on order to that person.

Recommendation 14
Section 28 of the CIA should be moved to Part 12 of the CIA and limited to suspects voluntarily assisting officers.

Recommendation 15
Section 31 of the CIA should be amended to allow an officer to delay giving an occupier a copy of the search warrant in circumstances where the officer reasonably suspects that giving the person the copy may frustrate or otherwise hinder the investigation or another investigation. However, the officer may only delay for so long as he or she continues to have the reasonable suspicion. The latest time for compliance should be immediately after the search is complete.

Recommendation 16
The requirement in section 31(2)(e) of the CIA to give an occupier an opportunity to give informed consent to the place being entered should be repealed.

Recommendation 17
Division 2 of Part 5 of the CIA should not be amended to allow a police officer to enter a place to check on a person’s compliance with a curfew condition imposed under the Bail Act. However, consideration should be given to amending the Bail Act to facilitate compliance checking.

Recommendation 18
The WA Police and other agencies that may establish PFAs, should give further consideration to amending the definition of “serious offence” in section 40(1) of the CIA by:
(a) including an offence under section 5 of the Graffiti Vandalism Act; or
(b) lowering the statutory threshold of 5 years; or
(c) enabling the prescription of offences for the purposes of the definition.

Recommendation 19
A new standalone provision not connected to PFAs should be inserted in Part 5, Division 2 of the CIA that provides that if a police officer suspects on reasonable grounds that a public safety situation exists, then the officer may:
(a) set up a restricted access area (by cordons etc);
(b) order the movement of people, animals, vehicles etc in, into and out of and around the restricted access area;
(c) order the closure of buildings, roads, waterways etc to all persons, vehicles etc except to emergency responders and their vehicles or other authorised persons;
(d) order the evacuation of an area or areas;
(e) take, or order any person to take, reasonable measures that the officer considers necessary to protect the safety of any person or to prevent damage to property (eg disconnect electricity);
(f) take possession of (including in situ), move to a safe place, open and examine (including by x-ray), analyse and test an article, substance, gas or suspicious package and/or its contents to determine whether it poses a threat (in some cases this may include taking possession of a vehicle or other item in which the article or suspicious package is located);
(g) dismantle, destroy, render safe or otherwise dispose of the suspicious package and/or its contents.

A public safety situation occurs where:
(a) an act has been done, or a threat has been made to do an act, in or in relation to a public place; and
(b) the act, or the threat of action if carried out, causes or could cause one or more of the following: the death of, or serious harm to, one or more persons; endangerment to a person's life or the lives of more than one person; a serious risk to the health or safety of the public or a section of the public; or the destruction of, or serious damage to, property; and
(c) the act, or the threat of action if carried out, involves or would involve one or more of the following: the taking of a hostage or hostages; the hijacking of a vehicle; a siege situation; the use of explosives; the use of a chemical, biological, radiological, or other noxious substance; the spread of an infectious disease; the use of firearms or weapons or both firearms and weapons; the use of a vehicle or any other article as a weapon.

A public safety situation also occurs where a suspicious package has been located in a public place.

**Recommendation 20**
Section 42(4) of the CIA should be amended to remove the requirement for the JP to record the reasons for the refusal to issue a search warrant.

**Recommendation 21**
The power to issue search warrants should remain with JPs.

**Recommendation 22**
The WA Police should consider whether all search warrants should fall under the CIA or be standardised to comply with Division 3 of Part 5 of the CIA.

**Recommendation 23**
Section 44 of the CIA should be amended to enable officers to disable a device (such as an alarm or a surveillance device) or pacify any animal when it is reasonably necessary to do so for the purpose of entering or searching the place or vehicle.

**Recommendation 24**
Section 44 of the CIA should be amended to give an officer the power to order a person present at the place:
(a) to provide his or her personal details; and
(b) to remain in the place for a reasonable period for the purpose of the officer obtaining and verifying the personal details of that person.

**Recommendation 25**
The CIA should be amended to enable the covert search of a place or a vehicle under a covert search warrant.
Recommendation 26
Only authorised police officers and authorised CCC officers should be able to apply for a covert search warrant. The officers should be authorised by the Commissioner of Police or the Corruption and Crime Commissioner.

Recommendation 27
A covert search warrant should apply to all offences (other than terrorism offences). However, the applicant for a covert search warrant must justify why the warrant should be covert and the person before whom the application is made must take into account the nature and seriousness of the offence in deciding whether or not a covert search warrant should be issued.

Recommendation 28
A covert search warrant should only be issued by a Supreme Court Judge.

Recommendation 29
Applications for covert search warrant should be heard in private.

Recommendation 30
The prerequisites for the issue of a covert search warrant should be that the Supreme Court Judge is satisfied that there are reasonable grounds for believing that:

(a) evidence of an offence is at the place or vehicle, or is likely to be taken to the place or vehicle, within the next 10 days; and
(b) it is reasonably necessary for the entry and search of the place or vehicle to be conducted without the knowledge of the occupier of the place or the person in charge of the vehicle.

Recommendation 31
In deciding whether or not to issue a covert search warrant, a Supreme Court Judge should be required to take into account the following matters:

(a) the nature and seriousness of the offence in respect of which the warrant is sought;
(b) the extent to which issuing the warrant would assist in preventing, detecting or providing evidence of the commission of an offence;
(c) the extent to which the privacy of any person is likely to be affected by the execution of the covert search warrant;
(d) the extent to which evidence or information is likely to be obtained by methods of investigation not involving the use of a covert search warrant (conventional methods of investigation);
(e) the extent to which police officers investigating the matter have used or can use conventional methods of investigation;
(f) how much the use of conventional methods of investigation would be likely to help in the investigation of the matter;
(g) how much the use of conventional methods of investigation would prejudice the investigation of the matter;
(h) any other warrants sought or issued under the CIA, the SD Act or the TI Act in connection with the same matter and the benefits derived from those warrants.

Recommendation 32
A covert search warrant issued under the CIA should authorise the exercise of powers similar to those contained in section 27(7) and (8) of the TEP Act.
Recommendation 33
A covert search warrant should be able to be executed at any time of the day or night.

Recommendation 34
A covert search warrant should be in effect for a period of no more than 30 days after it is issued but officers should be able to return a thing to the place or vehicle, or retrieve a thing from the place or vehicle, after the 30 day period if required.

Recommendation 35
An audiovisual recording should be made of the execution of a covert search warrant but only if reasonably practicable.

Recommendation 36
It should be an offence to publish confidential information in relation to a covert search warrant except in accordance with the approval of the Supreme Court.

Recommendation 37
An occupier of a place or the person in charge of a vehicle should not be notified that the place or vehicle has been the subject of a covert search.

Recommendation 38
An officer should be required to provide a written report about the execution of a covert search warrant to the Supreme Court Judge who issued the warrant or, in his or her absence, the Chief Justice.

Recommendation 39
Any thing seized under a covert search warrant should, so far as is practicable and appropriate, be dealt with under Part 13 of the CIA (unless the thing is returned to the place or vehicle as permitted under the warrant).

Recommendation 40
Section 46(5) of the CIA should be repealed.

Recommendation 41
The CIA should not be amended to allow an officer not otherwise involved in the investigation to exercise the powers in section 47(2) of the CIA.

Recommendation 42
The CIA should not be amended to allow private contractors to exercise the functions contained in sections 46(2) and 47(2) of the CIA.

Recommendation 43
A new provision should be inserted into section 47 of the CIA that enables an officer to give an order to prohibit an unauthorised person from publishing a photograph or a recording of a PFA, or any person or thing in the PFA, if the publication could reasonably be expected to:

(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law; or
(b) prejudice an investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted; or
(c) enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered; or
(d) prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings; or
(e) endanger the life or physical safety of any person; or
(f) endanger the security of any property; or
(g) prejudice the maintenance or enforcement of a lawful measure for protecting public safety.

Recommendation 44
The definition of "business" in section 50 of the CIA should be amended to make it clear that the term includes:
(a) any government department, agency or instrumentality irrespective of whether or not they carry on a commercial undertaking; and
(b) a person who is the holder of an office established or continued for a public purpose by the State (for example, the Public Advocate, the Chief Psychiatrist).

Recommendation 45
Section 52 of the CIA should be amended to enable a police officer to issue an order to produce.

Recommendation 46
Police officers of or above the rank of sergeant should be permitted to issue orders to produce. However, a police officer must not issue an order to produce if he or she is, or was, involved in the investigation to which the order relates.

Recommendation 47
The offence contained in section 55(2) of the CIA should apply to the issue of an order to produce by a police officer.

Recommendation 48
No changes should be made to the requirement in section 53(2) of the CIA for the order to produce to contain the name of the JP who issued the order. Further, if police officers are to be able to issue orders to produce, then the order to produce should contain the name of the police officer who issued the order.

Recommendation 49
Part 7 of the CIA should be amended to enable a Magistrate to issue a data access order to officers to enable them to access data held in external storage whether or not:
(a) officers have possession of, or access to, a data storage device; and
(b) any data storage device is operable.

Recommendation 50
The penalty for non-compliance with a data access order should be increased to 10 years' imprisonment with a summary conviction penalty of 7 years' imprisonment.

Recommendation 51
The definition of "serious offence" in section 57 of the CIA should be deleted together with the references to "serious" in section 58(3)(b) and (h) of the CIA, so that a data access order may be obtained in relation to any offence.

Recommendation 52
Section 59 of the CIA should be amended:
(a) in section 59(1)(b), by requiring the Magistrate to be satisfied that the target person has knowledge relevant to gaining access to data or is able to access the data by provision of his or her biometric information; and
(b) in section 59(2)(d), to make it clear that information or assistance extends to biometric information or assistance including the provision of fingerprints, a retinal scan or voice activation.

**Recommendation 53**
The CIA should be amended to enable Magistrates to issue data access orders in anticipation of an applicant having lawful possession of, or lawful access to, the target device.

**Recommendation 54**
Section 59(2)(e) of the CIA should be amended to require the data access order to contain either a time within which the order must be obeyed, or a date on or before which the order must be obeyed.

**Recommendation 55**
Section 59(2)(d) of the CIA should be amended to require the person to whom the data access order is issued to provide information or assistance to the applicant, another officer nominated by the applicant, or a class of officers nominated by the applicant.

**Recommendation 56**
The WA Police and other agencies who may apply for data access orders should give further consideration to the inclusion of a new provision in the Criminal Code, which would make it an offence to destroy, damage, erase or alter data the subject of a data access order issued under the CIA.

**Recommendation 57**
Data access orders should continue to be issued by Magistrates.

**Recommendation 58**
Funding should be provided for duty Magistrates to deal with urgent applications for data access orders (and other matters under the CIA).

**Recommendation 59**
The requirements in section 70(2)(c) and (d) of the CIA to request the consent of the person to the search and to inform them that it is an offence to obstruct the searcher should be repealed.

**Recommendation 60**
Section 70 of the CIA should not be amended to require the searcher to inform the person of what the search will entail and request the person's cooperation.

**Recommendation 61**
Section 68 of the CIA should be amended:

(a) so that the section applies where an officer reasonably suspects that there is a thing relevant to an offence on a person's body (eg an injury, marking or substance); and

(b) to enable the officer to photograph, measure or otherwise make a record of the injury, marking or substance by way of forensic examination.

**Recommendation 62**
Section 65 of the CIA should be amended to:

(a) make it clear that a searcher may order the person to accompany the searcher to a place in the immediate vicinity where the basic search can be done; and
(b) give the searcher conducting a basic search or a strip search the power to photograph any thing on the person’s body (eg an injury, marking or substance).

**Recommendation 63**
The WA Police should undertake some preliminary scoping work to determine whether Part 9 of the CIA should be repealed and included in the CIIP Act.

**Recommendation 64**
Items 1 and 2 in each of the Tables in section 103 of the CIA should be deleted.

**Recommendation 65**
The reference to "guardian" in paragraph (d) of the definition of "responsible person" in relation to an incapable person in section 73 of the CIA should be amended to refer to the following guardians:
  (a) a plenary guardian;
  (b) a limited guardian but only if the limited guardianship includes the function of consenting to the person undergoing a forensic procedure; and
  (c) an enduring guardian who has the same functions as a plenary guardian or, if the functions of the enduring guardian are limited, the enduring power of guardianship includes the function of consenting to the person undergoing a forensic procedure.

**Recommendation 66**
The CIA should not be amended to deal with the issue of establishing capacity to consent to forensic procedures. However, WA Police Policy should provide direction on this issue.

**Recommendation 67**
The definition of "admission" in section 115(1) of the CIA should be amended to make it clear that it does not include:
  (a) an admission made by the suspect to a third party; or
  (b) an admission that the suspect makes when he or she is talking to himself or herself, which is overheard or observed by the police officer or CCC officer

**Recommendation 68**
No amendment should be made to the definition of "suspect" in section 115 of the CIA.

**Recommendation 69**
No amendment should be made to the definition of "reasonable excuse" in section 118(1) of the CIA.

**Recommendation 70**
No amendment should be made to the CIA to require the recording of interviews with persons other than suspects.

**Recommendation 71**
The CIA should not be amended to make special provision for the conduct of interviews with Aboriginal Persons or Torres Strait Islanders. However, the WA Police should conduct a trial of notifying the ALS whenever an Aboriginal person is detained in custody.

**Recommendation 72**
No provisions should be inserted in Part 11 of the CIA for interpreter certificates.
Recommendation 73
The CIA should not be amended to make provision for interview friends.

Recommendation 74
Section 118(3)(b)(ii) of the CIA should be deleted and replaced with the following: "the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence."

Recommendation 75
Section 124 of the CIA should be amended to enable an audiovisual recording of an interview to be played to a researcher for the purposes of research.

A researcher should be defined to mean a person who is:
(a) a police officer or a CCC officer carrying out research authorised by the Commissioner of Police or the Corruption and Crime Commissioner; or
(b) employed or engaged by the Police Force, the Police Department or the Corruption and Crime Commission to carry out research.

Recommendation 76
The CIA should not be amended to make provision for assessing a suspect's fitness for interview. However, WA Police Policy should provide direction on this issue.

Recommendation 77
The WA Police should give consideration to amending sections 128(1) of the CIA by:
(a) lowering the statutory threshold of 5 years in paragraph (a) of the definition of serious offence; or
(b) enabling the prescription of offences for the purposes of the definition of "serious offence".

Section 128(2) of the CIA should not be amended.

Section 128(3) of the CIA should be amended so that it reads:
A police officer or a public officer may arrest a person for an offence that is not a serious offence if:
(a) the officer reasonably suspects that the person has committed, is committing, or is just about to commit, the offence; and
(b) the officer:
   (i) has not been able to obtain or verify the person's name and other personal details; or
   (ii) reasonably suspects that if the person is not arrested:
        (a) the person will continue or repeat the offence; or
        (b) the person will commit another offence; or
        (c) the person will endanger another person's safety or property; or
        (d) the person will interfere with witnesses or otherwise obstruct the course of justice; or
        (e) the person will conceal or disturb a thing relevant to the offence; or
        (f) the person's safety will be endangered.

Recommendation 78
Section 128 of the CIA should not be amended to set out how an arrest is to be made.

Recommendation 79
The CIA should not be amended to make express provision for the discontinuance of an arrest.
Recommendation 80
Section 131 of the CIA should be amended to make it clear that when officers are exercising the ancillary powers in section 44:
(a) a reference in section 44 to a “target thing” should be interpreted as a reference to a “thing relevant to an offence”; and
(b) a reference in section 44 to a “target place” should be interpreted as a reference to the place the subject of a search under section 132, 133 or 134.

Recommendation 81
Section 131 of the CIA should be amended so that officers who are authorised under Division 3 of Part 12 to enter and search a vehicle may, for the purpose of doing so, exercise any of the ancillary powers in section 44.

Recommendation 82
Section 131 of the CIA should be amended to provide that an audiovisual recording may be made of the exercise of powers under sections 132, 133 and 134 of the CIA.

Recommendation 83
Section 131 of the CIA should not be amended to provide a power to search persons when exercising powers under sections 133 and 134.

Recommendation 84
The definition of “arrestable person” in section 132 of the CIA should be amended to include a person who may be arrested under section 54(2)(a) of the Bail Act.

Recommendation 85
The definition of “serious offence” in section 133(1) of the CIA should be amended to correspond with the definition of “serious offence” in section 128 of the CIA.

Recommendation 86
Section 133(2) of the CIA should be amended to enable a police officer or a public officer to enter and search any place or places from which the person fled immediately before being arrested.

Recommendation 87
The WA Police and other agencies whose officers exercise powers under the CIA should introduce a policy to oblige an investigating officer to inform a person whether or not they are a suspect where:
(a) the officer has requested the person to accompany the officer or another officer for the purposes of assisting in the investigation of the offence; and
(b) the person asks the officer whether or not he/she is a suspect or requests information about his or her status.

Recommendation 88
The CIA should be amended to provide that:
(a) a suspect who is not under arrest and who is requested to accompany the officer or another officer for the purposes of assisting in the investigation of an offence is to be notified of the following:
   (i) that he or she is not under arrest; and
   (ii) that he or she does not have to accompany the officer concerned; and
   (iii) that if he or she accompanies the officer concerned, he or she is free to leave at any time unless he or she is then under arrest.
(b) If the suspect referred to in paragraph (a) above accompanies the officer or another officer for the purposes of assisting in the investigation of an offence, then he or she is entitled to:
   (i) the rights in section 137(3)(a), (b), (c) and (d) and section 138(2)(b)-(d); and
   (ii) the right to be informed of any offences that he or she is suspected of having committed.
(c) The officer in charge of the investigation must:
   (i) inform the suspect of his or her rights under sections 137 and 138;
   (ii) afford the suspect his or her rights under sections 137(a), (b) and (d) and 138(b) and (d); and
   (iii) afford the suspect his or her rights under section 137(3)(c) and 138(2)(c) if so requested.

Recommendation 89
The CIA should not be amended to confer additional rights on suspects.

Recommendation 90
The CIA should not be amended to confer any rights on a person of interest.

Recommendation 91
The CIA should not be amended to separate rights into post-arrest and pre-interview rights.

Recommendation 92
The CIA should not be amended to provide for the arrest of a person voluntarily assisting police but who subsequently withdraws their assistance.

Recommendation 93
Section 138(2)(d) of the CIA should not be amended to clarify the right of an arrested suspect not to be interviewed until the services of an interpreter or other qualified person are available. Instead, the WA Police and other agencies exercising powers under the CIA should:
   (a) develop a method of assessing a person’s capacity to understand English via policy; and
   (b) ensure that officers receive additional training in relation to the application of the policy.

Recommendation 94
The CIA should not be amended at this point of time to require a caution in terms similar to the UK caution or the special caution in New South Wales.

Recommendation 95
Section 138(2) of the CIA should be amended to provide that if, during the course of an interview, the officer suspects that the suspect has committed another offence or offences and informs the suspect of the offence as required by section 138(2)(a) then it is sufficient compliance with section 138(2)(b) for the officer to inform the suspect that the caution given before the interview commenced now applies to the new suspected offence.

Recommendation 96
Section 138(3) of the CIA should be amended to make it clear that the officer in charge of the investigation must afford the suspect his or her rights under sections 137(3)(c) and 138(2)(c) if so requested.
Recommendation 97
Section 138(4) of the CIA should not be amended to set out any other circumstances in which an officer may refuse an arrested suspect his or her right to communicate or to attempt to communicate with a person.

Recommendation 98
The CIA should not be amended to require an officer to make an audiovisual recording of the giving of information to a person in relation to their rights and their responses (if any). However, the policies of WA Police and other agencies should be amended to require an officer at the commencement of the interview to confirm the status of the person being interviewed (i.e., suspect) and to confirm with the person being interviewed that they have been informed of their rights or, if they have not been so informed, to be given their rights.

Recommendation 99
Section 139(2)(a) of the CIA should be amended to enable a police officer or a public officer to detain an arrested suspect in custody after the suspect is arrested for the purposes of doing a search under the CIA or any other written law.

Recommendation 100
Section 140(4) of the CIA should be amended to permit a senior officer to authorise the detention of an arrested suspect for a further period of not more than 8 hours.

Recommendation 101
Section 140(6)(b) of the CIA should be amended to permit a Magistrate to authorise the detention of a suspect for a period up to 16 hours.

Recommendation 102
Section 141 of the CIA should be amended to include an additional factor to be taken into account under section 140, namely the special vulnerability of the arrested suspect due to age or physical or mental impairment.

Recommendation 103
Section 142 of the CIA should be amended to make it clear that, for the purposes of that section and compliance with section 6 of the Bail Act, an arrested suspect is charged with an offence when:
(a) the arrested suspect is notified by an officer that he or she is to be charged with one or more offences; and
(b) the officer makes a record of that notification.

Recommendation 104
Section 142(1) of the CIA should not be amended to include a definition of "obstruct the course of justice".

Recommendation 105
Section 141(2) of the CIA should not be amended to include any other circumstances in which not releasing a suspect unconditionally is justified.

Recommendation 106
Section 142(7) of the CIA should be amended to refer to section 157 of the Mental Health Act 2014 in addition to section 196 of the Mental Health Act 1996.

Recommendation 107
Section 142(8) of the CIA should be amended to refer to the time needed to:
(a) notify the arrested suspect that he or she is to be charged with one or more offences; and
(b) make a record of that notification.

**Recommendation 108**
The WA Police should consult with the Courts as to whether the CIA and the CP Act should be amended to enable compliance with the requirements of a warrant or process to be delayed to enable officers to deal with an arrested person under Part 12, whether or not they are an arrested suspect, provided that:

(a) the person has been:
   (i) arrested under the CIA, or another written law, on suspicion of having committed an offence and the officer subsequently becomes aware that there is a process or warrant requiring the person's arrest; or
   (ii) the person has been arrested under any process or warrant and, at the time of the person's arrest, the officer could also have arrested the person under section 128 of the CIA, or another written law, on suspicion of having committed an offence; and
   (b) the offence that the person is reasonably suspected to have committed is unrelated to the process or warrant; and
   (c) the process or warrant permits compliance with the warrant to be delayed.

**Recommendation 109**
Section 151 of the CIA should be amended to enable an officer to apply to a court for the extension of a limitation period for the commencement of a prosecution for an offence, either prior to or after the expiration of the limitation period, in circumstances where a claim for privilege has been, or is to be, determined under the CIA.

**Recommendation 110**
Section 151 of the CIA should be amended to:

(a) require claims for LPP and PIP to be dealt with in accordance with the process prescribed in Regulations made under the CIA; and
(b) make it clear that nothing done in compliance with the prescribed process constitutes a waiver of privilege.

Further, Regulations setting out the process for the determination of claims should be developed in consultation with the Court(s).

**Recommendation 111**
Section 151 of the CIA should be amended so that it applies not only where records are seized but in the following circumstance:

(a) where a search warrant has been issued, a statutory search power is being exercised or a notice to produce has been issued; and
(b) a claim for privilege is made by a person prior to any seizure being made or prior to the record being produced.

**Recommendation 112**
Section 151 of the CIA should be amended to either require claims for privilege to be determined by a Supreme Court Judge or give Magistrates the power to refer a claim for privilege to the Supreme Court.

**Recommendation 113**
Section 151 of the CIA should be amended to:

(a) require claims for LPP and PIP in respect of electronic records to be dealt with in accordance with the process prescribed in Regulations made under the CIA; and
(b) give the Court the express power to make orders to facilitate the determination of the claim to privilege including the appointment of an expert to assist the Court;
(c) give the Court the power to order the party claiming privilege to pay for the costs of any expert appointed to assist the Court; and 
(d) make it clear that nothing done in compliance with the prescribed process constitutes a waiver of privilege.

Further, regulations setting out the process for the determination of claims in respect of electronic records should be based on the proposal in the Issues Paper and should be developed in consultation with the Supreme Court.

**Recommendation 114**
No amendments should be made to section 152 of the CIA to allow the CEO of a prescribed agency to determine a claim to property or refer a question of law to a Court. However, WA Police should give further consideration to the proposals to amend the CFPD Act as part of a review of the CFPD Act.

**Recommendation 115**
Sections 154 and 155 should be amended to state that they do not apply to confessional evidence. Instead the common law discretions should apply.

**Recommendation 116**
A provision should be inserted into the CIA that:
(a) defines the terms "serious offence" and “confidential information" as follows:
   (i) a "serious offence" means an offence the statutory penalty for which is or includes imprisonment for 5 years or more or life; and
   (ii) "confidential information" means information the disclosure of which is not permitted due to a duty of confidentiality arising at law, in equity or by virtue of professional obligations; and
(b) permits a person to disclose confidential information to a police officer whether or not the information has been requested by the police officer where:
   (i) the information relates to an act or omission that constitutes a serious offence that the person making the disclosure reasonably suspects has been, is being, or is about to be, committed;
   (ii) the information relates to an act or omission that involves, or is likely to involve: a risk of injury to, or prejudice to the safety of, one or more persons or the public generally; or a risk of damage to, or destruction of, property;
   (iii) the information relates to an investigation into the death of a person or the identification of a deceased person;
   (iv) the information relates to an investigation into the whereabouts of a person reported as missing, lost or in distress;
   (v) the information relates to an investigation into the identification of, a person who has been found but not identified;
   (vi) the information is about the medical condition of, and injuries sustained by, a person injured in an incident involving a vehicle; or
   (vii) the information is about a person who is seeking or has sought medical assistance for an injury which is suspected to have been inflicted as a result of the use of a firearm, a controlled weapon or a prohibited weapon.
(c) requires a health professional to disclose health information about a person ("the detainee") to an authorised person (eg police officer, police auxiliary officer, or health professional employed or engaged by the WA Police) where such information is requested by the authorised person to assist in managing the care of the detainee whilst the detainee is in the custody of the WA Police or another agency;
(d) provides that the provision does not limit the provision of information to the WA Police under any other law.

**Recommendation 117**
The provision of confidential information should extend to information in any form. However, whilst a person may disclose the existence of a sample (eg blood) taken from a person, the provision should not extend to the provision of the sample itself.

**Recommendation 118**
A provision should be inserted in the CIA that restricts the use, recording and disclosure of confidential information provided to a police officer for specified purposes such as:

(a) use, recording and disclosure for the purposes of the investigation of any suspected offence;

(b) use, recording and disclosure for the purposes of preventing the commission of a suspected offence;

(c) use, recording and disclosure for the purposes of an investigation into any person who has been reported missing, lost or in distress;

(d) use, recording and disclosure for the purposes of an investigation into the identification of a person who has been found but not identified;

(e) use, recording and disclosure for the purposes of an investigation into the death of any person;

(f) use, recording and disclosure for the purposes of the conduct of proceedings against any person, including proceedings for the prosecution of an offence;

(g) use, recording and disclosure for the purposes of providing the information to another law enforcement agency; a Coroner; the CCC;

(h) use, recording and disclosure for the management of a person in the lawful custody of the WA Police or another person or another agency;

(i) use, recording and disclosure otherwise within the course of duty of the police officer; and

(j) use, recording and disclosure authorised by the Commissioner of Police.

**Recommendation 119**
A provision should be inserted in the CIA that protects a person who discloses confidential information to the police. In particular:

(a) no civil or criminal liability is incurred in respect of the disclosure; and

(b) the disclosure is not to be regarded as —

(i) a breach of any duty of confidentiality or secrecy imposed by law; or

(ii) a breach of professional ethics or standards or any principles of conduct applicable to a person’s employment; or

(iii) unprofessional conduct.

A similar provision should be inserted in the CIA that protects a police officer who uses, records or discloses confidential information provided to him or her by another person.

**Recommendation 120**
The WA Police should consider whether powers for dealing with unlawful assemblies and riots should be modernised and included in the CIA.

**Recommendation 121**
The WA Police should give consideration to amending the CIA to clarify the circumstances in which police officers may enter private property in circumstances where they are conducting "stand by" tasks.
Recommendation 122
The CIA should not be amended to:
  (a) codify the powers of police officers to deal with emergencies;
  (b) include additional powers for police officers to deal with emergencies; or
  (c) include a statement about the role of the Police Force with respect to the
      protection of life and property or additional powers for dealing with
      emergencies.

Recommendation 123
The CIA should not be amended to make provision for compensation for damage
caused by the use of unreasonable force during a search.

Recommendation 124
The CIA should not be amended to make provision for compensation for the
unnecessary dismantling of, damage to, or destruction of, a thing as a result of a
forensic examination.

Recommendation 125
The CIA should not be amended to provide for the provision of alternative
accommodation for persons affected by the establishment of a PFA or the execution
of a search warrant.

Recommendation 126
Regulation 9 of the CI Regulations should be repealed or, in the alternative,
 amended to refer to sections 44, 47, 97, 133 of the CCM Act.
Introduction

The enactment of the CIA

1. The CIA is "[a]n Act to provide powers for the investigation and prevention of offences and for related matters."  

2. The CIA amalgamates police powers that were previously contained in the Police Act and the Criminal Code and is the primary source of police investigative powers in Western Australia. However, it is important to note that the CIA does not codify all of the powers of police officers. For example, police powers are also contained in the CIIP Act, the Criminal Investigation (Covert Powers) Act 2012 (WA), the Criminal Code, the MDA, the Firearms Act, the SD Act, the TEP Act and the Terrorism (Preventative Detention) Act 2006 (WA).

3. The CIA came into operation on 1 July 2007.

The amendment of the CIA

4. The CIA has been amended on 17 occasions since its enactment. The most significant amendments to the CIA were made by the following Acts: the Criminal Investigation Amendment Act 2011 (WA); the Criminal Law Amendment (Out-of-Control Gatherings) Act 2012 (WA); and the Criminal Investigation Amendment Act 2014 (WA).  

5. The Criminal Investigation Amendment Act 2011 amended section 103 of the CIA to enable specified qualified persons to undertake certain internal forensic procedures.

6. The Criminal Law Amendment (Out-of-Control Gatherings) Act 2012 conferred new powers on police officers to respond to out-of-control gatherings. The powers cannot be used without the authorisation of a senior officer. The investigative powers complement new offences relating to out-of-control gatherings which were inserted into the Criminal Code and the CIA.

7. The Criminal Investigation Amendment Act 2014 removed the requirement in section 139(3) of the CIA for an arrested suspect to be “detained in the company of a police officer and not in a lock-up or other place of confinement, unless the circumstances make it impractical to do so”.

The requirement for a statutory review

8. Section 157 of the CIA requires that the Act be reviewed “as soon as is practicable after the expiry of 5 years from its commencement". The Minister is

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1 Long Title to the CIA.
2 *Wright v The State of Western Australia* [2010] WASCA 199 at [118]-[119] (Blaxell J).
3 *Johnson v Staskos* [2015] WASCA 32 at [120] (Mazza JA).
4 Operational May 2011.
5 Operational December 2012
6 Operational January 2015.
7 See sections 38A-38B of the CIA.
8 See sections 75A and 75B of the Criminal Code.
9 See section 38C of the CIA.
to prepare a report based on the review and lay that report before both houses of Parliament as soon as is practicable after the report is prepared.

9. In May 2015, Ms Carol Conley of the State Solicitor’s Office was appointed to chair a Review Group for the purposes of the statutory review. The other Review Group members from the WA Police were:
   i. Detective Superintendent Anthony Lee (State Intelligence);
   ii. Detective Senior Sergeant Jamie Brennan (Regional WA Crime Coordinator, Crime & Operations Coordination Division);
   iii. Senior Sergeant Peter Sawyer (Manager, Emergency Preparedness);
   iv. Detective Sergeant Steve Carter (Investigation Manager, Midland Police Station);
   v. Sergeant Saskia Yates (Capability Coordinator, Counter Terrorism & Emergency Response); and
   vi. Mr Matthew Samson (Principal Legislative Project Manager, Legislative Services).

10. The project plan for the statutory review is set out in Appendix 1.

The Issues Paper

11. In 2015 and 2016 an Issues Paper was prepared following wide consultation within the WA Police, an examination of case law in Western Australia and an examination of legislation in other Australian jurisdictions.

12. In January 2017 the Issues Paper was made available for viewing on the WA Police website at www.police.wa.gov.au/ciareview. A notice seeking submissions from stakeholders and members of the general public was included on the website and is set out in Appendix 2. The closing date for submissions was 30 March 2017.

13. Submissions on the Issues Paper were sought directly from the 33 stakeholders listed in Appendix 3.

Submissions

14. The Review Group received a number of submissions in response to the Issues Paper. Submissions were received from the persons and entities listed in Appendix 4.

15. In some cases, the date for the making of submissions was extended. The last submission was received on 6 March 2018.

16. It is obvious that much time and thought went into the drafting of the submissions for the review of the CIA. The Review Group found the submissions to be very helpful and appreciates the assistance given by the persons who made the submissions.

17. Some of the submissions are referred to in the Final Report with the permission of the person making the submission.
Review Group meetings

18. The members of the Review Group met on several occasions to discuss the submissions received in response to the Issues Paper and to consider what recommendations should be made for the purposes of the statutory review.

The Final Report

19. The Final Report deals with the issues raised in the Issues Paper and additional issues which were raised during the course of the Review. The Table in Appendix 5 contains a list of issues by number and a reference to the relevant recommendation in the Final Report.


21. The Review Group notes that the CIA is complemented by policies, procedures, practices and training for all officers at the WA Police Academy.

22. In preparing the Final Report, the Review Group was mindful of the need to strike a balance between the needs of officers who are tasked with investigating crime and the rights of those persons who may be affected by the exercise of the powers in the CIA.

23. The Review Group was also mindful that some problems with the operation and effectiveness of the CIA may be overcome by changes in policy, procedures and practices and by additional training rather than legislative amendment.

24. The Review Group has concluded that overall the CIA is operating well and is effective. However, some amendments should be made to the CIA and the CI Regulations to improve the operation and effectiveness of the legislation. Further, some matters should be dealt with by way of changes to policy.

Acknowledgments

25. The Review Group would like to acknowledge the invaluable assistance of Ms Tatijana Vukic and Senior Sergeant Alan Jayne.

26. The Review Group would like to thank everyone who contributed to the drafting of the Issues Paper and everyone who made a submission on the issues raised in the Issues Paper.
Part 1: Preliminary

27. Part 1 of the CIA contains a number of miscellaneous provisions.

28. The following issues have arisen in relation to the operation and effectiveness of Part 1 of the CIA:
   (a) whether there needs to be one definition of "serious offence" that applies throughout the CIA;
   (b) the relationship of the CIA with the common law;
   (c) the authorisation of public officers to exercise powers under the CIA;
   (d) whether the duty in section 10 of the CIA requires amendment; and
   (e) whether delegations made under the CIA should be in writing.

Definition of serious offence

29. The term "serious offence" is defined in sections 40(1), 57, 128(1), 133(1) and 142(1) of the CIA. The term is also used in the CIIP Act.

30. Appendix 6 lists the offences in the Criminal Code that are not "serious offences" for the purposes of sections 40(1), 57, 128(1), 133(1) and 142(1) of the CIA.

31. The different definitions of "serious offence" in the CIA itself, but also other legislation such as the CIIP Act, may lead to confusion amongst officers as to when a particular power may be exercised.

32. Issue 1 in the Issues Paper was whether there should be only one definition of "serious offence" throughout the CIA.11

33. Issue 2 in the Issues Paper was whether the definition of "serious offence" should be made consistent with the definition of that term in the CIIPA.12

34. Issue 3 in the Issues Paper was whether the term "serious offence" in section 128 of the CIA should be changed to "arrestable offence".13

35. Issues 1-3 are dealt with together.

36. The CCC submitted that it was not necessary to standardise the definition of "serious offence" within the CIA because "[d]oing so might cause confusion as the definition adopts a different meaning depending on which part of the CIA it pertains to".14

37. The DPP was of the view that a definition of "serious offence" in the CIA should be consistent with the definition of "serious offence" in the YO Act and the TI Act and that the term should be considered in light of other definitions in the RO Act, the Sentence Administration Act 2003 (WA) and the Evidence Act.15 The DPP submitted that the current definition excludes certain attempted versions of offences and that consideration should be given to including specific indictable offences under the Criminal Code within the definition (for example,

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11 Issues Paper at p.22.
12 Issues Paper at p.22.
13 Issues Paper at p.22.
15 DPP submission dated 27 March 2017.
deceiving a witness contrary to section 131 of the Criminal Code).\textsuperscript{16} The DPP also submitted that there is merit in retaining different definitions of "serious offence" in the CIA and the CIIP Act.\textsuperscript{17} Finally, the DPP did not support changing the term "serious offence" in section 128 to "arrestable offence".\textsuperscript{18}

38. PathWest submitted that the definition of "serious offence" in the CIA "should be brought into line with that in the CIIP Act: ie reduced from "5 years or more" to "12 months or more"\textsuperscript{19}

39. The Review Group is of the view that the current definition of "serious offence" in each of sections 40(1), 57, 128(1), 133(1) and 142(1)\textsuperscript{20} of the CIA focusses on the seriousness of the offence by the imposition of an arbitrary threshold of imprisonment for 5 years.

40. However, the Review Group is of the view that this approach may not always be appropriate and that, in some cases, the focus should be on how useful the particular provision is, or would be, in relation to the investigation of a specific offence or class of offences.

41. The problem is highlighted by the fact that the definition of "serious offence" in section 128(1) of the CIA has had to be amended on more than one occasion to accommodate specific offences and a class of offences that did not meet the threshold of imprisonment for 5 years but were considered sufficiently serious to warrant the application of the power of arrest contained in section 128(2) of the CIA.

42. The Review Group does not support any changes to the definition of "serious offence" that would make the definition the same throughout the CIA. This is for the following reasons:

(a) the term "serious offence" has various meanings depending on which part of the CIA is under consideration. It would be difficult to standardise the definition without undermining the way in which the various parts of the CIA are intended to operate;

(b) any changes to the definitions of "serious offence" in the CIA would lead to greater confusion given that the CIA has been in operation for over a decade; and

(c) the Review Group has made separate recommendations relating to the definition of "serious offence" in specific sections of the CIA.\textsuperscript{21}

43. The Review Group does not support changing the definition of "serious offence" in section 128 to "arrestable offence" for the reasons outlined in Part 12 below.

\begin{center}
\textbf{Recommendation 1}
\end{center}
The definition of the term "serious offence" in the CIA should not be standardised.

\textsuperscript{16} DPP submission dated 27 March 2017.
\textsuperscript{17} DPP submission dated 27 March 2017.
\textsuperscript{18} DPP submission dated 27 March 2017.
\textsuperscript{19} PathWest submission dated 24 March 2017.
\textsuperscript{20} It is noted that a serious offence for the purposes of section 142 of the CIA must also be an indictable offence.
\textsuperscript{21} See recommendations 18, 51, 77 and 85.
Relationship of the CIA with the common law

44. Section 7(1) of the CIA gives police officers the powers, duties or responsibilities of a constable under the common law. However, if the CIA confers a power, duty or responsibility that the officer also has at common law, then that the power, duty or responsibility must be performed in accordance with the CIA.22 Further, the CIA prevails to the extent of any inconsistency between a provision of the CIA and a power, duty or responsibility that the police officer has at common law.23

45. Section 7 of the CIA was applied by the Court of Appeal in Johnson v Staskos.24 In that case, the question arose as to whether the common law rule, which requires that a person arrested be informed of the reasons for the arrest, still applies in Western Australia. The Court of Appeal held that the common law rule did not apply in this State having regard to the requirements relating to arrest contained in sections 128 and 138 of the CIA.25

46. The Review Group is of the view that this case illustrates the effectiveness of section 7 of the CIA in the resolution of inconsistency between the CIA and the common law.

Authorisation of public officers to exercise powers

47. The powers in the CIA may be exercised by police officers, public officers or officers (both police officers and public officers). For example, police officers are the only persons who may issue move-on orders.26 However, both police officers and public officers may apply for a search warrant.27

48. Public officers are those officers appointed under a written law to an office that is prescribed under section 9.28

49. Pursuant to section 9 of the CIA, another Act or the CI Regulations may prescribe:
   (a) an office to which people are appointed under a written law for a purpose and the functions of which are or include investigating or prosecuting offences; and
   (b) some or all of the powers in the CIA that a holder of that office may exercise, being powers that may be exercised by a public officer under the CIA.

50. The effect of section 9 of the CIA is that public officers may be authorised to exercise powers under the CIA without any amendment to either the CIA or the CI Regulations.

51. The following Table sets out the extent to which officers of other agencies may exercise powers under the CIA as public officers (including where legislation is yet to come into operation).

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22 Section 7(2) of the CIA.
23 Section 7(3) of the CIA.
25 Johnson v Staskos [2015] WASCA 32 at [7]-[17] (McLure P); at [32] (Buss JA); and [99]-[128] (Mazza JA).
26 Section 27(1) of the CIA.
27 Section 41(1) of the CIA.
28 See the definition of “public officer” in section 3(1) of the CIA.
<table>
<thead>
<tr>
<th>Agency</th>
<th>Office prescribed</th>
<th>Powers in CIA which may be exercised by officer</th>
<th>Year when provisions became operative</th>
</tr>
</thead>
<tbody>
<tr>
<td>CCC</td>
<td>Authorised officer, namely the Commissioner and an officer of the Commission appointed under section 184(2)&lt;sup&gt;29&lt;/sup&gt;</td>
<td>Authorised officers may exercise all of the powers of a public officer in the CIA&lt;sup&gt;30&lt;/sup&gt; An authorised officer may also exercise the powers of a police officer in section 40 of the CIA&lt;sup&gt;31&lt;/sup&gt;</td>
<td>2007</td>
</tr>
<tr>
<td>Department of Water and Environmental Regulation</td>
<td>Inspector under the Water Services Act&lt;sup&gt;32&lt;/sup&gt;</td>
<td>An Inspector may exercise the powers contained in Parts 6 and 13 of the CIA&lt;sup&gt;33&lt;/sup&gt; (obtaining business records and seizing things)</td>
<td>2012</td>
</tr>
<tr>
<td>Department of Biodiversity, Conservation and Attractions</td>
<td>Wildlife officer appointed under section 45(1)(a)&lt;sup&gt;34&lt;/sup&gt;</td>
<td>Wildlife officer may exercise: (a) the powers in Part 2 of the CIA (ancillary powers) other than the power in section 44(2)(g)(iv) to do a strip search of a person; (b) the powers in Part 6 of the CIA (obtaining business records); (c) the powers in Part 8 of the CIA to the extent that they authorise, or apply in relation to, the doing of a basic search of a person (searching people); (d) the powers in Part 9 of the CIA (forensic procedures) to the extent that they authorise, or apply in relation to, the doing of a non-intimate forensic procedure on a person;</td>
<td>Not operational as at 10 May 2018</td>
</tr>
</tbody>
</table>

<sup>29</sup> See section 184(3)(a) of the CCM Act.<br><sup>30</sup> See section 184(3)(b) of the CCM Act.<br><sup>31</sup> See section 184(3a) of the CCM Act.<br><sup>32</sup> See section 41(2)(a) of the Water Services Act.<br><sup>33</sup> See section 41(2)(a) of the Water Services Act.<br><sup>34</sup> Section 125(2)(a) of the CALM Act as inserted by the Biodiversity Conservation Act 2016 (to be proclaimed).
52. As can be seen from the above Table:

(a) only authorised officers of the CCC may exercise all of the powers of a public officer in the CIA;
(b) an inspector under the Water Services Act may exercise limited powers in the CIA; and
(c) a wildlife officer will be able to exercise some powers under the CIA but only when the amendments to the CALM Act come into force.

53. The Review Group notes that whilst there are a large number of agencies that have investigative functions, very few of their officers have been prescribed as public officers for the purposes of exercising powers under the CIA. This is likely due to the fact that many of these agencies have investigative powers conferred by legislation other than the CIA.

54. The Review Group is of the view that the prescription of officers and powers for the purposes of section 9 of the CIA has proceeded in a very conservative manner since the CIA came into operation.

Informing people who do not understand English

55. Section 10 of the CIA sets out the circumstances in which an officer must use an interpreter, qualified person or other means to inform a person about matters under the CIA.

56. Issue 85 was whether section 10 of the CIA should be amended to clarify the duty imposed on officers to use interpreters, qualified persons or other means to inform a person of their rights.

57. The ALS submitted that section 10 of the CIA “should be amended to ensure that police first consider the use of an interpreter or other qualified person and only if it is not reasonably practical to obtain the services of an interpreter or other qualified person within a reasonable period, can ‘other means’ be used.”

58. The Commissioner for Children and Young People supported an amendment “to clarify the duty to use interpreters … particularly with respect to Aboriginal children and young people.”

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35 Section 125(2)(b) of the CALM Act as amended by the Biodiversity Conservation Act 2016 (WA) (to be proclaimed).
38 ALS submission dated 29 March 2017.
59. The CCC submitted that the CIA does not require amendment in relation to the use of interpreters and that the provisions are clear and provide the "ultimate protection to suspects".40

60. The DPP submitted that the duty imposed on police officers "is clearly stated" in section 10 and that issues that arise in relation to section 10 "relate to training rather than lack of clarity in the CIA of the duty" and, to this extent, section 10 does not require amendment.41

61. SARC submitted that section 10 of the CIA "should be amended to clarify the duty imposed on officers to use interpreters, qualified persons or other means to inform a person of their rights."42

62. The Review Group is of the view that section 10 must be considered in the context of the rights conferred on arrested persons because adherence to these rights underscores the duty imposed by section 10 of the CIA. In particular, the right conferred on an arrested person by section 137(3)(d) of the CIA43 and the right conferred on an arrested suspect by section 138(2)(d) of the CIA.44

63. The Review Group is of the view that section 10 of the CIA is sufficiently clear with respect to the obligation of an officer to use an interpreter or other qualified person or other means to inform a person about matters which the CIA requires them to be informed about.

64. However, the Review Group is of the view that the WA Police should introduce a policy to make it clear that officers should ensure that interpreters have first preference, qualified persons second preference, and other means third preference when it comes to informing a person of matters under the CIA.

65. The Review Group notes that WA Police Policy IT-01.00 Interpreters and Translators—Use of (Professionals) applies to the engagement of professional interpreters and translators.

**Recommendation 2**

Section 10 of the CIA should not be amended to clarify the duty imposed by that section. However, the WA Police should introduce a policy that gives interpreters first preference, qualified persons second preference and other means third preference for the purposes of section 10 of the CIA.

**Written delegations**45

66. Section 12(1) of the CIA makes provision for an officer to delegate the performance of a function under the CIA, other than the power of delegation, to another officer.

67. There is no requirement in the CIA for the delegation to be made by way of written instrument or for a written record to be made of an oral delegation. The

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40 CCC submission dated 30 March 2017.
41 DPP submission dated 27 March 2017.
43 The right to be assisted in communicating by an interpreter or other qualified person if the arrested person is for any reason unable to understand or communicate in spoken English.
44 The right not to be interviewed until the services of an interpreter or other qualified person are available if the arrested suspect is for any reason unable to understand or communicate in spoken English.
45 Issues Paper at pp.4-36.
lack of a written instrument or a written record may cause difficulties if an accused challenges the exercise of power by the delegate.46

68. Issue 10 of the Issues Paper was whether section 12 of the CIA should be amended to require a delegation to be in writing or a written record to be made of a delegation.47

69. Submissions on this issue were mixed. The ALS supported delegations being reduced to writing48 whereas the Emergency Preparedness Unit of the WA Police indicated their preference for a written record to be made of a delegation where a situation is time critical.49 By way of contrast, the CCC was of the view that "the law is adequate in its current form, particularly following Cotchilli v The State of Western Australia".50

70. The Review Group is of the view that no changes are required to section 12 of the CIA. This is for the following reasons:
(a) there is nothing to prevent an officer from making a written delegation or a written record of a delegation; and
(b) in emergency situations an oral delegation is appropriate; and
(c) challenges to the exercise of power by a delegate will need to be dealt with on a case by case basis as in Cotchilli v The State of Western Australia.51

Recommendation 3
Section 12 of the CIA should not be amended to require a delegation to be in writing or to require a written record to be made of a delegation.

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46 See Cotchilli v The State of Western Australia [2008] WASC 103; and Martin v The State of Western Australia [2008] WASC 105.
47 Issues Paper at pp.36.
50 CCC submission dated 30 March 2017.
51 [2008] WASC 103.
Part 2: Ancillary provisions about exercising powers

71. Part 2 of the CIA contains a number of ancillary provisions about exercising powers under the CIA, including provisions about the use of force and the use of animals.

72. The following issues have arisen in relation to the operation and effectiveness of Part 2 of the CIA:
   (a) the protection of animals being used by public officers pursuant to section 17;
   (b) the protection of public officers using animals pursuant to section 17;
   (c) the scope of the use of force pursuant to section 16; and
   (d) the use of body worn cameras by public officers.

Use of animals

73. Section 17 of the CIA sets out the circumstances in which officers exercising powers under the CIA may use an animal to assist them.

74. An officer who is exercising a power in the CIA, or using force under section 16, may use an animal to assist if the animal has been trained for the purposes for which it is used, and use of the animal is reasonably necessary in the circumstances.

75. There have been instances in which animals being used by police in the exercise of their powers under the CIA have been attacked. For example, in October 2015, a person was convicted of an offence of animal cruelty contrary to section 19 of the AW Act after hitting a police dog with a hammer. This sort of incident has led to concerns about whether the CIA adequately protects police animals and their handlers.

76. The WA Police use both horses and dogs to assist police officers in exercising their powers under the CIA.

77. The Mounted & Canine Operations section of the WA Police has advised the Review Group that, as at April 2018, the WA Police had 20 horses and 37 dogs (26 general purpose dogs, 8 narcotic detection dogs, 1 explosive detection dog and 2 passive alert dogs).

78. It would cost many thousands of dollars to replace or rehabilitate a trained police horse or police dog.

79. The Review Group also notes that whilst the Animal Welfare Amendment Bill 2017 was introduced into Parliament in October 2017, that Bill does not increase penalties for animal cruelty or introduce any new offences involving cruelty to animals working for the WA Police and other agencies.

Assaults or obstruction of animals being used by public officers

80. In other Western Australian legislation and in other Australian jurisdictions, a person who assaults or obstructs an animal (usually dogs or horses) being
used by a public officer, is taken or deemed to have assaulted or obstructed the public officer.55

81. Issue 4 in the Issues Paper was whether the CIA should be amended to provide that if an animal being used by an officer under section 17 of the CIA is assaulted or obstructed, then the person who assaulted or obstructed the animal is deemed to have assaulted or obstructed the officer handling the animal.56

82. The ALS was strongly opposed to any amendment that would deem an assault of a police animal to be an assault of the police officer. They stated in their submission that the examples from Queensland and the Northern Territory (referred to in the Issues Paper) did not include a deeming provision in relation to the offence of assault. They also stated that whilst the obstruction of an animal being used by a police officer may also constitute the obstruction of the police officer, the assault of an animal is not an assault of the police officer.57

83. The Review Group notes that an assault may be constituted by the indirect application of force and is of the view that an application of force to an animal being used by an officer could result in the indirect application of force to the officer and thereby constitute an assault.

84. The Review Group supports the proposal to amend the CIA to provide that if an animal being used by an officer under section 17 of the CIA is assaulted or obstructed, then the person who assaulted or obstructed the animal is deemed to have assaulted or obstructed the officer handling the animal. This is for the following reasons:

(a) animals are often used by officers, particularly police officers, in the exercise of their powers under the CIA and may be targeted by persons who are the subject of the exercise of those powers;
(b) the proposal would mean that a person who assaults or obstructs an animal could be charged with an assault of a public officer contrary to section 318(1)(d) of the Criminal Code, or obstruction of a public officer contrary to section 172 of the Criminal Code; and
(c) the assault or obstruction of an animal being used by an officer under the CIA should be treated in the same way as the assault or obstruction of a dog being used by a prison officer or a dog handler in Western Australia.

85. The Review Group notes that the mandatory sentencing provisions of section 318 of the Criminal Code would apply where a person is deemed to have assaulted a public officer.

**Recommendation 4**
Section 17 of the CIA should be amended to provide that if an animal being used by an officer under section 17 of the CIA is assaulted or obstructed, then the person who assaulted or obstructed the animal is deemed to have assaulted or obstructed the officer using the animal.

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55 See, for example, section 49A(3) of the Prisons Act and regulation 97(1) of the YO Regulations 1995; see also section 790 of the PPR Act (Qld) and section 159 of the PA Act (NT).
56 Issues Paper at p.25.
57 ALS submission dated 29 March 2017.
New offences relating to the killing, wounding or injuring of an animal being used by a public officer

86. In Western Australia, under section 19(1) of the AW Act, it is an offence for a person to be cruel to an animal. The minimum penalty is a fine of $2,000 and the maximum penalty is a fine of $50,000 and imprisonment for 5 years. There are no separate offences relating to the killing, wounding or injuring of an animal being used by a public officer.

87. In some jurisdictions, a person who kills, assaults or obstructs an animal (usually dogs or horses) being used by a public officer commits an offence. The maximum penalties for these offences vary quite considerably.

88. Issue 5 in the Issues Paper was whether the CIA should be amended to make it an offence for a person to wound, injure or obstruct an animal being used under the CIA and, if so, what the penalty should be for such an offence.

89. The WA Police Union “advocates harsher penalties for offenders found guilty of assaulting a police animal.”

90. The ALS accepted that the approach in Issue 5 was "a more rational approach."

91. The Review Group is of the view that the introduction of new offences for the killing, obstruction or assault of an animal being used by a public officer pursuant to section 17 of the CIA should be dealt with separately by way of amendment to the Criminal Code or the AW Act. This is for the following reasons:

   (a) animals are not only used by public officers to assist in the exercise of powers under the CIA but may, for example, be used to exercise powers under the MDA or the Prisons Act. Therefore, any amendments should not be confined to the use of animals under the CIA; and

   (b) it is more appropriate for new offence provisions relating to cruelty to animals to be inserted in the Criminal Code or the AW Act.

**Recommendation 5**

New offences relating to the killing, obstruction or assault of an animal being used by a public officer should not be dealt with by way of amendment to the CIA. However, the WA Police and other agencies using animals in the course of their duties should consider whether such offences should be inserted in the Criminal Code or the AW Act.

Recovery of costs of treatment, care, rehabilitation, retraining or buying and training a replacement

92. Animals used by public officers under section 17 of the CIA will be of significant value to an agency because of the work they perform to assist public officers

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59 See, for example, section 124(g) of the Corrective Services Act 2006 (Qld); section 10.21B of the PSA Act (Qld); section 159A of the PA Act (NT); section 82D of the PS Act (Tas); section 531 of the Crimes Act (NSW); and section 83I(1) of the CLC Act (SA).
60 Issues Paper at p.27.
61 WA Police Union submission dated 6 March 2018.
63 Issues Paper at pp.27-29.
and because of the resources invested into their training. If such an animal is wounded or injured, then the agency may incur significant costs in relation to treatment, care, rehabilitation and retraining of the animal. If such an animal is killed then the agency may incur cost in relation to buying and/or training the animal's replacement.

93. In a number of Australian jurisdictions, there are legislative provisions that enable a court to order a person to pay a reasonable amount for the treatment, care, rehabilitation and retraining of a police animal or a working animal or for buying or training its replacement.64

94. Issue 6 in the Issues Paper was whether the CIA should be amended to provide that if a person is convicted of killing, wounding, or injuring an animal being used to assist an officer in the exercise of powers under the CIA, then the court may order the offender to pay for the treatment, care, rehabilitation and retraining of the animal and/or to pay for buying or training its replacement.65

95. The Review Group notes that the Sentencing Act currently makes provision for the making of compensation orders to compensate a victim for the loss of, or damage to, the victim’s property and any expense reasonably incurred by the victim, as a direct or indirect result of the commission of the offence.

96. The WA Police Union submitted that "[s]ection 17 of the CIA should be amended to deter anyone from seriously injuring a police animal and provide greater peace-of-mind for the officers who train and use them."66

97. In their submission, the ALS also referred to compensation and restitution orders available under the Sentencing Act. The ALS also noted that "in many cases, making an order to pay for treatment, care, rehabilitation and retraining of animals would be a futile exercise given the likely financial means of the vast majority of offenders". The ALS assumed that the WA Police have "appropriate and sufficient" insurance to cover injuries to police animals.67

98. The Emergency Preparedness Unit of the Western Australia Police supported the inclusion of such provisions in the Criminal Code.68

99. The Review Group is of the view that the recovery of costs in relation to the treatment, care, rehabilitation, retraining or replacement of an animal that is wounded, injured or killed whilst being used in the exercise of powers under the CIA should be dealt with separately by way of amendment to the AW Act, the Criminal Code or the Sentencing Act. This is for the following reasons:

(a) animals are not only used by public officers to assist in the exercise of powers under the CIA but may, for example, be used to exercise powers under the MDA or the Prisons Act. Therefore, any amendments should not be confined to the use of animals under the CIA; and

(b) it is more appropriate for cost recovery provisions to be inserted into a statute which creates offences related to the killing or assault of the

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64 See, for example, section 1021B(2) of the PSA Act (Qld); section 159A(2) of the PA Act (NT); and section 83J(1) of the CLC Act (SA).
65 Issues Paper at p.29.
66 WA Police Union submission dated 6 March 2018.
animal (such as the AW Act or the Criminal Code\(^{69}\) or the statute which allows for compensation orders to be imposed consequent upon conviction (namely, the Sentencing Act).

**Recommendation 6**
Provisions for the recovery of costs in relation to the treatment, care, rehabilitation, retraining or replacement of an animal that is wounded, injured or killed whilst being used in the exercise of powers under the CIA should not be included in the CIA. However, the WA Police and other agencies using animals in the course of their duties should consider whether such recovery provisions should be inserted in the Criminal Code or the AW Act or the Sentencing Act.

**Protection from liability for use of animals under the CIA\(^{70}\)**

100. Animals used by officers pursuant to section 17 of the CIA to assist them in the exercise of their powers under the CIA may cause injury or damage in the course of such use. Subject to section 16(2)\(^{71}\) and (3)\(^{72}\), an officer who uses an animal to assist with exercising a power under the CIA must take all reasonable measures to ensure the animal does not injure any person, or damage any property.

101. There is nothing in the CIA which protects officers from liability for injury or damage caused by animals assisting them in the performance or purported performance of their functions.\(^{73}\)

102. In Western Australia, section 49A(5) of the Prisons Act and regulation 97(3) of the YO Regulations make it clear that a prison officer or dog handler is not personally liable for injury or damage caused by the use of a dog under their control if the use of the dog was in accordance with the Prisons Act and YO Act respectively.

103. In other Australian jurisdictions, there are specific provisions that protect public officers from liability in respect of injury or damage caused by use of an animal.\(^{74}\) The scope of the protections varies between jurisdictions.

104. Issues 7 and 8 in the Issues Paper related to whether the CIA should be amended to provide that public officers using animals pursuant to section 17 of the CIA are protected from civil and criminal liability in respect of injury or damage caused by the animal.\(^{75}\)

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\(^{69}\) See, for example section 75B(5)-(7) of the Criminal Code (provisions for cost recovery for police response to an out-of-control gathering) and section 71(3)-(5) of the Criminal Code (provisions for cost recovery for creating a false belief).

\(^{70}\) Issues Paper at pp.29-33.

\(^{71}\) Section 16(2) of the CIA provides that if a person uses force under section 16(1), the force may be such as causes damage to the property of another person.

\(^{72}\) Section 16(3) of the CIA provides that any use of force under section 16(1) against a person is subject to Chapter XXVI of the Criminal Code.

\(^{73}\) It is noted that under section 137(3) of the Police Act, an action in tort does not lie against a member of the Police Force for anything that the member has done, without corruption or malice, while performing or purporting to perform his or her functions under a written or other law. However, there is nothing in the Police Act relating to protection from civil liability for injury or damage caused by animals being used by a member of the Police Force.

\(^{74}\) Section 82C of the PS Act (Tas); section 195(3) of the LEPR Act (NSW); section 38 of the PPR Act (Qld); section 116G of the PA Act (NT); section 27(2) of the Corrections Act 1986 (Vic); section 12A of the Australian Federal Police Act 1979 (Cth).

\(^{75}\) Issues Paper at p.33
105. The ALS submitted that "any amendment to the CIA to preclude public officers from civil or criminal liability when handling a police animal would be unnecessary and inappropriate". The ALS noted that police dogs can inflict serious injury (even death) and "their improper use should not be exempted from civil or criminal liability".

106. The WA Police Union submitted that "[p]olice officers lawfully using animals under the CIA should be explicitly protected from personal liability" and that "[t]he CIA should be amended to contain provisions similar to Section 49A of the Prisons Act 1981.".

107. The Review Group is of the view that provisions relating to protection from civil and criminal liability should be considered for inclusion in the Police Act or other agency specific legislation. This is for the following reasons:
   (a) animals are not only used by public officers to assist in the exercise of powers under the CIA but may, for example, be used to exercise powers under the MDA or the Prisons Act. Therefore, any amendments should not be confined to the use of animals under the CIA; and
   (b) many agencies which use animals in the exercise of their powers have protection from liability provisions in agency specific legislation.

Recommendation 7
Provisions protecting public officers from civil and criminal liability in relation to the use of animals in the course of their duties should not be included in the CIA. However, the WA Police and other agencies using animals in the course of their duties should consider whether protection from liability provisions should be included in agency specific legislation (e.g. the Police Act).

Extension of section 17 to animals used by public officers in the exercise of powers other than under the CIA

108. The use of animals to assist officers pursuant to section 17 of the CIA applies only where the officer is exercising a power in the CIA, or using force under section 16. However, police officers and other public officers may also use animals to assist them in the exercise of powers other than their powers under the CIA.

109. Issue 9 in the Issues Paper was whether section 17 of the CIA should be extended to the use of animals by public officers in the exercise of powers other than under the CIA.

110. The ALS submitted that "[a]ny extension of the power to use police animals beyond the CIA should be separately considered" and that they were "unable to provide an informed response without any specific need having been identified by the WA Police".

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76 ALS submission dated 29 March 2017.
77 ALS submission dated 29 March 2017.
78 WA Police Union submission dated 6 March 2018.
79 Issues Paper at pp.33-34.
80 For example, under the MDA, drug detection dogs are used to undertake preliminary drug detection testing: see Part 4A of the MDA.
81 Issues Paper at p.34.
82 ALS submission dated 29 March 2017.
111. The WA Police Union submitted that "[s]imilar protection should be extended to police animals for purposes outside the CIA. For example, the deployment of horses to assist with crowd control."\(^{83}\)

112. The Review Group is of the view that, since the ancillary provisions in Part 2 of the CIA apply only to the exercise of powers under the CIA, it would not be appropriate to extend section 17 of the CIA to the use of animals by officers other than in the exercise of powers in the CIA.

**Recommendation 8**
Section 17 of the CIA should not be extended to the use of animals by public officers under other legislation.

Use of force to effect an arrest\(^{84}\)

113. Section 16 of the CIA was considered by the Court of Appeal in *Elwin v Robinson*\(^{85}\) and *Johnson v Staskos*.\(^{86}\) No issues of concern arise from the decisions of the Court of Appeal.

114. Issue 11 of the Issues Paper was whether any changes are required to section 16 of the CIA in the context of the use of force to effect an arrest.\(^{87}\)

115. The ALS submitted that "the current law in relation to the use of force is appropriate and that no changes are required".\(^{88}\)

116. The Commissioner for Children and Young People recommended "the inclusion of safeguards in the CIA relating to the use of force when dealing with children and young people" because this will "ensure that police have clear and appropriate guidance … for the use of alternatives to force"\(^{89}\)

117. The WA Police Union was opposed to any amendment to section 16 of the CIA "that further restricts reasonable use of force by police officers during criminal investigations."\(^{90}\)

118. The Review Group notes that there is a comprehensive WA Police Policy relating to the use of force.\(^{91}\) This Policy contains appropriate safeguards for all persons.

119. The Review Group is of the view that no changes are required to section 16 of the CIA in relation to the use of force to effect arrest. This is for the following reasons:
   (a) no problems have been identified with the operation of section 16; and
   (b) the operation and effect of section 16 has been clearly outlined by the Court of Appeal; and
   (c) WA Police policies comprehensively deal with the use of force.

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\(^{83}\) WA Police Union submission dated 6 March 2018.

\(^{84}\) Issues Paper at pp.36-37.

\(^{85}\) [2014] WASCA 46 at [58] and [60]; See also, *Crosswell v Ainsworth* [2014] WASC 186 at [10] (Allanson J).

\(^{86}\) [2015] WASCA 32; (2015) 48 WAR 349; See also *Gartner v Brennan* [2016] WASC 89 at [41] (Pritchard J).

\(^{87}\) Issues Paper at p.37.

\(^{88}\) ALS submission dated 29 March 2017.

\(^{89}\) Commissioner for Children and Young People submission dated 29 March 2017.

\(^{90}\) WA Police Union submission dated 6 March 2018.

\(^{91}\) WA Police Policy FR-01.
Scope of use of force

120. It is clear that the power to use force to effect entry to a place includes the power to open doors and windows. However, an issue has arisen as to whether the power to use force to enter a place in the exercise of powers under the CIA includes the power to disable an alarm, camera or surveillance device and pacify any animal used to guard the place.

121. In New South Wales express powers have been conferred on officers executing a warrant to disable alarms, cameras or surveillance devices and pacify any guard dog at the premises where reasonably necessary to do so for the purpose of entering those premises.

122. The Review Group notes that the disabling of an alarm, camera or surveillance device or the pacification of an animal used to guard a place may not be necessary to effect entry to the place, but may be required to prevent advance warning to the occupants of entry to the place, to prevent injury to those entering the place and to otherwise facilitate the search.

123. Issue 12 of the Issues Paper was whether section 16 of the CIA should be amended to clarify the scope of the power to use reasonable force in the same way as section 70 of the LEPR Act (NSW).

124. The ALS submitted that a police officer "should only be permitted to disable a specified device at premises or to pacify a guard dog, if it is reasonably necessary to do so for the purpose of entering the premises". Further, the ALS submitted that "[a]ny extension of the power beyond what is reasonably necessary for the purpose of entry, must relate to the specific purpose of the power being exercised". The ALS added that a general express power to disable devices or pacify a dog, "should not be inserted into the CIA as a back door method of expanding the power to issue covert warrants".

125. The Review Group is of the view that this issue should be considered in the context of ancillary provisions relating to search warrants (including covert search warrants) and searches conducted under statutory authorisation.

Rendering dangerous articles safe

126. There is no clear statutory power in the CIA to render a dangerous article safe (including by means of the destruction of the article). The powers in section 21 of the CIA to conduct a forensic examination do not extend to rendering a thing safe. Nor are there any ancillary powers relating to the execution of a search warrant that may be utilised.

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93 Section 70 of the LEPR Act (NSW).
95 ALS submission dated 29 March 2017.
96 ALS submission dated 29 March 2017.
97 ALS submission dated 29 March 2017.
98 See Part 5 of the Final Report and recommendation 23.
127. The CFPD Act contains provisions for the disposal of held property and found property. In certain circumstances, such property may be destroyed. However, it is noted that seized property that has become held property cannot be disposed of until at least 2 months have elapsed from the time it became held property. There are also no powers in the CFPD Act to render safe a dangerous article. However, the doctrine of necessity in relation to civil law or extraordinary emergency under the criminal law would likely provide a defence to taking action to make an item safe.

128. In other Australian jurisdictions, officers authorised to search premises under warrant may do anything that is reasonably necessary to render safe any dangerous article found or to prevent it from being used. "Dangerous articles" include firearms; ammunition; prohibited weapons; articles or devices capable of discharging irritants or smoke or any other substances capable of causing bodily harm; a fuse capable of use with an explosive or detonator; and a detonator.

129. Issue 13 in the Issues Paper was whether a provision should be inserted in the CIA that gives officers the power to render a dangerous article safe or prevent it from being used (including by means of the destruction of that article).

130. The ALS had "no objection to an amendment to the CIA to the effect that police officers have the power to do anything that is reasonably necessary to render a dangerous article safe or prevent it from being used (including by means of the destruction of that article), provided that there is a clear definition under the CIA of the term ‘dangerous article’.

131. The Emergency Preparedness Unit of the Western Australia Police supports the proposal in principle but was cautious about the risk of over-prescription in legislation.

132. The WA Police Union submitted that they "would support an amendment similar to Section 70 of the NSW Law Enforcement (Powers and Responsibilities) Act 2002 giving officers the power to use force to effect entry and render safe a dangerous article."

133. The Review Group is of the view that there should be a provision in the CIA that clarifies the ability of police officers to render safe a dangerous article or prevent it from being used when exercising powers under the CIA.

134. The Review Group does not consider that the power should be limited to search warrants as police officers may come across dangerous articles in other contexts (for example, during a search for a security purpose under section 69 of the CIA).

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100 Sections 17-20 and 29 of the CFPD Act.
101 Section 9(4) of the CFPD Act.
102 See section 25 of the Criminal Code.
103 Section 70(4) of the LEPR Act (NSW) and section 51V(a) of the Defence Act 1903 (Cth).
104 See the definition of “dangerous article” in section 3(1) of the LEPR Act (NSW).
108 WA Police Union submission dated 6 March 2018.
Recommendation 10
A provision should be inserted in Part 2 of the CIA to give officers the power to render a dangerous article safe or prevent it from being used (including by means of the destruction of that article) when exercising powers under the CIA.

Use of body worn cameras

135. There is no general power in the CIA for officers to use a camera to make recordings of images and/or sounds while the officers are performing functions under the CIA or another law. However, there are a number of provisions in the CIA which permit or require recordings to be made or photographs to be taken.\\(^{109}\)

136. In 2016 the Evidence Based Policing Team of the WA Police commenced a 6 month trial of the use of body worn cameras by police officers. The trial sites were in Perth and Bunbury. Two public surveys and three officer surveys were carried out as part of the trial. An independent review of the trial of body worn cameras was completed in 2017.

137. The Review Group has been advised that the WA Police is currently giving further consideration to the future use of body worn cameras by police officers in Western Australia and issues associated with their use.\\(^{111}\)

138. The use of body worn cameras by police officers ensures that a recording exists of interactions between officers and members of the public with whom they come into contact. This recording is an important protection for both police officers and members of the public as it will generally provide the best evidence of that interaction. The record may be used in evidence in civil, criminal or disciplinary proceedings involving the officers or members of the public.\\(^{112}\)

139. However, there are some impediments to the use of body worn cameras by police officers in this State. These include: the prohibitions on recordings of private activities and private conversations in the SD Act; whether the scope of an implied licence to enter private premises extends to filming on those premises; and premises that have signs which make it clear that filming is not permitted on the premises.

140. In New South Wales and Queensland, legislation has been enacted to facilitate the use of body worn cameras by police officers.\\(^{113}\)

141. Issue 45 in the Issues Paper was whether a provision should be inserted into the CIA to facilitate the use of body worn cameras by police officers.\\(^{114}\)

142. The ALS expressed the view that legislative reform in relation to body worn camera should only occur after the results of the trial are known and made

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110 See, for example, section 45(2) of the CIA (audiovisual recording of the execution of a search warrant); sections 85 and 93 of the CIA (audiovisual recording of the making of a request and the giving of information); section 44(2) of the CIA (photograph of target thing in target place); and section 65(4)(b) of the CIA (photograph of a basic search).
111 See also, “Top Cop backs body cameras” reported in The Weekend West, April 14-15, 2018 at p.40.
112 ALS submission dated 29 March 2017.
113 Section 609 of the PPR Act (Qld); and section 50A of the SD Act (NSW).
114 Issues Paper at p.92.
public. The ALS was concerned about the proposed draft provision. The ALS submitted that: the camera should be turned on at all times when dealing with a member of the public; use should only be permitted if the person being recorded has been informed; and there should be rules about the storage, erasing and disclosure of recordings.115

143. The DPP submitted that any amendments to expand or broaden the use of body worn cameras by police officers should not be made "without a corresponding understanding of the broadening of the disclosure obligations" (under the CP Act) in relation to the footage "and the significant resource implications" flowing from the use of such devices.116

144. The Review Group is of the view that the CIA should not be amended to compel the use of body worn cameras by officers when performing the functions of their office because of the significant resource implications arising from their use. The decision as to whether body worn cameras are to be used and, if so, by which officers and in what circumstances, is a matter for the WA Police and other agencies contemplating their use.

145. However, the Review Group is of the view that if body worn cameras are to be used by officers for criminal investigative purposes, then provisions should be inserted in Part 2 of the CIA that facilitate their use, including provisions which permit officers to use a body worn camera:

(a) to record images, sounds, or both sounds and images in, or on, a place or vehicle when performing the functions of their office whether under the CIA or another law;
(b) notwithstanding that the use of the camera or the publication of the recordings might contravene the SDA or another law; and
(c) irrespective of whether or not the officer has obtained the consent of the person being recorded or the consent of the occupier of the place or vehicle at which the recording is taking place.

146. The Review Group is of the view that, if reasonably practicable, the officer must inform any person being recorded that the officer is wearing a body worn camera and that the person is being recorded.

147. The Review Group is of the view that if another provision of the CIA permits or requires an officer to take a photograph or make a recording, then the officer should be able to use a body worn camera to take the photograph or make the recording.

148. The Review Group notes that recordings made by use of a body worn camera would be records for the purposes of the State Records Act and subject to disclosure under the CP Act.

Recommendation 11
A provision should be inserted in Part 2 of the CIA to facilitate the use of body worn cameras by officers.

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Part 3: Citizens' powers

149. Part 3 of the CIA contains citizens' powers including: powers to use force to prevent violence, breaches of the peace and the commission of an offence; the power to make a citizen's arrest; and powers conferred on the person in command of a vehicle to deal with a person carrying a thing that may be used to commit an endangering offence.

150. Under section 25 of the CIA, any person may arrest another person in two circumstances. First, where the person reasonably suspects that another person (referred to as the suspect) has committed or is committing an arrestable offence (an offence the statutory penalty for which is or includes imprisonment). Second, where the suspect is doing or about to do an act that the person is entitled to prevent under section 24(1)(a), (b) or (c).

151. A person who arrests a suspect under section 25(2) or (3) must, as soon as practicable, arrange for a police officer to attend or take the suspect and any thing relevant to the offence to a police officer. In order to comply with this obligation, the person may detain the suspect until the police officer attends or until the suspect is taken to a police officer.

152. No issues were raised with the Review Group about the operation and effectiveness of Part 3 of the CIA. However, the Review Group is aware that there have been some instances reported in the media about the use of excessive force when private citizens are making a citizen's arrest. For example:

(a) in February 2017 it was reported that a 30 year old man was given a suspended sentence of imprisonment in the District Court after his citizen's arrest left an intruder in an induced coma for several weeks and with a permanent brain injury; and

(b) in September 2015 it was reported that the Coroner's Office was investigating the death of a man after a citizen's arrest in September 2015.

153. The Review Group is of the view that notwithstanding that there have been instances and allegations of the use of excessive force, the power to make a citizen's arrest should remain in the CIA. This is for the following reasons:

(a) the power to make a citizen's arrest enables members of the community to take action before police arrive on the scene (for example, to prevent the alleged offender fleeing from the scene of a crime); and

(b) the provisions in the CIA and the Criminal Code relating to the use of force to make a citizen's arrest act as a check on the exercise of the power.

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117 Section 25(2) of the CIA.
118 Section 25(3) of the CIA.
119 Section 25(5) of the CIA.
120 Section 25(6) of the CIA.
123 Section 16 of the CIA and Chapter XXVI of the Criminal Code.
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<tr>
<th><strong>Recommendation 12</strong></th>
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<td>The power to make a citizen's arrest should remain in the CIA.</td>
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Part 4: Miscellaneous official powers and duties

154. Part 4 of the CIA contains two miscellaneous unconnected provisions. Section 27 of the CIA relates to move on orders. Section 28 obliges an officer who requests a person who is not in lawful custody to accompany the officer to inform the person of specified matters.

155. The following issues have arisen in relation to the operation and effectiveness of Part 4 of the CIA:
   (a) the content of move on orders;
   (b) whether police officers should have powers to facilitate the giving of a move on order; and
   (c) whether section 28 of the CIA should be amended or repealed and replaced.

Move on orders

156. A move on order is an order made under section 27 of the CIA that enables a police officer to order a person who is in a public place, or a vehicle used for public transport, to leave it, or a part of it specified by the officer. A person who does not comply with a move on order without a reasonable excuse commits an offence contrary to section 153(1) of the CIA.

157. The Review Group was provided with information by Business Intelligence & Analytics in the WA Police in relation to the issue of move on orders that showed that:
   • between 2005 and the beginning of December 2017 the WA Police issued 241,469 move on orders;
   • the most move on orders were issued in 2012 (29,067) and 2013 (27,709);
   • since 2013 there has been a decline in the number of move on orders issued;
   • as at the beginning of December 2017, 15,601 move on orders had been issued;
   • the largest number of move on orders were issued in the Central Metropolitan District (142,439) followed by South Metropolitan District (22,470);
   • move on orders were most commonly issued where a police officer reasonably suspected the person intended to commit an offence (144,161) or was committing a breach of the peace (58,140) or was hindering, obstructing or preventing any lawful activity that was being, or was about to be, carried out by another person (18,176)

Content of move on orders

158. In Morrow v UJC\(^{124}\) an issue arose as to how an additional order for the purposes of section 27(2)(a) of the CIA that the person go beyond a reasonable distance from the place, or part of the place, set by the officer should be framed. Hall J held that section 27(2)(a) of the CIA permits a distance to be specified by reference to landmarks such as streets\(^{125}\)

\(^{124}\) [2012] WASC 114.
\(^{125}\) At [37].
The Review Group is of the view that since the question as to how an additional order may be framed has been clarified by the Supreme Court, no amendment to section 27(2) of the CIA is required in this respect.

Facilitating the giving of a move on order

A move on order must be given to a person in writing on a prescribed form.\(^{126}\)

There is no power in section 27 of the CIA to require a person to remain in a place for the purpose of issuing a move on order. This may cause a problem if the person to whom the move on order is to be issued decides to leave the area prior to the move on order being written up.

Sergeant David Bright submitted that section 27 of the CIA should be amended to contain a power to detain a person for the purposes of issuing a move on notice, similar to the powers in the RO Act for the issuing of police orders and violence restraining orders.\(^ {127}\)

The WA Police Union noted that "officers effectively need to arrest someone if they want to issue them with a [move on notice]" but "the principal purpose of a [move on notice] is to quickly remove a person from an area, not detain them in custody."\(^ {128}\) Accordingly, the WA Police Union submitted that "[a]llowing officers to detain a person 'on the spot' for the purposes of issuing a [move on notice] would be more time and cost effective than the CIA currently permits."\(^ {129}\)

By way of contrast, a police officer may:

(a) under the RO Act, order a person to remain in a place designated by the police officer, or accompany the police officer to a police station or some other place and wait at that place to facilitate service of an order by a police officer;\(^ {130}\) and

(b) under the RTA, direct the driver of a motor vehicle to wait at a place indicated by the police officer to issue a requirement for a driver or person in charge of a vehicle to provide a sample of his breath for a preliminary breath test;\(^ {131}\) and

(c) under the RTA, require a person to accompany a police officer to a police station or some other place, and require the person to wait at the police station or place for the purposes of requiring a person to allow a prescribed sample taker to take a sample of the person's blood or provide a sample of the person's urine.\(^ {132}\)

The Review Group is of the view that police officers should not have to arrest a person in order to give them a move on notice and that police officers should be able to order a person to remain at a particular place, or to accompany them someone else and remain there, to facilitate the giving of the move on order. The powers would be consistent with those currently contained in the RO Act and the RTA.

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\(^{126}\) Section 27(6) of the CIA.

\(^{127}\) Submission from Sergeant David Bright dated 1 February 2017.

\(^{128}\) WA Police Union submission dated 6 March 2018.

\(^{129}\) WA Police Union submission dated 6 March 2018.

\(^{130}\) Section 62F(1)(c) of the ROA.

\(^{131}\) Section 66(1aa) of the RTA.

\(^{132}\) Section 66(8C) of the RTA.
166. The Review Group notes that a person who, without a reasonable excuse, did not comply with such an order would commit an offence contrary to section 153(1) of the CIA.

**Recommendation 13**
Section 27 of the CIA should be amended to give police officers the power to:
(a) order a person to remain in a place designated by the police officer, or
(b) order the person to accompany them to a police station or other place and remain in that place,
for the purpose of giving a move on order to that person.

**Person accompanying officers to be informed of rights**

167. If a person merely accompanies an officer for the purpose of assisting the investigation of an offence, then that person must be informed of certain things and the officer must be satisfied that the person understands those things. Under section 28 of the CIA, the person must be informed (and understand) that: he or she is not under arrest; he or she does not have to accompany the officer concerned; and, if he or she accompanies the officer concerned, he or she is free to leave at any time unless he or she is then under arrest.134

168. The heading to the section refers to these matters as "rights". However, notifying someone that they are not under arrest, is arguably not a right but rather a statement as to their status. Similarly, telling someone that they do not have to accompany you is merely a statement of fact.

169. On its face, section 28 of the CIA applies to any person who is requested to accompany an officer for the purposes of assisting in the investigation of an offence.

170. This would include, for example:
(a) a suspect who is not under arrest but who agrees to accompany a police officer to the scene of an alleged offence or to the police station to take part in an interview;
(b) a victim or witness who has attended the front counter of a police station to report the commission of an offence and who is asked to accompany a police officer to another part of the police station for the purposes of providing a statement about the offence; and
(c) a victim or witness who, having reported the commission of an offence or provided information about the commission of an offence, is asked by a police officer at the crime scene to accompany that officer to the local police station to assist in the compilation of an identikit picture and to make a statement.

171. In his submission, Detective Inspector Brad Jackson said that section 28 of the CIA:

...is to be applied to any person accompanying a police officer, regardless if they are a suspect, witness or victim. As an extreme example, applying this interpretation a police officer would be compelled to advise the victim of a sexual assault that they were not under arrest, did not have to accompany etc. I doubt this was the intent of the section when created.

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133 Issues Paper at pp.140-144.
134 Section 28(1) of the CIA.
There are striking similarities between s 28. CIA and s29. Police and Criminal Evidence Act (PACE), which is UK legislation, this leads me to believe that the intent at the time creating s28. was that it applies to suspects, in line with PACE.  

172. Issue 76 in the Issues Paper was whether any other rights should be conferred on a person who is voluntarily assisting an officer.  

173. Issue 77 in the Issues Paper was whether section 28 of the CIA should be clarified to make it clear that the section only applies to a suspect who is voluntarily assisting police or what additional rights apply when a suspect is voluntarily assisting police.  

174. Issues 76 and 77 are dealt with together.  

175. Detective Inspector Jackson suggested that section 28 should be confined to suspects or that, if the section is to apply to any person who is asked to accompany a police officer, then a distinction should be made between what a suspect is told and what any other person is told. In particular, persons other than suspects should not be told that they are not under arrest.  

176. The ALS expressed the view that "the rights of persons voluntarily assisting police should be separately delineated from the rights of suspects (whether arrested or not)". The ALS also submitted that section 28 "should be amended to provide that it does not apply to a person who is suspected of an offence (irrespective of whether that suspicion is reasonable or otherwise)" and that the rights of arrested suspects contained in sections 137 and 138 "should also apply (with appropriate modification) to suspects who have not been (and who cannot be) arrested."  

177. The WA Police Union "supports amendments to Section 28 (and any required consequential amendments to Section 137 and 138) to clarify that a suspect's rights apply whether they are arrested or voluntarily accompanying police officers."  

178. The Review Group is of the view that section 28 of the CIA currently applies to three categories of person who may assist in the investigation of an offence. The first category is a person who is reasonably suspected of having committed an offence and who could be, but has not been, arrested under section 128. The second category is a person who is suspected, but not reasonably suspected, of having committed an offence but who cannot be arrested under section 128. The third category is a person who is not a suspect, such as the victim of an offence or a witness to an offence.  

179. The Review Group is also of the view that the trigger for the conferral of rights upon a suspect should not depend on whether or not they have been arrested. The trigger for the conferral of rights should be an assessment as to whether or not the person is a suspect (that is, a person who is suspected of having committed an offence whether or not there are reasonable grounds for that
suspicion). This is for two reasons. First, under section 128 of the CIA, an officer has a discretion as to whether or not he or she arrests a person who the officer reasonably suspects has committed an offence. Second, officers should not be placed in a position where the decision to arrest or not arrest determines the rights which are conferred upon a suspect.

180. If a victim or witness attends at a local police station to report the commission of an offence and is asked by a police officer to accompany him or her to an interview room to make a statement, then the police officer must inform them of the rights in section 28(1)(a)-(c) inclusive. This is, in the opinion of the Review Group, likely to cause confusion in the mind of the victim or witness.

181. The Review Group is of the view that section 28 of the CIA should not apply to victims or witnesses.

182. The Review Group is of the view that section 28 of the CIA should be moved to Part 12 of the CIA and limited to suspects voluntarily assisting officers (whether or not those suspects may be arrested under section 128). Further, that additional rights should be conferred on those suspects. This is for the following reasons:

(a) the application of section 28 to victims or witnesses creates confusion; and

(b) there is a large gap between what a suspect voluntarily assisting police must be notified of under section 28 and the rights conferred on an arrested suspect under sections 137 and 138. The gap cannot be explained because one suspect is arrested and the other is not.

183. Issues 76 and 77 in the Issues Paper, and the Review Group’s recommendations about the additional rights that should be conferred on persons and suspects voluntarily assisting officers, are dealt with further in Part 12 of the Final Report.143

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**Recommendation 14**  
Section 28 of the CIA should be moved to Part 12 of the CIA and limited to suspects voluntarily assisting officers.

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143 See recommendations 87-92 and, in particular, recommendation 88.
Part 5: Entering and searching places and vehicles

184. Part 5 of the CIA contains provisions relating to occupiers' rights, powers to enter and search with and without a search warrant and protected forensic areas.

185. The following issues have arisen in relation to the operation and effectiveness of Part 5 of the CIA:
   (a) whether the requirement to provide an occupier with a copy of the search warrant should be able to be delayed until after the execution of the search warrant;
   (b) whether the requirement to give the occupier an opportunity to give informed consent to the place being entered should be repealed;
   (c) whether officers should be given a power to enter a place without warrant to check compliance with a curfew condition imposed under the Bail Act;
   (d) whether the definition of "serious offence" in section 40(1) of the CIA should be extended to other offences;
   (e) whether police officers should be given additional powers to deal with public safety situations;
   (f) whether the requirement for a JP to record the reasons for the refusal to issue a search warrant should be deleted;
   (g) whether the power to issue search warrants should remain with JPs;
   (h) whether there should be an ancillary power to disable devices and pacify animals;
   (i) whether there should be an ancillary power to detain a person present at a place which is being searched;
   (j) whether officers should be able to obtain covert search warrants;
   (k) whether officers other than those involved in an investigation should be able to exercise powers in relation to PFAs; and
   (l) whether steps should be taken to restrict the use of aircraft to take photographs of PFAs.

Occupier's rights

186. The occupier's rights contained in section 31 of the CIA must be conferred in respect of:
   (a) entry to another place pursuant to section 20(3);
   (b) entry to a place under Part 5; and
   (c) entry to a place under Part 12 Division 3.

Provision of copy of search warrant to occupier

187. Section 31(2)(c) of the CIA requires an officer to give the occupier of a place, if present, a copy of the search warrant if the place is to be entered under a search warrant. The copy must be given before any officer enters the place.

188. During the course of the meetings of the Review Group, an issue was raised about whether, to prevent a person from hindering an investigation, section 31(2)(c) of the CIA should be amended to require an officer executing a search warrant to show the occupier the warrant or a copy of the warrant prior to entry and then provide the occupier with a copy of the warrant after the warrant has been executed.

189. The Review Group notes that in Queensland a police officer may delay giving the occupier a copy of the search warrant if the police officer reasonably...
suspects that giving the person the copy may frustrate or otherwise hinder the investigation or another investigation. However, the police officer may only delay for so long as the police officer continues to have the reasonable suspicion. Further, that police officer or another police officer involved in the investigation must remain in the vicinity of the place to keep the place under observation.

190. The Review Group is of the view that the requirement to delay giving the occupier a copy of the search warrant should not apply in all cases but only where the officer suspects that giving the person a copy of the warrant may frustrate or otherwise hinder the investigation or another investigation.

**Recommendation 15**

Section 31 of the CIA should be amended to allow an officer to delay giving an occupier a copy of the search warrant in circumstances where the officer reasonably suspects that giving the person the copy may frustrate or otherwise hinder the investigation or another investigation. However, the officer may only delay for so long as he or she continues to have the reasonable suspicion. The latest time for compliance should be immediately after the search is complete.

**Obtaining informed consent to enter**

191. A police officer cannot enter and/or search a place or vehicle without the consent of the occupier unless the officer has a warrant or some other form of statutory authorisation to do so.

192. Section 31(2)(e) of the CIA requires an officer who has a statutory power to enter and/or search or who has a search warrant to give the occupier an opportunity to give informed consent to the place being entered.

193. Issue 18 in the Issues Paper was whether the requirement in section 31(2)(e) of the CIA to give the occupier an opportunity to give informed consent to the place being entered should be repealed.

194. Issue 19 in the Issues Paper was whether, if section 31(2)(e) is retained, an additional provision should be inserted in the CIA that provides that informed consent need not be sought where the officer believes on reasonable grounds that immediate entry to the premises is required to ensure the safety of a person, or to ensure that the effective execution of the warrant is not frustrated, or any other matter.

195. Issue 20 in the Issues Paper was whether, if the requirement to seek consent is repealed, it should be replaced with some other similar provision to enable searches to be conducted with consent, but only where police do not have a power or the power is contingent on seeking a further approval that is not available at the time of entry. Alternatively, if the requirement to seek consent is retained, whether the CIA should be amended to make it clear that if the officer is given informed consent to enter, the informed consent permits entry only and, if the officer wishes to do something else in or on the place, the

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144 Section 158(2) of the PPR Act (Qld).
145 Issues Paper at pp.52-56.
147 Issues Paper at p.56.
148 Issues Paper at p.57.
196. Issues 18-20 are dealt with together.

197. The Review Group notes that during internal consultation with the WA Police it received more submissions on section 31(2)(e) of the CIA than any other issue. Police officers were strongly against having to seek informed consent from occupiers to enter a place where they have a search warrant or a statutory authority to enter and/or search. This is because of the confusion that such a requirement causes.

198. The Review Group is of the view that the requirement to give an occupier the opportunity to give informed consent to the place being entered should be repealed. This is for the following reasons:
   (a) the requirement to seek the consent of the occupier to entry is superfluous because a search warrant or a statutory authority to enter and search obviates the need to obtain consent to both the entry and the search;
   (b) the requirement to seek the consent of the occupier under section 31(2) only applies to entry and not search;
   (c) the requirement to seek the consent of the occupier causes confusion amongst occupiers and antagonism towards police officers as the occupier thinks that they have a choice as to whether or not they permit entry when in fact there is no choice; and
   (d) section 30 of the CIA makes it quite clear that an officer may, with the informed consent of the occupier of a place, enter and search a place without a warrant.

199. The Review Group did not consider that it was necessary for section 31(2)(e) to be replaced with any other requirement.

Recommendation 16
The requirement in section 31(2)(e) of the CIA to give an occupier an opportunity to give informed consent to the place being entered should be repealed.

Statutory powers to enter and search without warrant

200. There are a number of powers in Part 5 of the CIA that permit entry and search without a warrant. These are set out in Division 2.

Entry of a place to ascertain compliance with a curfew condition

201. There is no power in the Bail Act or the CIA which enables police officers to enter a place without a warrant to ascertain whether an accused person is complying with a curfew condition imposed under the Bail Act.

202. Issue 17 in the Issues Paper was whether the CIA should be amended to allow a police officer to enter a place to check on a person’s compliance with a curfew condition imposed under the Bail Act.

203. The ALS highlighted “that, in practice, curfew conditions require the accused to present themselves at the front door to police and, therefore, failure to do so,
The ALS expressed concern about repeated curfew condition checks by the WA Police. The Commissioner for Children and Young People did not "support any amendment that provides police with additional powers to enter a place without warrant" and noted that "permitting police to enter premises for the purposes of checking on a young person is a significant breach of that young person's right to privacy".

The DPP submitted that there "is merit in amending the CIA to allow police officers to enter a place to check on a person's compliance with a curfew condition". Further, that the amendment could be extended to include curfew conditions imposed under the DSO Act and conditions attached to post-sentence supervision orders under the Sentence Administration Act.

The Review Group is of the view that it is not necessary for the CIA to be amended to allow a police officer to enter a place to check on a person's compliance with a curfew condition imposed under the Bail Act. The Review Group is of the view that, where the Bail Act allows, it is preferable for a condition to be imposed on a grant of bail that the accused present himself or herself at the door when police attend. Alternatively, the Bail Act could be amended to facilitate compliance checking.

The Review Group is also of the view that if obligations are to be imposed on police officers and public officers to enter places to check compliance with curfew conditions that are imposed under the DSO Act or the Sentence Administration Act, then such powers should be conferred under those statutes and not the CIA.

**Recommendation 17**

Division 2 of Part 5 of the CIA should not be amended to allow a police officer to enter a place to check on a person's compliance with a curfew condition imposed under the Bail Act. However, consideration should be given to amending the Bail Act to facilitate compliance checking.

Protected forensic areas and serious offences

Under section 40 of the CIA, a protected forensic area may only be established in relation to a "serious offence", namely an offence the statutory penalty for which is or includes imprisonment for 5 years or more or life.

A number of submissions were made to the Review Group about amending the definition of "serious offence" to include other offences.

One offence in particular was drawn to the attention of the Review Group as requiring inclusion as a "serious offence" for the purposes of being able to establish a PFA. The offence is damaging property by graffiti contrary to section 5 of the Graffiti Vandalism Act.

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152 ALS submission dated 29 March 2017.
154 Commissioner for Children and Young People submission dated 29 March 2017.
155 DPP submission dated 27 March 2017.
156 DPP submission dated 27 March 2017.
157 See the definition of "serious offence" in section 40(1) of the CIA.
158 See Part 1 above.
211. Prior to the enactment of the Graffiti Vandalism Act in 2016, a person who damaged property by the application of graffiti might be charged with an offence of criminal damage contrary to section 444 of the Criminal Code. The maximum penalty for such an offence is imprisonment for 10 years. Accordingly, criminal damage by graffiti was a "serious offence" for the purposes of section 40(1) of the CIA and hence an offence in relation to which a PFA might be established.

212. Under section 5 of the Graffiti Vandalism Act, the offence of damaging property by graffiti is an offence with a penalty of a fine of $24,000 and imprisonment for 2 years. However, the offence is not a serious offence for the purposes of section 40(1) of the CIA and hence not an offence in relation to which a PFA may be established.

213. A police officer may wish to establish a PFA to prevent the graffiti, or items used to apply the graffiti, from being concealed or disturbed until the area has been properly inspected or examined. However, the police officer cannot do so if he or she reasonably suspects that the offence that has been or is being committed is an offence contrary to section 5 of the Graffiti Vandalism Act.

214. The Review Group is of the view that consideration should be given to amending the definition of "serious offence" in section 140(1) of the CIA so that it includes an offence under section 5 of the Graffiti Vandalism Act.

Recommendation 18
The WA Police and other agencies that may establish PFAs, should give further consideration to amending the definition of "serious offence" in section 40(1) of the CIA by:

(a) including an offence under section 5 of the Graffiti Vandalism Act; or
(b) lowering the statutory threshold of 5 years; or
(c) enabling the prescription of offences for the purposes of the definition.

Public safety situations

215. Police officers in Western Australia have special powers to deal with terrorist acts, out-of-control gatherings, unlawful assemblies and riots, situations involving dangerous goods and fires.

216. However, no special powers have been conferred on police officers to deal with other types of situations which impact, or have the potential to impact, on the safety of the general public. For example:

(a) the use of a vehicle to mow down pedestrians or to force other vehicles off the road;
(b) an armed offender firing shots into a public place or at persons in a public place; and
(c) a person being taken hostage in a public place by an armed offender.

217. After the Issues Paper was published, an issue was raised with the Review Group by the Counter Terrorism & Emergency Response section of the WA Police about dealing with other situations which impact, or have the potential to

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159 See the EM Act and the TEP Act.
160 Sections 38A-38C inclusive of the CIA.
161 Sections 64 and 66 of the Criminal Code.
162 See section 50 of the DGS Act.
impact, on the safety of the general public in the same way as other situations where police have special powers.

218. A public safety situation occurs where:
   (a) an act has been done, or a threat has been made to do an act, in or in relation to a public place, and
   (b) the act, or the threat of action if carried out, causes or could cause one or more of the following:
      (i) the death of, or serious harm to, one or more persons;
      (ii) endangerment to a person's life or the lives of more than one person;
      (iii) a serious risk to the health or safety of the public or a section of the public; or
      (iv) the destruction of, or serious damage to, property; and
   (c) the act, or threat of action if carried out, involves or would involve one or more of the following:
      (i) the taking of a hostage or hostages;
      (ii) the hijacking of a vehicle;
      (iii) a siege situation;
      (iv) the use of explosives;
      (v) the use of a chemical, biological, radiological, or other noxious substance;
      (vi) the spread of an infectious disease;
      (vii) the use of firearms or weapons or both firearms and weapons; or
      (viii) the use of a vehicle or any other article as a weapon.

219. When police are dealing with a public safety situation they need to be able to take immediate steps to protect the public.

220. A public safety situation may also occur where a suspicious package has been located in a public place. A "suspicious package" is:
   an envelope, parcel or other item capable of holding something (eg box, suitcase, backpack, bag etc) that is found or received and which arouses the suspicion of the finder or receiver because of the presence of one or more of the following:
   • the package has been delivered to the recipient in circumstances which attract attention/cause for concern (eg: package unsolicited; accompanied by threatening note);
   • the package has been abandoned or left unattended in a place or in a vehicle (that is, there is no person having custody, possession or control of the package);
   • the package has been located in a place where it should not be (eg powder found wrapped in plastic bags and submerged in water);
   • the appearance of the package attracts attention/cause for concern (eg oily stains, discolouration, crystallization on packaging, incorrectly addressed; improperly wrapped); and
   • the contents of the package attract attention/cause for concern (eg powder/other substance; strange odour; noise; protruding wires; persons suffering illness following exposure to package).

221. When police are dealing with a suspicious package, the package has to be treated on a worst case scenario basis as if it contains something, such as explosives, which has the potential to endanger the safety of people or cause serious damage to property. That is, it is the threat, whether real or perceived,

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164 See the definition of "public place" in section 3 of the CIA.
posed by the presence of the suspicious package to the safety of the public that requires a response.

222. Police need to be able to examine suspicious packages to:
   (a) determine whether or not the package poses a danger to people or property;
   (b) to establish whether the suspicious package is connected to an offence; and
   (c) to decide, under section 39 or 40, whether or not to establish a PFA.

223. The powers in the TEP Act only apply in relation to terrorist acts. The powers in the EM Act also apply, relevantly for present purposes, to terrorist acts. However, many public safety situations are not terrorist acts or, at the time they occur, it is not clear whether or not they are a terrorist act.

224. Section 37 of the CIA permits police officers to enter a place, or stop and enter a vehicle, if the police officer reasonably suspects that there is or has been a serious event in the place or vehicle. A "serious event" means "a fire, an explosion, or the presence of any article, substance or gas, that is likely to endanger the safety of people or cause serious damage to property." However, section 37 of the CIA cannot be used to deal with suspicious packages because they do not fall within the definition of a "serious event" until such time as police have some evidence to suggest that the suspicious package is an article likely to endanger the safety of people or cause serious damage to property.

225. Section 46 of the CIA permits the establishment of PFAs when another section of the CIA authorises an officer to establish a protected forensic area. Section 39(1)(f) authorises the establishment of a PFA around or in a vehicle. Section 40(2) authorises the establishment of a PFA in relation to a place in connection with a serious offence. Section 44(2)(f) authorises the establishment of a PFA in relation to the execution of a search warrant. While a protected area is established, an officer at the area may exercise the powers in section 46(2) including taking reasonable measures to protect the safety of any person who is in or may enter the area and to restrict entry to the area to people, animals, and vehicles, that are authorised. However, PFAs cannot be established in relation to all public safety situations and the powers which are currently available once a PFA is established are limited in scope. Further, the concept of a public safety situation is quite removed from the concept of a PFA.

226. Irrespective of the type of public safety situation, police need to be able to take immediate action to protect the safety of the public. This may include: setting up a restricted access area; evacuating people; closing buildings, roads and waterways in the area; and issuing directions to people to protect public safety or to protect property.

227. The Review Group notes that, from an operational perspective, the police response to a serious incident is the same irrespective of the motive of the offender (although the motive will be relevant to the charge faced by the offender).

228. The Review Group is of the view that special powers should be conferred on police officers to deal with public safety situations (irrespective of whether or not the situation has arisen as a result of a terrorist act) and that such special

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165 Section 37(2) and (3) of the CIA.
166 Section 37(1) of the CIA.
229. The Review Group considers that the special powers should not be available in relation to domestic disturbances in a private place; out-of-control gatherings; and lawful advocacy, protest, dissent and industrial action.

<table>
<thead>
<tr>
<th><strong>Recommendation 19</strong></th>
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<tbody>
<tr>
<td><strong>A new standalone provision not connected to PFAs should be inserted in Part 5, Division 2 of the CIA that provides that if a police officer suspects on reasonable grounds that a public safety situation exists, then the officer may:</strong></td>
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<tr>
<td>(a) set up a restricted access area (by cordons etc);</td>
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<td>(b) order the movement of people, animals, vehicles etc in, into and out of and around the restricted access area;</td>
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<tr>
<td>(c) order the closure of buildings, roads, waterways etc to all persons, vehicles etc except to emergency responders and their vehicles or other authorised persons;</td>
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<td>(d) order the evacuation of an area or areas;</td>
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<td>(e) take, or order any person to take, reasonable measures that the officer considers necessary to protect the safety of any person or to prevent damage to property (eg disconnect electricity);</td>
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<td>(f) take possession of (including in situ), move to a safe place, open and examine (including by x-ray), analyse and test an article, substance, gas or suspicious package and/or its contents to determine whether it poses a threat (in some cases this may include taking possession of a vehicle or other item in which the article or suspicious package is located);</td>
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<tr>
<td>(g) dismantle, destroy, render safe or otherwise dispose of the suspicious package and/or its contents.</td>
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A public safety situation occurs where:

(a) an act has been done, or a threat has been made to do an act, in or in relation to a public place; and

(b) the act, or the threat of action if carried out, causes or could cause one or more of the following: the death of, or serious harm to, one or more persons; endangerment to a person's life or the lives of more than one person; a serious risk to the health or safety of the public or a section of the public; or the destruction of, or serious damage to, property; and

(c) the act, or the threat of action if carried out, involves or would involve one or more of the following: the taking of a hostage or hostages; the hijacking of a vehicle; a siege situation; the use of explosives; the use of a chemical, biological, radiological, or other noxious substance; the spread of an infectious disease; the use of firearms or weapons or both firearms and weapons; the use of a vehicle or any other article as a weapon.

A public safety situation also occurs where a suspicious package has been located in a public place.
Search warrants

230. The Review Group was not able to obtain information about: the number of search warrants applied for each year; the number of search warrants granted or refused each year; and the number of search warrants executed each year.

Written reasons for refusal of search warrant

231. His Honour the Chief Magistrate expressed concern that the current provisions of the CIA, which require that a search warrant be issued by a JP and that JPs provide written reasons if they do not grant a search warrant, subtly "encourages Justices of the Peace to grant search warrants as it implies that a warrant should be granted unless there are particular reasons which should be specified."\(^{167}\)

232. His Honour the Chief Magistrate submitted that "[t]he correct starting position is that a warrant should not be issued unless the applicant satisfies certain requirements" and that "[w]ritten reasons should be provided in all cases, or not at all."\(^{168}\) However, given the delay that the preparation of reasons would cause, his Honour submitted that the requirement for written reasons where a search warrant is refused should be deleted.\(^{169}\)

233. In Victoria, South Australia, Queensland, Tasmania and the Australian Capital Territory there are no provisions requiring the making of written records of the reasons for the issue, or refusal to issue, a search warrant.\(^{170}\)

234. In the Northern Territory, where a JP issues a warrant, then he/she must record in writing the grounds upon which he/she relies to justify the issue of the warrant.\(^{171}\)

235. In New South Wales an eligible issuing officer who issues a warrant must cause a record to be made of all relevant particulars of the grounds the eligible issuing officer has relied on to justify the issue, or refusal to issue, the warrant.\(^{172}\)

236. The Review Group is of the view that the current situation is anomalous and that either JPs should be obliged to provide written reasons for the issue of a search warrant (in addition to having to provide written reasons for a refusal to issue a search warrant), or the obligation to provide written reasons for the refusal of a search warrant should be removed. The Review Group's preference is for the obligation to provide written reasons to be deleted given that a JP may only issue a search warrant for a place if he or she is satisfied, in respect of each of the matters in section 41(3) that the applicant suspects, there are reasonable grounds for the applicant to have that suspicion.

Recommendation 20

Section 42(4) of the CIA should be amended to remove the requirement for the JP to record the reasons for the refusal to issue a search warrant.

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\(^{167}\) Submission from the Chief Magistrate dated 3 April 2017.
\(^{168}\) Submission from the Chief Magistrate dated 3 April 2017.
\(^{169}\) Submission from the Chief Magistrate dated 3 April 2017.
\(^{170}\) Section 150 of the PPR Act (Qld); section 67 Summary Offences Act (SA); section 5 Search Warrants Act (Tas); section 57 Magistrates’ Court Act (Vic); section 22 Crimes Act (ACT).
\(^{171}\) Section 117(4) of the PAA (NT).
\(^{172}\) Section 65(1) and (1A) of the LEPR Act (NSW).
Issue of search warrants by police officers and senior public officers

237. Under the CIA, a JP is the only person who may issue a search warrant.  

238. Issue 21 in the Issues Paper was whether senior police officers and senior public officers should be given the power to issue search warrants as well as JPs and, if so, in what circumstances.  

239. Issue 22 in the Issues Paper was whether, if senior police officers and senior public officers are to be authorised to issue search warrants then: (a) what level or seniority should be required; (b) should an officer be precluded from issuing a search warrant if he or she is involved in the investigation for which the search warrant is required; and (c) what, if any measures, should be put in place to ensure the accountability of the process.  

240. Issues 21 and 22 are dealt with together.  

241. His Honour the Chief Magistrate submitted that "the suggestion that police officers should be able to issue search warrants should not be considered" because "[i]t is not appropriate for police to determine whether there is sufficient evidence to justify the issue of a warrant".  

242. His Honour the Chief Magistrate noted that one of the arguments for giving powers to police appears to be the availability of JPs and Magistrates.  

243. The Commissioner for Children and Young People did not support power being provided to senior police officers to issue search warrants because "judicial oversight of powers in the [CIA] is a fundamentally important component of the criminal justice system".  

244. The Department of Parks and Wildlife submitted that "[t]here are inherent risks in broadening the search warrant powers to senior public officers".  

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174 Section 42(1) of the CIA.  
175 Issues Paper at p.61.  
176 Issues Paper at p.61.  
177 Submission from the Chief Magistrate dated 3 April 2017.  
178 Submission from the Chief Magistrate dated 3 April 2017.  
179 Submission from the Chief Magistrate dated 3 April 2017.  
180 Submission from the Chief Magistrate dated 3 April 2017.  
181 Submission from the Chief Magistrate dated 3 April 2017.  
182 Submission from the Chief Magistrate dated 3 April 2017.  
183 Commissioner for Children and Young People submission dated 29 March 2017.  
184 Department of Parks and Wildlife submission dated 16 March 2017.
if such an amendment is made, then "it would be preferable to limit their application to CEOs or Directors (without delegation provisions) and for serious offences only".  Further, "no officer involved in an investigation should be able to authorise a search warrant for that same investigation and the same standards that apply to a Justice of the Peace should apply to a CEO or Director".

245. The Fremantle Association of Justices (Inc) did not support warrants being issued by senior police officers and public officers. They submitted that "[t]he immediate issue that is realised here is one of potential conflict of interest (perceived or actual). If the police are seen to have both requested and issued a warrant the checks and balances provided by an impartial approving party are lost." They also submitted that "JPs are an autonomous, economic and reliable resource."  

246. The Fremantle Association of Justices (Inc) also noted that the problem about police accessing JPs at night or on a weekend could be alleviated "by the provision to the police of access to an up to date database listing of JPs who are suitably trained and available in the areas closest to the police requiring the warrant." Further, that consideration should be given to the use of video links or skype with scanned documents sent through to the JP at a designated centre.

247. The Review Group is of the view that the power to issue search warrants should remain with JPs. This is for the following reasons:

- (a) no information was provided to the Review to suggest that police officers and public officers have difficulties obtaining search warrants due to the unavailability of JPs;
- (b) if there is a problem with the availability of JPs, then consideration should be given to the issue of warrants by Magistrates;
- (c) whilst there are other provisions in the CIA that permit senior police officers to issue authorities and approvals, the powers which may be exercised under such authorities and approvals are generally not as intrusive as those conferred by the authority of a search warrant;
- (d) the separation of the JP from the investigation that enables the JP to turn his or her mind objectively to the matters outlined in the application for a search warrant; and
- (e) the difficulty in rural areas in finding a police officer who is independent of the investigation.

Recommendation 21
The power to issue search warrants should remain with JPs.

One search warrant for all offences

248. During the course of the meetings of the Review Group it was noted that, in addition to the CIA, search warrants may be obtained under a number of other statutes including the MDA and the Firearms Act.

249. Section 26 of the Firearms Act provides:

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185 Department of Parks and Wildlife submission dated 16 March 2017.
186 Department of Parks and Wildlife submission dated 16 March 2017.
187 Fremantle Association of Justices (Inc) submission dated 11 June 2017.
188 Fremantle Association of Justices (Inc) submission dated 11 June 2017.
189 Fremantle Association of Justices (Inc) submission dated 11 June 2017.
190 Fremantle Association of Justices (Inc) submission dated 11 June 2017.
(1) Where a Justice is satisfied that there are reasonable grounds for suspecting that there is in any place any firearm or ammunition, or any document or other thing —
   (a) with respect to which under any written law an offence, involving any firearm, ammunition, silencer or other contrivance used in conjunction with a firearm, has been or is suspected, on reasonable grounds, to have been committed; or
   (b) that, there are reasonable grounds for believing —
      (i) will afford evidence as to the commission of any such offence; or
      (ii) is intended to be used for the purpose of committing any such offence,
   the Justice may grant to a member of the Police Force a warrant to enter and search such place for any such firearm, ammunition or other thing, and to seize any such firearm, ammunition or other thing found.

(2) Where a Justice is satisfied that there are reasonable grounds to suspect that any firearm or ammunition may be found on premises in the possession of a person in the circumstances described in section 24(2), the Justice may grant to a member of the Police Force a warrant to enter and search such premises for the purpose of exercising the powers given by that subsection.

250. Section 24(1) of the MDA relevantly provides:

   A justice of the peace who is satisfied by information on oath that there are reasonable grounds to suspect that any thing referred to in section 23(1)(a), (b) or (c) may be in or on any vehicle, or in or on any premises or other place, may grant to a police officer a search warrant authorising a police officer at any time or times within 30 days from the date of that search warrant to enter any vehicle, or any premises or other place, named in that search warrant and, subject to this section, to search that vehicle or those premises or that other place and any person and any baggage, package or other thing of any kind whatsoever found therein or thereon, using such force as is reasonably necessary and with such assistance as the police officer considers necessary.

251. The Review Group queried whether it was appropriate for all search warrants to fall under the CIA or be standardised in accordance with the CIA to the extent that this is possible. However, the Review Group was of the view that this issue required further consideration by the WA Police.

Recommendation 22
The WA Police should consider whether all search warrants should fall under the CIA or be standardised to comply with Division 3 of Part 5 of the CIA.

Disabling of devices and pacification of animals

252. This issue was discussed in Part 2 above.

253. The Review Group is of the view that the power of officers to disable devices and pacify animals should be clarified in relation to search warrants and searches of places authorised by the CIA. This could be achieved by amending the ancillary provisions relating to the execution of search warrants in section 44 of the CIA as this provision also applies to searches conducted under Division 3 of Part 12 of the CIA.191

191 Section 131 of the CIA.
254. The Review Group is of the view that the power to pacify animals should not be limited to guard dogs as sometimes other animals are used to deter persons from entering or searching premises.

255. The Review Group is also of the view that the power to disable devices and pacify animals should not be limited to where it is reasonably necessary to do so for the purpose of entering premises but also where it is reasonably necessary to do so for the purpose of searching premises. This is because some devices or animals prohibit or impede entry but others prohibit or impede searches.

**Recommendation 23**

Section 44 of the CIA should be amended to enable officers to disable a device (such as an alarm or a surveillance device) or pacify any animal when it is reasonably necessary to do so for the purpose of entering or searching the place or vehicle.

**Detention of persons present at place the subject of a search**¹⁹²

256. There is no general power in section 44 of the CIA to detain a person occupying the place that is being searched or who is present at the time the place is being searched.

257. However, if an officer reasonably suspects it is necessary to do so to protect the safety of any person who is in the target place when the warrant is being executed, the officer may detain a person who is in the place for no longer than is reasonably necessary.¹⁹³

258. Operational police officers sought a general power to detain for the following reasons:

(a) it is helpful to have an occupier present to assist in the search (eg by answering questions about the layout of the house and assisting entry to locked doors);

(b) if suspicious property is located it may be necessary to question the occupier to identify the owner and whether there is a legitimate excuse for possession;

(c) it is desirable to have an occupier present during the search to witness the execution of the warrant to ensure the accountability of the officers and to address any concerns of the occupier; and

(d) it may be necessary to arrest the occupier.

259. In the Northern Territory and Queensland, police officers have the power to detain persons in limited circumstances when a warrant is being executed.¹⁹⁴

260. Issue 23 in the Issues Paper was whether the CIA should be amended to allow a police officer to detain any person present at a place that is the subject of a search.¹⁹⁵

261. Issue 24 in the Issues Paper was what conditions should be imposed on any power to detain persons present at the place the subject of the search.¹⁹⁶

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¹⁹² Issues Paper at pp.61-65.
¹⁹³ Section 44(2)(g)(iii) of the CIA.
¹⁹⁴ Section 119A(4)(b) of the PA Act (NT); and section 157(1) of the PPR Act (Qld).
¹⁹⁵ Issues Paper at p.64.
¹⁹⁶ Issues Paper at p.64.
262. Issue 25 in the Issues Paper was what rights should be conferred on a person who is detained at the place the subject of the search.197

263. Issue 26 in the Issues Paper was whether any person who is detained should be in lawful custody.198

264. Issue 27 in the Issues Paper was whether the CIA should be amended to permit an officer to request the personal details of any person detained at a place during a search in circumstances which do not satisfy the criteria in section 16 of the CI(IP) Act.199

265. Issue 28 in the Issues Paper was whether any further ancillary powers should be conferred on officers who detain persons at a place during a search.200

266. Issues 23-28 are dealt with together.

267. The ALS submitted that "the current powers of detention are adequate" and that extending the power of detention would mean "that persons who happen to be present during the execution of a search will be unnecessarily detained and potentially placed under pressure to provide information to police".201 The ALS added that persons present at a place being searched "should have the right to voluntarily assist police if they so choose without being pressured to assist in order to avoid, or be released from, detention".202

268. The CCC submitted that "the CIA should not be amended to allow an officer to detain a person present at a place of a search merely for the purposes of keeping them there".203 The CCC noted that "[t]here is sufficient power within the ancillary provisions of the CIA for officers to detain those present at a search providing the necessary criteria are met".204 The CCC added that officers "should not have the power to detain merely for convenience".205

269. The Review Group does not support officers having a general power to detain persons who are present when a search warrant is being executed. This is for the following reasons:
   (a) police officers have no power to order the occupier (or anyone else present at the place) to provide any information or assistance to assist officers to execute the warrant (other than pursuant to section 44(2)(e)(ii) of the CIA);
   (b) a person present at the place being searched does not have to answer any questions put to them;
   (c) where practicable, an audiovisual recording must be made of the execution of a search warrant and this should go some way towards ensuring the accountability of officers executing search warrants and the concerns of the occupier;206
   (d) if the occupier of a place is concerned about the search, then he or she is likely to choose to remain at the place to see what takes place;

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197 Issues Paper at p.64.
198 Issues Paper at p.64.
199 Issues Paper at p.65.
200 Issues Paper at p.65
201 ALS submission dated 29 March 2017.
204 CCC submission dated 30 March 2017.
206 Section 45(2) of the CIA.
(e) a person who obstructs a public officer executing a search warrant commits an offence contrary to section 172 of the Criminal Code;

(f) powers of detention should not be conferred on police officers merely for investigative convenience; and

(g) giving police officers the power to detain someone just in case they may need to arrest that person during or after the execution of the search warrant undermines the powers of arrest contained in the CIA.

270. However, the Review Group does support the inclusion of an ancillary power to enable an officer to issue an order to any person in a place the subject of a search to provide his or her personal details and to order the person to remain in the place so that those personal details may be obtained and verified. The purpose of the orders is to ensure that officers have a record of all persons present at the place when the warrant is executed.

271. The Review Group notes that a person who, without a reasonable excuse, did not comply with the order would commit an offence contrary to section 153(1) of the CIA.

**Recommendation 24**

Section 44 of the CIA should be amended to give an officer the power to order a person present at the place:

- a) to provide his or her personal details; and
- b) to remain in the place for a reasonable period for the purpose of the officer obtaining and verifying the personal details of that person.

**Covert searches of places and vehicles**

272. A covert search warrant is a warrant authorising a place or vehicle to be entered and search without the knowledge of the occupier of the place or the person in charge of the vehicle.

273. Covert search warrants enable an investigation to be progressed without alerting a suspect to the investigation.

274. Covert search warrants are to be distinguished from warrants which permit entry to premises for a particular purpose where the entry is carried out covertly to achieve that purpose (eg to install a surveillance device) and where there is no requirement to notify the occupier of the entry.

275. In Western Australia, a covert search warrant may only be obtained under Part 3 of the TEP Act in relation to terrorist acts or terrorism offences.

276. However, in Queensland and New South Wales, the use of covert search warrants has been extended to other offences.

277. In Queensland and New South Wales a covert search warrant may be issued in relation to both places and vehicles.

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208 PPR Act (Qld); and LEPR Act (NSW).

209 See the definition of "place" in Schedule 6 of the PPR Act and the definition of "place" in the Dictionary in Schedule 2 of the CC Act. See also the definition of "place" in section 3 of the LEPR Act (NSW).
278. Issue 29 in the Issues Paper was whether the CIA should be amended to enable the covert search of a place or a vehicle under a covert search warrant in circumstances other than those currently permitted by the TEP Act.\textsuperscript{210}

279. Issue 31 in the Issues Paper was whether a covert search warrant should apply to both places and vehicles.\textsuperscript{211}

280. Issues 29 and 31 are dealt with together.

281. The Emergency Preparedness Unit noted that if provisions similar to those in the TEP are added to the CIA for the most serious offences, then "there is a risk of usurping the extraordinariness of the TEP Act to the detriment of that Act".\textsuperscript{212}

282. The ALS did "not support the extension of the power to issue covert search warrants beyond the current provisions in the TEP Act".\textsuperscript{213} The ALS referred to the extreme nature of the power and the lack of justification for making covert search warrants available for other offences.\textsuperscript{214} The ALS also submitted that, if the CIA is to be amended to provide for the use of covert search warrants, then they were of the view that certain minimum conditions should be met. These minimum conditions are discussed further below.\textsuperscript{215}

283. The Commissioner for Children and Young Children supported "the need for WA Police to investigate and detect serious crime" but did not support the need for covert search warrants.\textsuperscript{216} The Commissioner submitted that if the amendment is supported, then he urged the inclusion of safeguards, including the insertion of a provision to prevent the granting of a covert search warrant where there is a reasonable belief that children and young people will be affected.\textsuperscript{217}

284. The CCC submitted that provisions relating to covert search warrants should be codified in the CIA and that "these would be a useful investigative tool, particularly for the Commission in order to maintain the covert nature of Commission investigations".\textsuperscript{218}

285. The Review Group recognises the highly intrusive nature of covert search warrants. The Review Group supports the introduction of covert search warrants and accepts that appropriate safeguards must be put in place to ensure that the issue and execution of such warrants is properly scrutinised and that the rights of persons affected by such warrants are protected.

286. The Review Group also considered whether, as an alternative to a covert search warrant, a JP or Magistrate should be able to issue a delayed notification search warrant (that is, an ordinary search warrant but with approval to delay notifying the occupier of the place that the place has been searched for a short period of time to preserve the integrity of the investigation). However, the Review Group considered that such a warrant is still a covert search warrant and should be treated as such.

\textsuperscript{210} Issues Paper at p.66.
\textsuperscript{211} Issues paper at p.68.
\textsuperscript{212} Emergency Preparedness Unit submission dated 1 March 2017.
\textsuperscript{213} ALS submission dated 29 March 2017.
\textsuperscript{214} ALS submission dated 29 March 2017.
\textsuperscript{215} ALS submission dated 29 March 2017.
\textsuperscript{216} Commissioner for Children and Young Children submission dated 29 March 2017.
\textsuperscript{217} Commissioner for Children and Young Children submission dated 29 March 2017.
\textsuperscript{218} CCC submission dated 30 March 2017.
Recommendation 25
The CIA should be amended to enable the covert search of a place or a vehicle under a covert search warrant.

Applicants for covert search warrants

287. Issue 30 in the Issues Paper related to who should be able to apply for a covert search warrant.

288. In Queensland and New South Wales, applications for covert search warrants may only be made by police officers of particular ranks. Further, in Queensland, only authorised commission officers may apply for covert search warrants.

289. The Review Group is of the view that applications for covert search warrants should not be able to be made by all officers. Instead, only authorised police officers and authorised CCC officers should be able to apply for covert search warrants.

Recommendation 26
Only authorised police officers and authorised CCC officers should be able to apply for a covert search warrant. The officers should be authorised by the Commissioner of Police or the Corruption and Crime Commissioner.

Offences in relation to which a covert search warrant should apply

290. In Queensland and New South Wales, applications for covert search warrants may only be made in relation to specified offences. These offences may be classified as serious offences such as murder, organised crime and major crime.

291. Issue 32 in the Issues Paper related to the offences to which a covert search warrant should apply.

292. The ALS submitted that, if the CIA is to be amended to provide for the use of covert search warrants, then one of the minimum conditions should be that "the offences for which a covert search warrant" may be issued "should be clearly specified rather than categorised based on the maximum penalty available".

293. The Emergency Preparedness Unit submitted that, if covert search warrant provisions are to be included in the CIA, then there would need to be defined "a category of 'serious or organised crime' (or other appropriately defined category of major crime)".

294. The Review Group understands the concerns about covert search warrants being able to be obtained in relation to the commission of any offence.

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221 Section 212 of the PPR Act (Qld); and section 46C(1) of the LEPR Act (NSW).
222 Section 148(1) and (2) of the CC Act (Qld)
224 Sections 212(1) of the PPR Act (Qld); section 147 of the CC Act (Qld); and section 47(3) of the LEPR Act (NSW)
However, the Review Group notes that a surveillance device warrant may be obtained in relation to any offence and that, although such warrants do not authorised a covert search, they do enable covert surveillance for extended periods of time.

295. The Review Group is of the view that covert search warrants should be available for all offences. However, the nature and seriousness of the offence should be matters which are relevant to the issue of such a warrant.

### Recommendation 27

A covert search warrant should apply to all offences (other than terrorism offences). However, the applicant for a covert search warrant must justify why the warrant should be covert and the person before whom the application is made must take into account the nature and seriousness of the offence in deciding whether or not a covert search warrant should be issued.

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**Persons who may issue a covert search warrant**

296. Issue 33 in the Issues Paper was related to who should issue a covert search warrant.

297. The Review Group accepts that there needs to be an appropriate level of judicial supervision relating to the issue of a covert search warrant because of the highly intrusive nature of such warrants.

298. Warrants that are highly intrusive in nature are generally issued by Judges of the Supreme Court (for example, surveillance device warrants or covert search warrants under the TEP Act).

299. In Queensland and New South Wales, covert search warrants are issued by a Supreme Court Judge.

300. The ALS submitted that, if the CIA is to be amended to provide for the use of covert search warrants, then one of the minimum conditions should be that a covert search warrant should only be issued by a Supreme Court Judge. The Emergency Preparedness Unit’s submission was to the same effect (that is, they should be approved in the same way as a covert search warrant under the TEP Act).

301. The Review Group considers that covert search warrants should only be issued by a Supreme Court Judge because this is consistent with covert search warrant issued under the TEP Act and in other Australian jurisdictions.

### Recommendation 28

A covert search warrant should only be issued by a Supreme Court Judge.

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**Hearings of applications for covert search warrants**

302. Issue 34 in the Issues Paper was whether applications for covert search warrant should be heard in the same manner as applications for covert search warrants under the TEP Act.

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228 Issues Paper at p.71.
303. Applications for covert search warrants under the TEP Act, the PPR Act (Qld), the CC Act (QLD) and the LEPR Act (NSW) are heard in private.\textsuperscript{234}

304. The Review Group considers that applications for covert search warrants should be heard in the same manner as applications for covert search warrants under the TEP Act.

**Recommendation 29**
Applications for covert search warrant should be heard in private.

**Prerequisites for issue of a covert search warrant\textsuperscript{235}**

305. Under the PPR Act (Qld) and the CC Act (Qld), a Supreme Court Judge may issue a covert search warrant if satisfied that there are reasonable grounds for believing that evidence of the relevant offence (that is, a designated offence, organised crime or terrorism or major crime) is at the place, or is likely to be taken to the place, within the next 72 hours.\textsuperscript{236}

306. Under the LEPR Act (NSW), an eligible applicant may apply to a Supreme Court Judge for the issue of a covert search warrant if the applicant suspects that there is, or within 10 days will be, in or on the premises, a thing of a kind connected with a searchable offence in relation to the warrant, and considers that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.\textsuperscript{237} A Supreme Court Judge may issue a covert search warrant if satisfied there are reasonable grounds for doing so.\textsuperscript{238}

307. Issue 35 in the Issues Paper was related to the prerequisites for an application for a search warrant.\textsuperscript{239}

308. The Review Group is of the view that the prerequisites for the grant of a covert search warrant should be a hybrid of the requirements contained in the PPR Act (Qld), the CC Act (Qld) and the LEPR Act (NSW). In particular, the Review Group is of the view that there should be reasonable grounds for believing rather than reasonable grounds for suspecting.

**Recommendation 30**
The prerequisites for the issue of a covert search warrant should be that the Supreme Court Judge is satisfied that there are reasonable grounds for believing that:

(a) evidence of an offence is at the place or vehicle, or is likely to be taken to the place or vehicle, within the next 10 days; and

(b) it is reasonably necessary for the entry and search of the place or vehicle to be conducted without the knowledge of the occupier of the place or the person in charge or the vehicle.

\textsuperscript{233} Issues Paper at p.72.
\textsuperscript{234} Section 212(1) of the PPR Act (Qld); section 148(1) of the CC Act (Qld); and section 46A of the LEPR Act (NSW).
\textsuperscript{235} Issues Paper at pp.72-73.
\textsuperscript{236} Section 215(1) of the PPR Act (Qld); and section 151(1) of the CC Act (Qld).
\textsuperscript{237} Section 47(2) of the LEPR Act (NSW).
\textsuperscript{238} Section 48(1) of the LEPR Act (NSW).
\textsuperscript{239} Issues Paper at p.73.
Special considerations for issue of covert search warrant

309. Issue 36 in the Issues Paper related to what special considerations (if any) the person issuing the covert search warrant should be required to take into account when deciding whether or not to issue a search warrant.241

310. The Review Group is of the view that, before a covert search warrant is issued, the Judge must consider a number of factors that primarily focus on the highly intrusive nature of a covert search warrant under the PPR Act (Qld) and the CCA Act (Qld).242

Recommendation 31
In deciding whether or not to issue a covert search warrant, a Supreme Court Judge should be required to take into account the following matters:

(a) the nature and seriousness of the offence in respect of which the warrant is sought;
(b) the extent to which issuing the warrant would assist in preventing, detecting or providing evidence of the commission of an offence;
(c) the extent to which the privacy of any person is likely to be affected by the execution of the covert search warrant;
(d) the extent to which evidence or information is likely to be obtained by methods of investigation not involving the use of a covert search warrant (conventional methods of investigation);
(e) the extent to which police officers investigating the matter have used or can use conventional methods of investigation;
(f) how much the use of conventional methods of investigation would be likely to help in the investigation of the matter;
(g) how much the use of conventional methods of investigation would prejudice the investigation of the matter; and
(h) any other warrants sought or issued under the CIA, the SD Act or the TI Act in connection with the same matter and the benefits derived from those warrants.

Conduct which is authorised by a search warrant

311. A search warrant issued under Division 3 of Part 5 authorises the exercise of the powers in sections 43 and 44 of the CIA.

312. The key feature of a covert search warrant as distinct from any other search warrant is that the warrant authorises the entry and search of a place or vehicle without the knowledge of the occupier of the place or the person in charge of the vehicle. The covert search warrant will also authorise the exercise of various other powers connected to the entry and search.244

313. Issue 37 in the Issues Paper was what a covert search warrant should authorise.245

314. The Review Group is of the view that a covert search warrant should authorise the exercise of similar powers to those contained in the TEP Act.

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240 Issues Paper at pp.73-74.
241 Issues Paper at p.74.
242 Section 214 of the PPR Act (Qld); and section 150 of the CC Act (Qld).
243 Issues Paper at pp.74-78.
244 See, for example, section 27(7) of the TEP Act.
245 Issues Paper at p.78.
Recommendation 32
A covert search warrant issued under the CIA should authorise the exercise of powers similar to those contained in section 27(7) and (8) of the TEP Act.

Time for execution of covert search warrant

315. Issue 38 in the Issues Paper was when a covert search warrant should be able to be executed.\textsuperscript{247}

316. Under the CIA, a search warrant must be executed between 6am and 9pm unless the officer executing it reasonably suspects that if it were, the safety of any person, including the officer, may be endangered or the effectiveness of the proposed search may be jeopardised.\textsuperscript{248}

317. However, where a covert search warrant is concerned, it may be more difficult to execute the warrant without the knowledge of the occupier.

318. Under the TEP Act and in Queensland and New South Wales a covert search warrant may be exercised at any time of the day or night unless it is expressly provided otherwise.\textsuperscript{249}

319. The Review Group is of the view that there should be no time restrictions on when a covert search warrant is to be executed because this is consistent with covert search warrants issued under the TEP Act and in other Australian jurisdictions.

Recommendation 33
A covert search warrant should be able to be executed at any time of the day or night.

Duration of covert search warrant

320. The execution of a covert search warrant may take some time because police officers have to wait for the right opportunity to execute the warrant for the following reasons. First, to ensure that no one is in the place or vehicle that is the subject of the proposed covert search. Second, to minimise other people observing their covert entry and search of the place or vehicle.

321. A covert search warrant issued under the TEP Act must state an expiry date, which cannot be more than 30 days after the day of issue.\textsuperscript{251} A covert search warrant ceases to be in force on the expiry date specified in the warrant or when it is executed.\textsuperscript{252} However, a covert search warrant continues in effect in accordance with section 28(11) of the TEP Act for the purposes or returning any thing removed from, or retrieving any thing substituted in, the place or vehicle when it was first entered under the warrant.

322. In Queensland, a covert search warrant is issued under the PPR Act (Qld) or the CC Act (Qld) for a period of not more than 30 days.\textsuperscript{253} The warrant may be

\textsuperscript{246} Issues Paper at p78.
\textsuperscript{247} Issues Paper at p.78.
\textsuperscript{248} Section 43(6) of the CIA.
\textsuperscript{249} Section 27(3) and clause 1 of Schedule 1 of the TEP Act; section 216(d) of the PPR Act (Qld); section 152(d) of the CC Act (Qld); and section 72(1A) of the LEPR Act (NSW).
\textsuperscript{250} Issues Paper at pp.78-79.
\textsuperscript{251} Section 26(5)(h) of the PPR Act (Qld).
\textsuperscript{252} Section 27(10) of the PPR Act (Qld).
\textsuperscript{253} Sections 215(1) of the PPR Act (Qld); and section 152(f) and 153(1) of the CC Act (Qld).
extended. The warrant remains in force until the earlier of the following: the day stated in the warrant or when the initial search is complete. A police officer may continue to exercise powers under a covert search warrant issued under the PPR Act (Qld) but only to the extent necessary to return a thing seized under the warrant and taken to another place.

323. In New South Wales, a covert search warrant is issued under the LEPR Act (NSW) for a period of not more than 30 days after the warrant starts.

324. Issue 39 in the Issues Paper was for how long a covert search warrant should last.

325. The Review Group is of the view that a covert search warrant should last no more than 30 days after the day of issue because this is consistent with covert search warrant issued under the TEP Act and in other Australian jurisdictions. However, a covert search warrant should continue in effect to the extent that officers need to return anything seized from the place or vehicle or to retrieve any thing substituted in the place or vehicle.

Recommendation 34
A covert search warrant should be in effect for a period of no more than 30 days after it is issued but officers should be able to return a thing to the place or vehicle, or retrieve a thing from the place or vehicle, after the 30 day period if required.

Audiovisual recordings of the execution of a covert search warrant

326. An audiovisual recording must be made of the execution of a search warrant issued under the CIA, if reasonably practicable.

327. In Queensland, a search carried out under a covert search warrant must be videotaped if practicable.

328. Given that a covert search warrant is executed without the knowledge or consent of the occupier of the place or vehicle it is arguable that it is even more appropriate for the entry and search to be the subject of an audiovisual recording. However, there may be circumstances in which taking recording equipment in a place or vehicle which is the subject of a covert search may not be practicable because it may, for example, alert other people to the fact that something is going on.

329. Issue 40 in the Issues Paper was whether there should be a requirement to make an audiovisual recording of the execution of a covert search warrant.

330. The Review Group is of the view that, if reasonably practicable, the execution of a covert search warrant should be the subject of an audiovisual recording in the same way as a search warrant issued under the CIA. The making of an audiovisual recording provides a measure of accountability in relation to the execution of a covert search warrant.

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254 Section 217(2) of the PPR Act (Qld); and section 153(2) of the CC Act (Qld).
255 Section 217(1) of the PPR Act (Qld); and section 153(1) of the CC Act (Qld).
256 Section 217(4) of the PPR Act (Qld).
257 Section 152 of the LEPR Act (NSW).
258 Issues Paper at p.79.
259 Issues Paper at pp.79-80.
260 Section 45(2) of the CIA.
261 Section 216(e) of the PPR Act (Qld); and section 152(e) of the CC Act (Qld).
262 Issues Paper at p.80.
Recommendation 35
An audiovisual recording should be made of the execution of a covert search warrant but only if reasonably practicable.

Restrictions on access to, and publication of, records relating to covert search warrants

331. Under the TEP Act, it is an offence to publish confidential information in relation to a covert search warrant except in accordance with the approval of the Supreme Court.

332. In Queensland, under the PPR Act (Qld) and the CC Act (Qld), a transcript of an application for a covert search warrant and any order made on it must not be made despite the Recording of Evidence Act 1962 (Qld). It is an offence for a person to publish a report of a proceeding on an application for a covert search warrant or an extension thereof. Further, a person is not entitled to search information in the custody of the Supreme Court in relation to an application for a covert search warrant unless a Supreme Court Judge otherwise orders in the interests of justice.

333. In New South Wales, under the LEPR Act (NSW), it is an offence to intentionally or recklessly publish an application for a covert search warrant, a report prepared under section 74 or 74A, an occupier’s notice or any information derived therefrom except as permitted in section 76B(1).

334. Issue 41 in the Issues Paper was what restrictions should apply to access to, and the publication of records relating to covert search warrants.

335. The Review Group is of the view that the restrictions in the TEP Act that apply to the publication of confidential information about a covert search warrant should apply to covert search warrants under the CIA.

Recommendation 36
It should be an offence to publish confidential information in relation to a covert search warrant except in accordance with the approval of the Supreme Court.

Notification of occupiers or other persons

336. In Western Australia, under the TEP Act, there is no requirement for an occupier of a place or the person in charge of a vehicle to be notified that the place or vehicle has been the subject of a covert search. The position is the same in Queensland. This means that unless the person is prosecuted for an offence and evidence is to be led of what was found during the covert search, the occupier of the place or the person in charge of a vehicle may never know of the covert search. The Review Group notes that there is also no requirement in the SD Act or the TI Act for persons the subject of covert

263 Issues Paper at pp.80-81.
264 Section 29(2) of the TEP Act.
265 Section 218(1) of the PPR Act (Qld); and section 154(1) of the CC Act (Qld).
266 Section 218(2) of the PPR Act (Qld); and section 154(2) of the CC Act (Qld).
267 Section 218(3) of the PPR Act (Qld); and section 154(3) of the CC Act (Qld).
268 Section 76B(1) of the LEPR Act (NSW).
269 Issues Paper at p.81.
270 Issues Paper at pp.81-82.
surveillance in respect of warrants issued under those Acts to be notified of the existence of the warrant.

337. In New South Wales, under the LEPR Act (NSW), an occupier's notice relating to a covert search warrant must be served on an occupier. However, service of such a notice may be postponed for a period or periods of up to 6 months. Further, an adjoining occupier's notice must be served on the person who was the occupier of the adjoining premises at the time the covert search warrant was executed on, or as soon as practicable, after the service of the occupier's notice on the occupier unless the eligible issuing officer dispenses with service.

338. Issue 42 in the Issues Paper was whether the occupier of a place or the person in charge of a vehicle should be notified that the place or vehicle has been the subject of a covert search warrant and, if so, when.

339. The ALS submitted that, if the CIA is to be amended to provide for the use of covert search warrants, then one of the minimum conditions should be that "if a covert search warrant is executed and no charges laid within 12 months, then the person subject to the covert search warrant should be notified of the existence and execution of the covert search warrant." 

340. The Review Group is of the view that the occupier of a place or the person in charge of a vehicle should not be notified that the place or the vehicle has been the subject of a covert search. The requirement that covert search warrants only be issued by a Supreme Court Judge provides an appropriate level of oversight. The Review Group notes that notification of a covert search warrant will occur if a person is charged with an offence because of prosecution disclosure requirements.

Recommendation 37
An occupier of a place or the person in charge of a vehicle should not be notified that the place or vehicle has been the subject of a covert search.

Reporting requirements

341. In Western Australia, a police officer, or a replacement police officer, must provide a written report about the execution of the covert search warrant to the Supreme Court Judge who issued the warrant or, in that Judge's absence, the Chief Justice. If the warrant was executed, then the report must contain the matters set out in section 28(3) of the TEP Act and be provided within 7 days of the day on which it was executed (unless an interim report together with an application for an extension of time is given to the Judge and the Judge grants such extension). If the warrant was not executed, then the report must contain the matters set out in section 28(4) of the TEP Act and be provided within 7 days after the expiry date specified in the warrant. Further, under the

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271 A warrant issued under the SD Act authorises, inter alia, the use of surveillance devices to record private activities or private conversations. A warrant issued under the TI Act authorises, inter alia, the recording of telephone conversations.
272 Section 67A of the LEPR Act (NSW).
273 Section 67B(4) of the LEPR Act (NSW).
274 Issues Paper at p.82.
276 Issues Paper at pp.82-83.
277 Section 28 of the TEP Act.
278 Section 28(3A) and (3B) of the TEP Act.
279 Section 28(2) of the TEP Act.
TEP Act, the Commissioner of Police must provide an annual report to the Minister of Police about covert search warrants.\(^{280}\)

342. In Queensland, a police officer or commission officer must make a report to the Supreme Court Judge who issued the warrant or to a monitor within 7 days after the warrant is executed.\(^{281}\)

343. In New South Wales, under the LEPR Act (NSW), an executing officer for a covert search warrant must provide a written report to the eligible issuing officer who issued the warrant within 10 days after the execution or the expiry of the warrant (whichever occurs first).\(^{282}\) If premises are entered for the purpose of returning or retrieving a thing, then an additional report must be provided to the eligible issuing officer. The additional report must be provided within 10 days after entry to the premises.\(^{283}\)

344. The Review Group notes that in Queensland and New South Wales no powers are conferred on a Supreme Court Judge to do anything in relation to the report.

345. Issue 43 was whether there should be a requirement to lodge a report relating to the execution of a covert search warrant and, if so, with whom.\(^{284}\)

346. The Review Group is of the view that the police officer to whom the warrant was issued or another police officer involved in the investigation should provide a written report to a Supreme Court Judge about the execution or non-execution of a covert search warrant in the same way as under the TEP Act. This is to ensure that there is some oversight of the execution of such warrants.

**Recommendation 38**

An officer should be required to provide a written report about the execution of a covert search warrant to the Supreme Court Judge who issued the warrant or, in his or her absence, the Chief Justice.

Taking things seized and photographs before the person who issues the covert search warrant\(^{285}\)

347. In Queensland, under both the PPR Act (Qld) and the CC Act (Qld), the police officer or the commission officer must, if practicable, take before the Supreme Court Judge anything seized under a covert search warrant and any photograph taken during the covert search.\(^{286}\) The Judge may then make orders relating to the seized items and photographs (eg to be held by a police officer until any proceeding in which the thing may be evidence ends or to be dealt with in some other way).\(^{287}\)

348. Issue 44 in the Issues Paper was whether there should be a requirement for any thing seized, and any photographs taken, during the execution of a covert search warrant to be taken before a Supreme Court Judge.\(^{288}\)

\(^{280}\) Section 30 of the TEP Act.
\(^{281}\) Sections 216 and 220 of the PPR Act (Qld); and section 156(1) and (2) of the CC Act (Qld).
\(^{282}\) Section 74A(2) of the LEPR Act (NSW).
\(^{283}\) Section 74A(4) of the LEPR Act (NSW).
\(^{284}\) Issues Paper at p.83.
\(^{286}\) Section 220(5) of the PPR Act (Qld); and section 156(3) of the CC Act (Qld).
\(^{287}\) Section 220(6) of the PPR Act (Qld); and section 156(4) of the CC Act (Qld).
\(^{288}\) Issues Paper at p.84.
349. The Review Group is of the view that any thing seized under a covert search warrant should be dealt with under Part 13 of the CIA in the same way as a thing seized under a search warrant. The Review Group notes that some items seized under a covert search warrant may be returned to the place or vehicle in the exercise of powers under the warrant. The Review Group does not consider that it is necessary for things seized to be taken before a Supreme Court Judge.

**Recommendation 39**

Any thing seized under a covert search warrant should, so far as is practicable and appropriate, be dealt with under Part 13 of the CIA (unless the thing is returned to the place or vehicle as permitted under the warrant).

**Out-of-control gatherings**

350. In 2012 new powers were inserted into the CIA by the *Criminal Law Amendment (Out-of-control Gatherings) Act 2012* to deal with out-of-control gatherings.289 At the same time, new offences relating to hosting out-of-control gatherings were inserted in the *Criminal Code*.290 In the second reading speech for the Bill the then Minister for Police stated:

> The government is introducing this bill to assist police in tackling out-of-control gatherings in this state. Out-of-control gatherings are characterised by large numbers of attendees and criminal or antisocial conduct. Gatherings of this nature are a relatively modern social phenomenon. In some cases, it is the organisers who act in an irresponsible manner, which leads to the gathering becoming out of control. In other cases, social gatherings attract the attention of persons who are intent on causing mayhem. In many cases, attendance at these gatherings is fuelled by reports or invitations in social media.

> The task of responding to such gatherings falls upon the police force of this state, because it is the police who bear primary responsibility for maintaining public order. Out-of-control gatherings impose a heavy burden on police resources. This is because large numbers of police officers, together with police vehicles, police dogs, police horses and the police air wing, are being utilised to quell unruly disturbances in suburbs across the metropolitan area. In many cases, police officers who are called to respond to out-of-control gatherings are attacked by persons associated with the out-of-control gathering. Unfortunately, it is not uncommon for glass bottles and other missiles to be launched at police officers and other police assets.291

351. Under section 38A(2) of the CIA, a senior officer (of the rank of sergeant or above) may authorise the exercise of the powers under section 38B if the senior officer reasonably suspects that:

(a) there is an out-of-control gathering occurring in a place or vehicle; or

(b) a gathering of persons occurring in a place or vehicle is likely to become an out-of-control gathering.

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289 See sections 38A-38C of the CIA.
290 See sections 75A and 75B of the Criminal Code.
352. The authorisation of the exercise of powers under section 38B by a senior officer does not involve the making of a declaration that a gathering is out-of-control. However, such gatherings are often referred to as having been "declared out-of-control".

353. The powers in section 38B of the CIA include power for police officers to: enter a place or stop and enter a vehicle without warrant; locate a person in authority; order persons or groups of persons to leave or cease particular conduct; take, or order another person or group of persons to take, reasonable measures to deal with the out-of-control gathering or to prevent the gathering from becoming out-of-control.

354. Under the Criminal Code, a court may order a person convicted of an offence under section 75B(2) to pay some or all of the reasonable expenses of or incidental to any action that was reasonably taken by police officers in responding to the out-of-control gathering.\(^{292}\)

355. In a report in PerthNow on 17 July 2016 it was reported that since the legislation came into effect:
- 22 gatherings were shut down in 2013; 20 in 2014; 17 in 2015 and 11 so far (in 2016);
- 65 people had been charged with hosting out-of-control gatherings;
- 62 people had been charged with other offences such as criminal damage, resisting arrest or assaulting police;
- Police spent more than $2.5 million on 9 extra police dogs and two police party buses to help enforce the legislation; and
- Party hosts have been ordered to pay police more than $42,000 to recover costs.\(^{293}\)

356. In a report in the Sunday Times on 8 April 2018 it was reported that since the legislation came into effect:
- 74 people have been charged with offences;
- 47 people have been successfully prosecuted;
- Hosts of the gatherings have been ordered to pay police nearly $55,000 to recover costs; and
- 116 parties have been declared out-of-control gatherings.\(^{294}\)

357. In or about 2015 the WA Police established an out-of-control register. This register records information about out-of-control gatherings. The following information was provided to the Review Group current as at June 2017:
- police have declared 111 out-of-control gatherings since the register was created;
- 54 charges have been laid under section 75B of the *Criminal Code*; and
- $68,509.15 had been claimed by, and $44,786.93 had been awarded to, the WA Police by way of reasonable expenses in responding to out-of-control gatherings.

358. In April 2018 Business Intelligence & Analytics of the WA Police provided the Review Group with information about charges relating to out-of-control gatherings. Since 2012, 53 people have been charged with an offence contrary to section 75B of the Criminal Code and 44 people have been charged with an offence contrary to section 38C of the Criminal Code.

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\(^{292}\) Section 75B(5) of the CIA.


\(^{294}\) "Out of Control" reported in the *Sunday Times* April 8, 2018 at p.27.
359. The Review Group is satisfied that the new provisions relating to out-of-control gatherings are effective and being used by the WA Police in the way that they were intended to be used. This is reflected in: the number of authorisations granted; the number of charges laid for hosting an out-of-control gathering; and the recovery of expenses by the WA Police.

360. The Review Group also notes that provisions similar to sections 38A-38B of the CIA have now been introduced in Queensland for out-of-control events.295

Protected forensic areas

361. A PFA is an area established in accordance with section 46.296 Once a PFA is established, then an officer at the area may take reasonable measures,297 including giving orders, which are designed to meet three key ends. First, to prevent concealment or disturbance of evidence and disturbance of the area. Second, to protect the safety of a person. Third, to control access to the area.

362. Section 47(7) of the CIA makes it an offence for an unauthorised person, to enter a PFA without a reasonable excuse and section 47(8) of the CIA makes it an offence for an unauthorised person to disturb any thing in a protected forensic area without a reasonable excuse. A person is unauthorised unless they are authorised by the officer in charge of the investigation at the PFA.298 The maximum penalty for the each of the offences in section 47 is a fine of $12,000 and imprisonment for 12 months.

Exercise of powers under section 47(2) by the officer who is required to remain at a PFA299

363. Section 46(5) of the CIA places the officer who established the PFA, or another officer involved in the investigation, under a mandatory obligation to remain at the area while a PFA is established.

364. Issue 46 was whether section 46 of the CIA should be amended to allow an officer not otherwise involved in the investigation (for example, an employee of the Police Service or another Government Department or a contractor) to be the person who is required to remain at the area established as a PFA.300

365. The Emergency Preparedness Unit gave in principle support to the proposal for an officer who is not involved in the investigation to be the person who is required to remain at the PFA.301 However, they did not consider that private contractors should be able to exercise the powers due to scene contamination unless there were significant controls.302

366. The Review Group is of the view that it is not necessary for the CIA to require the officer who established the PFA or another officer involved in the investigation to remain at the area. This is because if it is no longer necessary for an officer to remain at the PFA then the PFA should be disestablished.

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295 See Part 7 of the PPR Act (Qld).
296 See the definition of "protected forensic area" in section 3(1) of the CIA.
297 Section 47(2) of the CIA.
298 See the definition of "authorised" in section 47(1) of the CIA.
299 Issues Paper at pp.93-96.
300 Issues Paper at p.96.
301 Emergency Preparedness Unit submission dated 1 March 2017.
Recommendation 40
Section 46(5) of the CIA should be repealed.

Exercise of powers in section 47(2) of the CIA

367. Issue 47 was whether section 47 of the CIA should be amended to allow an officer not otherwise involved in the investigation (for example, an employee of the Police Service or another Government Department or a contractor) to exercise the powers in section 47(2).

368. The Emergency Preparedness Unit gave in principle support to the proposal for an officer who is not involved in the investigation to be able to exercise powers under section 47(2) of the CIA. However, they did not consider that private contractors should be able to exercise the powers due to scene contamination unless there were significant controls.

369. The Review Group notes that while a protected forensic area is established, the powers in section 47(2) of the CIA may be exercised by "an officer at the area". However, pursuant to section 15 of the CIA, a person who may exercise the powers in section 47(2) of the CIA may authorise as many other persons to assist in exercising the powers as are reasonably necessary in the circumstances and a person so authorised may exercise the power or assist the other to exercise the power.

370. The Review Group is of the view that, since the powers in section 47(2) to take reasonable measures may be exercised by an officer at the area and section 15 of the CIA applies to the exercise of those powers, it is not necessary to amend section 47 to allow an officer not otherwise involved in the investigation to exercise the powers in section 47(2) of the CIA.

371. The Review Group also notes that, unless their instrument of appointment says otherwise, police auxiliary officers have all of the powers, duties and obligations that a police officer or a member of the Police Force has under any written law other than the Police Act. This would include the powers in section 47(2) of the CIA.

Recommendation 41
The CIA should not be amended to allow an officer not otherwise involved in the investigation to exercise the powers in section 47(2) of the CIA.

372. Issue 48 was whether the Commissioner of Police, or the CEO of another Government Department whose officers may establish a PFA, should be given the power to engage private contractors to perform the functions in section 46(5) and 47(2) of the CIA.

373. The Emergency Preparedness Unit did not consider that private contractors should be able to exercise the powers due to scene contamination unless there were significant controls.

303 Issues Paper at pp.93-96.
304 Issues Paper at p.96.
307 Section 15(1) of the CIA.
308 Section 15(2) of the CIA.
309 Section 38H(12)(a) of the Police Act.
310 Issues Paper at p.96.
374. The CCC noted that "the engagement of private contractors in relation to a ... (PFA) is problematic as a private contractor may not always fall within the Commission's jurisdiction". They submitted that "a PFA is established to maintain evidence integrity in circumstances of a serious criminal offence" and, "as a core policing activity, it would be preferable that in all circumstances, persons enforcing the PFA are subject to CCC oversight and jurisdiction".

375. The Review Group is of the view that section 15 of the CIA applies to the exercise of the powers contained in section 46 and 47 of the CIA. Accordingly, it is not necessary to amend the CIA to allow private contractors to perform the functions contained in sections 46(2) and 47(2) of the CIA.

**Recommendation 42**
The CIA should not be amended to allow private contractors to perform the functions contained in sections 46(2) and 47(2) of the CIA.

**Remotely piloted aircraft and PFAs**

376. An issue raised with the Review Group related to the use of unmanned aerial vehicles or remotely piloted aircraft (that is, drones) by media organisations and other persons to take photographs or footage of a PFA or any person or thing in or on the PFA.

377. It would seem that there are two key concerns. First, that the remotely piloted aircraft may crash into the PFA and contaminate or disturb the PFA or injure persons within the PFA. Second, the media may publish photographs or footage of the PFA or a person or thing in the PFA which might:
- (a) compromise or prejudice an ongoing investigation; or
- (b) compromise the safety and privacy of a victim, witness or suspect; or
- (c) prejudice the fair trial of a person accused of committing an offence in relation to which the PFA was established.

378. In one article, it was reported that the operator of a drone was fined $850 after flying the drone over a police operation in Melbourne. In this case, the drone hit a power line and almost landed on a police officer.

379. The use of remotely piloted aircraft is generally regulated by the Civil Aviation Safety Act 1998 (Cth) and under Part 101 of the Civil Aviation Safety Regulations 1998 (Cth).

380. Whilst officers can give a direction pursuant to section 47(2)(d) of the CIA to prevent an unauthorised person, animal or vehicle (including aircraft) from disturbing an area which is a PFA, a direction cannot be given which is

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312 CCC submission dated 30 March 2017.
313 CCC submission dated 30 March 2017.
314 Issues Paper at pp.96-98.
315 The term "remotely piloted aircraft" replaced the term "unmanned aerial vehicle" by virtue of the Civil Aviation Legislation Amendment (Part 101) Regulations 2016 (Cth).
316 The privacy of a victim should be protected: see the requirement in schedule 1 clause 5 to the Victims of Crime Act 1994 (WA).
317 An arrested person or an arrested suspect is entitled to a reasonable degree of privacy from the mass media: see section 137(3)(b) of the CIA.
318 "Australia drone laws to be relaxed this year but experts warn of safety threat" reported on 9 April 2016 at www.news.com.au.
inconsistent with the Commonwealth legislation\textsuperscript{319} (for example, a direction prohibiting all aircraft from flying in the airspace above a PFA).

381. Issue 49 in the Issues Paper was whether a new offence should be inserted into section 47 of the CIA to make it an offence for an unauthorised person to use a remotely piloted aircraft to take a photograph of a PFA or any person or thing in or on the PFA.\textsuperscript{320}

382. Issue 50 in the Issues Paper was whether the penalty for such an offence should be the same as for an offence contrary to section 47(7) or 47(8) of the CIA.\textsuperscript{321}

383. Issues 49 and 50 are dealt with together.

384. The Emergency Preparedness Unit were of the view that the proposal needs to extend beyond the use of remotely piloted aircraft to take photographs, to obtaining other visual records or digital imagery without recording (such as live streaming), or other on board data gathering (such as GPS coordinates, thermal scanning).\textsuperscript{322}

385. The Emergency Preparedness Unit also submitted that the consideration that should a remotely piloted aircraft crash into the scene, causing contamination that could prejudice an investigation, extends beyond any photographic/imagery capability.\textsuperscript{323} They also noted that police may wish to use remotely piloted aircraft in an investigative capacity and hence, any provisions may need to allow for conditions or exclusions.\textsuperscript{324}

386. The Review Group accepts that by virtue of section 109 of the Commonwealth Constitution there are limits on the extent to which the State may legislate with respect to aircraft and that, in any event, prohibiting a person from using an aircraft such as a remotely piloted aircraft to take a photograph of a PFA would be difficult to enforce.

387. The Review Group notes that it is an offence to disturb a PFA.\textsuperscript{325} However, the Review Group is of the view that a new provision should be inserted into section 47 of the CIA to enable an officer to give an order that prohibits an unauthorised person from publishing a photograph or a recording of a PFA, or any person or thing in the PFA in specified circumstances. Such a provision would be similar to the power to take reasonable measures in section 47(2) of the CIA.

388. The Review Group notes that a person who, without a reasonable excuse, did not comply with the order would commit an offence contrary to section 153(1) of the CIA.

\textsuperscript{319} By virtue of the operation of section 109 of the Commonwealth Constitution.
\textsuperscript{320} Issues Paper at p.98.
\textsuperscript{321} Issues Paper at p.98
\textsuperscript{322} Emergency Preparedness Unit submission dated 1 March 2017.
\textsuperscript{323} Emergency Preparedness Unit submission dated 1 March 2017.
\textsuperscript{324} Emergency Preparedness Unit submission dated 1 March 2017.
\textsuperscript{325} Section 47(2) of the CIA.
Recommendation 43

A new provision should be inserted into section 47 of the CIA that enables an officer to give an order to prohibit an unauthorised person from publishing a photograph or a recording of a PFA, or any person or thing in the PFA, if the publication could reasonably be expected to:

(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law; or

(b) prejudice an investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted; or

(c) enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered; or

(d) prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings; or

(e) endanger the life or physical safety of any person; or

(f) endanger the security of any property; or

(g) prejudice the maintenance or enforcement of a lawful measure for protecting public safety.
Part 6: Obtaining business records

389. Prior to the introduction of Part 6 of the CIA, business records could only be obtained with the consent of the owner of the records or under a search warrant.

390. Part 6 of the CIA introduced new provisions for obtaining business records by means of an order to produce issued by a JP. These orders enable investigating officers to access the business records of a third party who is not suspected of involvement in the commission of the offence under investigation in circumstances where, for the most part, the owner of the business records is willing to produce the records but wants to do so under compulsion to avoid any civil action for doing so (e.g. breach of confidence).

391. An order to produce requires the production of business records but does not authorise the entry and search of a place to locate the business records. However, there is nothing in Part 6 of the CIA that prevents an officer from applying for a search warrant in respect of a business record, whether before or after the issue of an order to produce.\(^{326}\)

392. An order to produce cannot be issued under Part 6 to a person in relation to a business record that relates or may relate to an offence that the person is suspected of having committed.\(^{327}\)

393. In practice, a significant proportion of orders to produce business records that are issued in Western Australia are directed towards ADIs for the purposes of the investigation of stealing and fraud offences.

394. If a business record is produced under an order to produce and a claim of privilege is made by a person entitled to possession of the record or the officer to whom it is produced reasonably suspects that all or some of the information is privileged, then the record must be dealt with in accordance with section 151 of the CIA.\(^{328}\)

395. The following issues have arisen in relation to the operation and effectiveness of Part 6 of the CIA:
   (a) whether the definition of "business" in section 50 of the CIA requires amendment;
   (b) whether a police officer should be empowered to issue an order to produce; and
   (c) deletion of the name of the JP from the order to produce prior to service.

Definition of business\(^{329}\)

396. The term "business" is defined in section 50 of the CIA to mean "any business, including a business of a governmental body or instrumentality or a local government or any occupation, trade or calling."

397. Issue 56 in the Issues Paper was whether the definition of "business" in section 50 of the CIA should be amended to make it clear that the term includes any

\(^{326}\) Section 51(2) of the CIA.
\(^{327}\) Section 51(1) of the CIA.
\(^{328}\) Section 151(2) of the CIA.
\(^{329}\) Issues Paper at pp.111-113.
government department, agency or instrumentality irrespective of whether or not they carry on a commercial undertaking.330

398. Issue 57 in the Issues Paper was whether the definition of "business" in section 50 of the CIA should be extended to a person who is the holder of an office established or continued for a public purpose by the State (for example, the Public Advocate, the Chief Psychiatrist).331

399. Issues 56 and 57 are dealt with together.

400. The Public Advocate supported "a broad and inclusive definition of "business" which includes statutory office holders".332.

401. The Fremantle Association of Justices (Inc) noted that it seemed "more sensible to have the definition of a term consistent across similar legislation where possible".333

402. The Review Group is of the view that it is arguable that the definition of "business" in the CIA is narrower than the definition of "business" in the Evidence Act because the CIA refers to "a business" whereas the Evidence Act refers to "the business".

403. So, for example, the Court of Appeal has held that the WA Police and the Chemistry Centre are "the business of a governmental body or instrumentality" for the purposes of the definition of "business" in the Evidence Act. However, there is an issue as to whether both agencies would fall within the definition of "business" for the purposes of the CIA. Whilst the Chemistry Centre clearly carries on a business having regard to its functions under the Chemistry Centre (WA) Act 2007 (WA) (namely, the provision of, inter alia, chemical information, advice and analytical services to government agencies and by earning revenue by engaging in commercial activities), the same cannot be said for the Police Force having regard to the Police Act 1892.

404. The Review Group is of the view that a government department, agency or instrumentality that is a "business" for the purposes of the Evidence Act should also be a "business" for the purposes of the CIA. The Review Group can see no reason why a government department, agency or instrumentality, that does not carry on a commercial undertaking or a person who is the holder of an office established or continued for a public purpose by the State should not be able to be issued with an order to produce.

**Recommendation 44**
The definition of "business" in section 50 of the CIA should be amended to make it clear that the term includes:
(a) any government department, agency or instrumentality irrespective of whether or not they carry on a commercial undertaking; and
(b) a person who is the holder of an office established or continued for a public purpose by the State (for example, the Public Advocate, the Chief Psychiatrist).

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330 Issues Paper at p.113.
331 Issues Paper at p.113.
333 Fremantle Association of Justices (Inc) submission dated 11 June 2017.
Issue of order to produce by police officers

405. Orders to produce may only be issued by JPs.  

406. In Western Australia, under the CPC Act, a police officer may by written notice require a financial institution to provide information about accounts and account holders. 

407. In Queensland, a senior police officer (of or above the rank of inspector) may issue a notice requiring a financial institution to provide specified information. In New South Wales, an authorised employee of the Attorney General's Department may issue a notice to produce to an ADI on the application of a police officer. 

408. Issue 58 in the Issues Paper was whether police officers should be able to issue an order to produce under section 53 of the CIA. 

409. Issue 59 in the Issues Paper was whether the power of a police officer to issue an order to produce should be limited to ADIs. 

410. Issues 58 and 59 are dealt with together. 

411. The Fremantle Association of Justices (Inc) submitted that similar issues exist in relation to police being able to issue search warrants. They expressed the view that police “should not be put in a position where there is a potential conflict of interest (perceived or actual)” and that “the way to avoid this is to keep the current separation in place and use JPs”. 

412. The Review Group is of the view that a police officer should be able to issue an order to produce a business record. This is for the following reasons: 

(a) police officers issue orders under the CIA on a regular basis in circumstances where non-compliance with the order constitutes a criminal offence. For example: move-on orders; orders in relation to out-of-control gatherings; and orders ancillary to the execution of a search warrant including ordering an occupier to provide any information or assistance that is reasonable and necessary to enable the officer to gain access to, or recover, or make a reproduction of, a record;  

(b) other agencies have the power to issue notices requiring statements of information or the production of records;  

(c) most orders to produce applied for by police officers are issued to ADIs;  

(d) an order to produce a business record cannot be issued to a person who is suspected of having committed an offence;

335 Issues Paper at pp.113-115. 
336 Section 53 of the CIA. 
337 Section 54 of the CPC Act. 
338 Section 197B of the PPR Act (Qld). 
339 Section 53 of the LEPR Act (NSW). 
341 Issues Paper at p.115. 
342 Fremantle Association of Justices (Inc) submission dated 11 June 2017. 
343 Fremantle Association of Justices (Inc) submission dated 11 June 2017. 
344 Sections 27 and 153(1) of the CIA. 
345 Section 38B(1)(c)-(f) and 38B(2) and 38C(2) of the CIA. 
346 Sections 44(2) and 153(1) of the CIA. 
347 See, for example, sections 94 and 95 of the CMC Act.
(e) an order to produce is less intrusive than a search warrant because it
does not authorise entry to or the search of a place but merely the
production of the business records;  

(f) orders to produce are generally issued in preference to a search
warrant in circumstances where the holder of the business records is
willing to co-operate with an investigation into a suspected offence, or
who prefers that the business premises are not searched, but requires
an order to ensure that they are not the subject of civil action;

(g) less search warrants will be required if documents are able to be
obtained by means of an order to produce;

(h) irrespective of whether documents are obtained under an order to
produce or seized under a search warrant, any questions about
privilege are adjudicated in the same way under section 151 of the
CIA;  

(i) safeguards can be put in place to limit the ability of police officers to
issue orders to produce.

Recommendation 45
Section 52 of the CIA should be amended to enable a police officer to issue an order
to produce.

413. Issue 60 was whether, if police officers are to be authorised to issue orders to
produce, which police officers may issue then. Further, whether an officer
should be precluded from issuing a notice to produce if he or she is involved in
the investigation to which the notice to produce relates.

414. The Review Group is of the view that there should be two restrictions imposed
on police officers issuing orders to produce. First, only senior officers should
be able to issue the orders. Second, senior officers should not have any
involvement in the investigation to which the order relates.

Recommendation 46
Police officers of or above the rank of sergeant should be permitted to issue orders to
produce. However, a police officer must not issue an order to produce if he or she is,
or was, involved in the investigation to which the order relates.

415. A person who is served with an order to produce and who, without a
reasonable excuse, does not obey commits an offence the maximum penalty
for which is a fine of $12,000 and imprisonment for 12 months.

416. Issue 61 was whether the offence contained in section 55(2) of the CIA should
apply when the order is issued by a police officer.

417. The Review Group notes that non-compliance with an order issued by an
officer under the CIA attracts a maximum penalty of $12,000 and imprisonment
for 12 months. This is the same as the maximum penalty for non-compliance
with an order to produce contrary to section 55(2) of the CIA. Therefore, the
Review Group is of the view that the same penalty should apply irrespective of
whether the order is issued by a police officer or a JP.

350 Issues Paper at p.115.
351 Section 55(2) of the CIA.
352 Issues Paper at p.115
353 Section 153(1) of the CIA.
Recommendation 47
The offence contained in section 55(2) of the CIA should apply to the issue of an order to produce by a police officer.

Service of order to produce on person to whom it applies

418. An order to produce business records must contain, *inter alia*, the name of the JP who issued it\(^{354}\) and must be served on the person to whom it applies.\(^{355}\)

419. The Review Group has been made aware of a practice whereby the name of the JP who issued the order to produce is deleted from the order prior to service on the business. It is not clear how widespread this practice is.

420. There is no provision in the CIA for the deletion of the name of the JP who issued the order. By way of contrast, a copy of a search warrant given to an occupier under section 31(2)(c) or (3)(b) or left under section 31(5)(b) must omit the name of the judicial officer who issued it.

421. It is possible that the practice of deleting the name of the JP from the order to produce has developed in the mistaken belief that the name must be deleted from the order in the same way as the name of the JP who issues a search warrant.

422. The Review Group is of the view that it is not appropriate for the name of the person who issued an order to produce to be deleted from the order. The considerations that require the deletion of the name of the issuing officer from a search warrant do not apply in relation to an order to produce. No submissions were received which requested a change to the CIA in this respect.

Recommendation 48
No changes should be made to the requirement in section 53(2) of the CIA for the order to produce to contain the name of the JP who issued the order. Further, if police officers are to be able to issue orders to produce, then the order to produce should contain the name of the police officer who issued the order.

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\(^{354}\) Section 53(2)(i) of the CIA.

\(^{355}\) Section 54(1) of the CIA.
Part 7: Gaining access to data controlled by suspects

423. Under Part 7 of the CIA a Magistrate may issue a data access order to a police officer or a public officer who has lawful possession of, or lawful access to, a target device.\(^{356}\)

424. The data access order is an order to the person to whom it applies to provide, on or before the date specified, information or assistance that is reasonable and necessary to allow the applicant to:
   (a) gain access to any data that the target device may contain;
   (b) copy any such data to another data storage device; and
   (c) reproduce any such data on paper.\(^{357}\)

425. A person who does not comply with a data access order commits a crime.\(^{358}\)

426. In The State of Western Australia v Doyle\(^{359}\) the Court of Appeal observed:

   It is the experience of this court that many drug transactions are conducted by mobile telephone. It is common for data stored on mobile devices to be encrypted and password protected. The detection of this criminal activity depends, to a significant degree, upon law enforcement agencies being able to interrogate the mobile devices that are seized. The purpose of a data access order is to compel the holder of the device to divulge information in order to allow law enforcement authorities to obtain relevant data stored on the device. Such orders are made to be obeyed. Offenders who fail to comply are obstructing law enforcement authorities from undertaking their role in detecting offences.

427. The Review Group was not able to obtain information about the numbers of data access orders issued each year.

428. The following issues have arisen in relation to the operation and effectiveness of Part 7 of the CIA:
   (a) access to data stored in external storage;
   (b) increasing the penalty for contravention of a data access order;
   (c) extending the scope of offences in relation to which a data access order may be obtained;
   (d) extending the scope of information and assistance to include biometric information and assistance;
   (e) pre-emptive applications for data access orders;
   (f) compliance with data access orders within a reasonable time;
   (g) enabling the information and assistance to be provided to an officer other than the applicant;
   (h) making it an offence to destroy, damage, erase or alter data the subject of a data access order;
   (i) whether senior police officers should be able to issue data access orders; and
   (j) whether there are any other ways to speed up the process for obtaining data access orders.

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\(^{356}\) See sections 58 and 59 of the CIA.

\(^{357}\) Section 59(2)(d) of the CIA.

\(^{358}\) Section 61(2) of the CIA.

Access to data stored in external storage

429. Since the enactment of the CIA, there have been a number of technological developments relating to the storage of data. In particular, in addition to data being stored on the hard drive of a computer or a local storage device such as a thumb drive, data may now be stored on an off-site or remote database maintained by another party (commonly referred to as external storage). "Cloud" storage is an example of external storage.

430. A computer user is able to upload their documents to external storage via the internet and, once uploaded, may access the data from any location using any device (provided that they have internet access).

431. Data that is stored in external storage is often encrypted for security purposes. This means that any person seeking access to the data must have the key to accessing the data such as a password.

432. Amendments have been made to the Crimes Act (Cth) that enable a Magistrate to issue an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to, inter alia, access data that is held in, or accessible from, a computer or data storage device that is on warrant premises; has been moved and is at a place for examination or processing; or has been seized. Section 3LA of the Crimes Act (Cth) requires the police to be in possession of a computer or data storage device. However, there may be circumstances where the police do not have possession of a computer or data storage device but are aware that data has been stored in external storage.

433. Issue 62 in the Issues Paper was whether Part 7 of the CIA should be amended to allow police and public officers to apply for data access orders that enable orders to be given to a target person to provide information and assistance to access information contained in external storage accounts.361

434. Issue 63 in the Issues Paper was whether the power to obtain a data access order should be available even where a target device is not seized, or the target device is inoperable.362

435. Issues 62 and 63 are dealt with together.

436. There was strong support from within the WA Police for amendments to the CIA to better facilitate access to data in external storage.

437. The DPP submitted that "there is merit in amending Part 7 of the CIA to allow police and public officers to apply for data access orders that enable orders to be given to a person of interest to provide information and assistance to access information contained in "the cloud" and "cloud storage accounts". The DPP submission noted that "[t]his is particularly relevant in matters involving child exploitation material and sexual offences more generally".363

438. The Review Group is of the view that Part 7 of the CIA requires amendment to enable officers to access data held in external storage and that the amendment

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360 Issues Paper at pp.115-121.
361 Issues Paper at p.121.
362 Issues Paper at p.121.
should not be limited to circumstances in which the officers have lawful possession of, or access to, a data storage device.365

**Recommendation 49**

Part 7 of the CIA should be amended to enable a Magistrate to issue a data access order to officers to enable them to access data held in external storage whether or not:

(a) officers have possession of, or access to, a data storage device; and
(b) any data storage device is operable.

**Increasing the penalty for contravention of a data access order**366

439. A person who is served with a data access order and who, without a reasonable excuse, does not obey the order commits a crime contrary to section 61(2) of the CIA with a maximum penalty of 5 years' imprisonment.

440. In the *State of Western Australa v Doyle*367 the Court of Appeal stated that "[t]he penalty to be imposed on an offender who fails to comply with a data access order must serve as a deterrent to others."

441. In *Sumption v Gaunt*368 Hall J said that "the offence provision is intended to address circumstances where a police investigation would be hindered unless information to enable access to electronic data was provided." His Honour noted six factors which may be relevant to the imposition of a sentence for breach of a data access order:

1. the significance of the information to the police investigation;
2. whether the information was readily available to the person served with the notice;
3. the period for which non-compliance continued;
4. the reasons that the person gave for non-compliance;
5. the effect that non-compliance had on the police investigation; and
6. the importance of imposing a penalty that acts as a deterrent and overcomes the reluctance that the person and others may have to cooperate with the police.369

442. In the 2016 calendar year there were 70 briefs created for offences contrary to section 61(2) of the CIA with 31 results. The penalties imposed varied significantly.

443. Data access orders enable police officers and public officers to gain access to data that may provide evidence as to the commission of a large variety of offences. Some of that data may provide direct evidence of the commission of very serious offences such as sexual offences and offences relating to child exploitation material.

444. However, where a person is under investigation for a serious offence, the problem is that the penalty for non-compliance with a data access order is likely to be significantly less than the penalty which the person would face if he or she is charged with the serious offence. Accordingly, a person who is being investigated for an offence and who is issued with a data access order has no

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365 See the definition of “data storage device” in section 57 of the CIA.
366 Issues Paper at pp.121-122.
368 [2013] WASC 258 at [38].
369 At [39].
incentive to comply with the data access order unless the penalty for contravention of the data access order is greater than the penalty for the offence for which he or she is under investigation.

The problem is illustrated by the following examples:

Example 1
X is being investigated by police for possession of child exploitation material. It is suspected that X has the child exploitation material stored on his computer. A Magistrate issues a data access order to X. The maximum penalty for possession of child exploitation material is 7 years' imprisonment whereas the maximum penalty for non-compliance with the data access order is 5 years' imprisonment (and a fine of $24,000 and imprisonment for 2 years where the offence is deal with summarily). Accordingly, there is no incentive for X to comply with the data access order because the penalty for contravention of the data access order is substantially less than the penalty for the offence for which X is under investigation; and

Example 2
X is being investigated by police for using a camera to make a recording of a private activity to which he was not a party contrary to section 6(1)(a) of the SDA. It is suspected that X has the recording stored on his computer. A magistrate issues a data access order to X. The maximum penalty for an offence contrary to section 6 of the SDA is, in the case of an individual, a fine of $5,000 or imprisonment for 12 months, or both. The maximum penalty for an offence contrary to section 61(2) of the CIA is set out above in the first example. Accordingly, there is incentive for X to comply with the data access order because the penalty for contravention of the data access order is more than the penalty for the offence for which X is under investigation.

445. The Review Group highlights the penalties for the following offences contained in the Table below:

Table 2: Maximum penalties for serious offences

<table>
<thead>
<tr>
<th>Offence(s)</th>
<th>Maximum penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Involving a child in child exploitation (s.217 of the Criminal Code)</td>
<td>10 years' imprisonment</td>
</tr>
<tr>
<td>Producing child exploitation material (s.218 of the Criminal Code)</td>
<td>10 years' imprisonment</td>
</tr>
<tr>
<td>Possession of child exploitation material (s.220 of the Criminal Code)</td>
<td>7 years' imprisonment</td>
</tr>
<tr>
<td>Distribution of child exploitation material (s.219(2) of the Criminal Code)</td>
<td>10 years' imprisonment</td>
</tr>
<tr>
<td>Possession of child exploitation material with intent to distribute (s.219(3) of the Criminal Code)</td>
<td>10 years' imprisonment</td>
</tr>
<tr>
<td>Indecent recording of children and others (ss.320(6), s.321(6) and (8);</td>
<td>Between 4-10 years' imprisonment depending on the circumstances</td>
</tr>
<tr>
<td>Offence(s)</td>
<td>Maximum penalties</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>--------------------------------------------------------</td>
</tr>
<tr>
<td>322(6); s.329(6) and (10); 330(6) and (8) of the Criminal Code</td>
<td></td>
</tr>
<tr>
<td>Showing offensive material to a child with intent to commit an offence</td>
<td>5 years' imprisonment</td>
</tr>
<tr>
<td>(s.204A(2) of the Criminal Code)</td>
<td></td>
</tr>
<tr>
<td>Using electronic communication with intent to procure the child to engage</td>
<td>5 or 10 years' (depending on age of child)</td>
</tr>
<tr>
<td>in sexual activity or to expose a child to indecent matter</td>
<td></td>
</tr>
<tr>
<td>(s.204B of the Criminal Code)</td>
<td></td>
</tr>
<tr>
<td>Murder (s.279 of the Criminal Code)</td>
<td>Between 15 years' imprisonment and life imprisonment</td>
</tr>
<tr>
<td>(s.338A-338C of the Criminal Code)</td>
<td>depending on the circumstances (for an adult)</td>
</tr>
<tr>
<td>Threats (ss.338A-338C of the Criminal Code)</td>
<td>3, 4, 6, 7 or 10 years' imprisonment depending on the</td>
</tr>
<tr>
<td>(s.338E(1)(a) of the Criminal Code)</td>
<td>circumstances (summary conviction penalties not</td>
</tr>
<tr>
<td></td>
<td>included)</td>
</tr>
<tr>
<td>Aggravated stalking (s.338E(1)(a) of the Criminal Code)</td>
<td>8 years’ imprisonment (summary conviction penalties</td>
</tr>
<tr>
<td></td>
<td>not included)</td>
</tr>
</tbody>
</table>

446. The above offences are clearly offences where access to data may provide direct evidence of the commission of the offence. However, the penalties for these offences are significantly greater than for the offence of failing to comply with a data access order.

447. There have only been two appeal cases relating to sentences for contravention of a data access order.

448. In *Sumption v Gaunt*\textsuperscript{370} the appellant was found in possession of drugs and drug paraphernalia. Her mobile telephone was seized by police. The police could not access data on the mobile telephone because the telephone had a pin lock and the appellant refused to reveal the pin number. The police obtained a data access order to require the appellant to provide the police with the pin number. The appellant refused to comply with the data access order. After she was charged with an offence contrary to section 61(2) of the CIA, the appellant provided a pin number. However, an attempt to access the data on the mobile telephone using that pin number was unsuccessful. The appellant was convicted of a contravention of section 61(2) and sentenced to 4 months' imprisonment. She was also sentenced for drugs offences. The sentence was upheld on appeal.

449. In *Dias v The State of Western Australia*\textsuperscript{371} the appellant refused a request by police to provide the unlock codes for his two iPhones and a Samsung mobile phone seized by police. Police obtained a data access order but the appellant failed to comply with it. The appellant was convicted of a contravention of section 61(2) of the CIA and sentenced to 9 months' imprisonment.

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\textsuperscript{370} [2013] WASC 258.
\textsuperscript{371} [2017] WASCA 49.
imprisonment for the offence. He was also sentenced for other offences (drugs, firearms and weapons offences and unlawful possession). The appellant's appeal against his sentence was dismissed.

450. Issue 64 in the Issues Paper was whether the penalty for a contravention of section 61 of the CIA should be increased.\(^{372}\)

451. Issue 65 in the Issues Paper was whether the penalty for a contravention of section 61 should be amended to apply a sliding scale punishment connected to the penalty for the offence that police are investigating.\(^{373}\)

452. Issues 64 and 65 are dealt with together.

453. His Honour the Chief Magistrate suggested that any new offence should be an either way offence.\(^{374}\)

454. The Review Group is of the view that the penalty for non-compliance with a data access order is inadequate and should be substantially increased so that there is little advantage in an offender refusing to comply with a data access order.

455. The Review Group does not support the imposition of a sliding scale punishment connected to the penalty for the offence that police were investigating. This is because the sentencing court would be required to impose a sentence in accordance with ordinary sentencing principles having regard to, amongst other matters, the seriousness of the offence.\(^{375}\) Further, and in any event, such an approach might contravene the limitation identified in \textit{Kable v Director of Public Prosecutions (NSW)}.\(^{376}\)

\begin{tabular}{|l|}
\hline
\textbf{Recommendation 50} \\
The penalty for non-compliance with a data access order should be increased to 10 years' imprisonment with a summary conviction penalty of 7 years' imprisonment. \\
\hline
\end{tabular}

Extending the scope of offences in relation to which a data access order may be obtained\(^{377}\)

456. Data access orders may only be obtained in relation to a serious offence (namely, an offence the statutory penalty for which is or includes imprisonment for 5 years or more or life).\(^{378}\)

457. Issue 66 in the Issues Paper was whether the definition of "serious offence" in section 57 of the CIA should be amended to accommodate domestic violence related offences through including prescribed offences.\(^{379}\)

458. A reference in the RO Act to "family violence" is a reference to: 
(a) violence, or a threat of violence, by a person towards a family member of the person; or

\begin{itemize}
\item \(^{372}\) Issues Paper at p.122.
\item \(^{373}\) Issues Paper at p.122.
\item \(^{374}\) Submission from the Chief Magistrate dated 3 April 2017.
\item \(^{375}\) See section 6 of the Sentencing Act.
\item \(^{376}\) [1996] HCA 24; (1996) 189 CLR 51.
\item \(^{377}\) Issues Paper at pp.122-123.
\item \(^{378}\) See section 58(3)(b) of the CIA and the definition of "serious offence" in section 57 of the CIA.
\item \(^{379}\) Issues Paper at p.123.
\end{itemize}
(b) any other behaviour by the person that coerces or controls the family member or causes the member to be fearful.\(^{380}\)

459. Section 5A(2) of the RO Act sets out examples of behaviour that may constitute family violence and includes: "distributing or publishing, or threatening to distribute or publish, intimate personal images of the family member."\(^{381}\)

460. A Family Violence Restraining Order ("a FVRO") may be made under Part 1B of the RO Act. When making a FVRO, a Court may restrain the respondent from, *inter alia*, "distributing or publishing, or threatening to distribute or publish, intimate personal images of the person seeking to be protected."\(^{382}\)

461. In making a police order, a police officer may impose such restraints on the lawful activities and behaviour of a person as the officer considers appropriate to prevent a person committing family violence, or behaving in a manner that could reasonably be expected to cause the person seeking to be protected to apprehend that they will have family violence committed against them.\(^{383}\)

462. A person who is bound by a FVRO or a police order and who breaches the order commits an offence contrary to section 61(1) or (2a) respectively of the RO Act. The penalty for each offence is a fine of $6000 or 2 years' imprisonment or both.

463. The Review Group notes that restraining orders do not affect the criminal liability of a person bound by the order in respect of the same conduct as that out of which the application for the order arose.\(^{384}\) However, in some cases there is no substantive offence in relation to the conduct which is restrained. For example, there is currently no offence in the Criminal Code which prohibits the distribution or publication, or threats to distribute or publish, intimate personal images.\(^{385}\) Accordingly, if a person subject to a FVRO with a restraint referred to in section 10G(2)(g) distributed or published, or threatened to distribute or publish, intimate personal images of the person seeking to be protected, that person could be charged with breach of a FVRO contrary to section 61(1) of the RO Act. However, a police officer who is investigating an offence contrary to section 61(1) of the RO Act, where a breach of the restraint in section 10(2)(g) is alleged, cannot obtain a data access order because that offence is not a serious offence as defined in section 57 of the CIA.

464. The ALS did not support the inclusion of domestic violence offences by the inclusion of "prescribed offences" in the definition of serious offence but considered that any additional offences should be expressly inserted into section 57 of the CIA.\(^{386}\)

465. The Sexual Assault Resource Centre supported the inclusion of domestic violence related offences by including prescribed offences.

466. In addition to offences contrary to section 61(1) or (2a) of the Restraining Orders Act or offences that involve family violence or a threat to enact that violence, the Review Group has identified a number of different offences with a

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\(^{380}\) Section 5A(1) of the RO Act.  
\(^{381}\) Section 5A(2)(k) of the RO Act.  
\(^{382}\) Section 10G(2)(g) of the RO Act.  
\(^{383}\) Section 30C(1) of the RO Act.  
\(^{384}\) Section 63C(2) of the RO Act.  
\(^{385}\) The current State Government has indicated that it plans to introduce legislation relating to the non-consensual distribution of intimate images.  
\(^{386}\) ALS submission dated 29 March 2017.
penalty of less than 5 years imprisonment where the investigation of an offence would clearly be facilitated by access to data via a data access order. For example:

- **graffiti vandalism**\(^{387}\) where the offender takes photographs of the graffiti using his or her mobile telephone or tablet;
- **criminal defamation**\(^{388}\) where the defamatory matter may be contained in an email or text;
- **stalking** (other than stalking committed in circumstances of aggravation)\(^{389}\) where the offender takes photographs on a mobile telephone of the victim or the victim's home, workplace etc or repeatedly communicates with the victim by text or email;
- **organising an out-of-control gathering**\(^{390}\) where the offender sends out invitations to the gathering via email or text or a social media platform;
- **driving at a reckless speed**\(^{391}\) filmed on a mobile telephone, tablet or other recording device when the offender is driving the vehicle;
- **threats**\(^{392}\) where the threat is made in writing via email or a text or a social media platform; and
- **consorting offences**\(^{393}\) where the consorting in question takes place via email, text or a social media platform.

467. The Review Group notes that it seems anomalous that an officer may obtain a warrant or an order to produce or issue an order under section 44(2)(e)(ii) of the CIA in relation to any offence but cannot obtain a data access order under Part 7 in relation to any offence.

468. In light of the above matters, the Review Group is of the view that data access orders should be able to be obtained in relation to any offence.

469. The Review Group notes that before issuing a data access order the Magistrate would still have to be satisfied of the matters in section 59(1) of the CIA (in particular, that there are reasonable grounds for the applicant to suspect that any data the target device may contain is or may be a thing relevant to the offence).

**Recommendation 51**

The definition of "serious offence" in section 57 of the CIA should be deleted together with the references to "serious" in section 58(3)(b) and (h) of the CIA so that a data access order may be obtained in relation to any offence.

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\(^{387}\) The penalty for an offence contrary to section 5 of the Graffiti Vandalism Act is a fine of of $24 000 and imprisonment for 2 years.

\(^{388}\) The penalty for an offence contrary to section 345 of the Criminal Code is 3 years imprisonment.

\(^{389}\) The penalty for stalking contrary to section 338E(1) of the Criminal Code (without circumstances of aggravation) is 3 years imprisonment.

\(^{390}\) The penalty for organising an out-of-control gathering contrary to section 75B of the Criminal Code is imprisonment for 12 months and a fine of $12 000.

\(^{391}\) The penalty for a first offence of driving at a reckless speed contrary to section 60A(1) of the RTA is a fine of 120 PU or imprisonment for 9 months: see section 60B of the RTA.

\(^{392}\) The penalty for making a threat (other than a threat to kill or a threat committed in circumstances of racial aggravation) contrary to section 338B of the Criminal Code is 3 years imprisonment. The penalty for demanding property with threats with intent to steal contrary to section 396 of the Criminal Code is imprisonment for 3 years.

\(^{393}\) Sections 557J and 557K of the Criminal Code.

\(^{394}\) This power also applies in the context of Division 3, Part 12: see section 131 of the CIA.
Extending the scope of information and assistance to include biometric information and assistance

470. On an application for a data access order, a Magistrate must, *inter alia*, be satisfied that the target person has knowledge relevant to gaining access to any data the target device may contain. The sort of knowledge being referred to would include knowledge about a password or code.

471. Detective First Class Constable Michael Truong requested that the Review Group consider amending the provision "to include access to devices by fingerprint, voice, biometrics or any security other than a password or passcode." 396

472. The Review Group accepts that gaining access to a device may require assistance other than the provision of a password or code. For example: biometric assistance such as the provision of a fingerprint or a retinal scan or voice activation.

473. The Review Group is of the view that in light of changes in the way in which people are able to access data storage devices, a data access order should be able to be issued where the Magistrate is satisfied that the target person is able to provide biometric assistance to gain access to data.

Recommendation 52
Section 59 of the CIA should be amended:

(a) in section 59(1)(b), by requiring the Magistrate to be satisfied that the target person has knowledge relevant to gaining access to data or is able to access the data by provision of his or her biometric information; and

(b) in section 59(2)(d), to make it clear that information or assistance extends to biometric information or assistance including the provision of fingerprints, a retinal scan or voice activation.

Pre-emptive applications for data access orders

474. A data access order cannot be issued unless, *inter alia*, the Magistrate is satisfied that the applicant has lawful possession of or lawful access to the target device (that is, the data storage device to which the applicant wants access).

475. A suggestion was made to the Review Group that officers should be able to make an application for a data access order pre-emptively before a suspect is apprehended and the target device seized.

476. The Review Group notes that an officer executing a search warrant may, where the target thing is a record, order the occupier to provide any information or assistance that is reasonable and necessary to enable the officer to gain access to, recover, or make a reproduction of, the record. However, the officer must reasonably suspect that the occupier of the target place knows how to gain access to or operate the device or equipment. 397

477. The Review Group is of the view that there is merit in enabling a data access order to be issued in anticipation of the applicant having lawful possession or, or lawful access to the target device so that the data access order can be

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395 Section 59(1)(c) of the CIA.
396 Submission from Detective First Class Constable Michael Truong dated 7 March 2017.
397 Section 44(2)(e)(ii) of the CIA.
served on the person to whom it applies as soon as the applicant is in lawful possession of, or has lawful access to, the target device.

**Recommendation 53**
The CIA should be amended to enable Magistrates to issue data access orders in anticipation of an applicant having lawful possession of, or lawful access to, the target device.

Compliance with data access order within a reasonable time

478. A data access order must set out “the date on or before which the order must be obeyed”. 398

479. It was suggested to the Review Group that section 59(2)(e) should be amended to allow for immediate compliance with the request. For example, within 10 minutes of the order being served.

480. The Review Group is of the view that, in some cases, a Magistrate should have the discretion to choose between stipulating a date on or before which the order must be obeyed or stipulating a period of time within which the order must be obeyed.

**Recommendation 54**
Section 59(2)(e) of the CIA should be amended to require the data access order to contain either a time within which the order must be obeyed or a date on or before which the order must be obeyed.

Enabling the information and assistance to be provided to an officer other than the applicant

481. A data access order requires the person to whom it applies to provide information or assistance that is reasonable and necessary to allow the applicant to do certain things. 399

482. Detective Senior Constable Gareth Reed suggested that an amendment be made to require the person to whom a data access order applies “to provide the necessary information to the applicant police officer or any other police officer within a certain environment, or similar”. 400 In his submission, Detective Senior Constable Reed referred to two charges of non-compliance with a data access order that were dismissed when the accused argued that they were not able to provide information or assistance to the applicant because the applicant was unable to be contacted. 401

483. The Review Group is of the view that a data access order should be extended to require the person to whom it applies to provide information or assistance to officers other than the applicant. This is because the applicant may not always be available to receive the information prior to the date on or before which the order must be obeyed.

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398 Section 59(2)(e) of the CIA.
399 Sections 59(2)(d) and 61(1) of the CIA.
400 Submission from Detective Senior Constable Gareth Reed dated 1 February 2017.
401 Submission from Detective Senior Constable Gareth Reed dated 1 February 2017.
Recommendation 55
Section 59(2)(d) of the CIA should be amended to require the person to whom the data access order is issued to provide information or assistance to the applicant, another officer nominated by the applicant, or a class of officers nominated by the applicant.

Making it an offence to destroy, damage, erase or alter data the subject of a data access order

484. The offence of non-compliance with a data access order contrary to section 61(2) of the CIA does not cover the situation where a person destroys, damages, erases or alters data to which access is being sought under a data access order.

485. Section 132 of the Criminal Code makes it an offence for a person who, knowing that any book, document or other thing of any kind is, or may be required in evidence in a judicial proceeding, to wilfully destroy it or render it illegible or undecipherable or incapable of identification with intent to prevent it from being used in evidence.

486. Issue 69 in the Issues Paper was whether an offence of destroying, damaging, erasing or altering data the subject of a data access order should be inserted into the CIA.

487. The DPP submitted that an offence of destroying, damaging, erasing or altering the data the subject of a data access order "should be an indictable offence under the Criminal Code". The DPP also noted that such an offence is arguably provided for in section 132 of the Criminal Code.

488. His Honour the Chief Magistrate suggested that any new offence "should be an either way offence".

489. Detective First Class Constable Michael Truong was of the view that such an offence would be difficult to prove and that "[t]he time, resources and expertise required to prove that data has been deleted would exceed the benefit in charging someone with the offence."

490. The Review Group is of the view that section 132 of the Criminal Code would be of limited application to data the subject of a data access order because that section applies only where there is destruction of data or rendering the data illegible, undecipherable or incapable of identification. This is probably a reflection of the age of the section.

491. The Review Group is of the view that further consideration should be given to a new offence relating to destroying, damaging, erasing or altering data the subject of a data access order.

492. The Review Group agrees with the DPP submission that any new offence should be contained in the Criminal Code. The Review Group also agrees with the Chief Magistrate that any new offence should be an either way offence.

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403 Issues Paper at p.125.
404 DPP submission dated 27 March 2017.
405 DPP submission dated 27 March 2017.
406 Submission from the Chief Magistrate dated 3 April 2017.
407 Submission from Detective First Class Constable Michael Truong dated 7 March 2017.
Recommendation 56
The WA Police and other agencies who may apply for data access orders should give further consideration to the inclusion of a new provision in the Criminal Code which would make it an offence to destroy, damage, erase or alter data the subject of a data access order issued under the CIA.

Issue of data access orders by senior police officers in urgent situations

493. Issue 67 in the Issues Paper was whether data access orders should be able to be issued by senior police officers in urgent situations.

494. His Honour the Chief Magistrate submitted that "if Government were to adequately resource a duty Magistrate there could be provision for urgent applications to be dealt with by remote communication and for written applications to be transmitted electronically where the urgency did not require immediate determination".

495. The ALS submitted that "data access orders should continue to be issued by magistrates given the intrusion into privacy" and that "[a]ny issue with urgency could be accommodated by providing resources to enable magistrates to be on call after hours for the purposes of issuing data access orders".

496. The Review Group is of the view that senior police officers should not be able to issue data access orders on an urgent basis. This is for the following reasons:
   (a) data access orders are currently issued by Magistrates and this reflects Parliament's views as to the serious nature of the orders; and
   (b) if there are concerns about the ability of police officers to obtain data access orders on an urgent basis, then this should be dealt with by the provision of extra resources to the Magistrates Court.

Recommendation 57
Data access orders should continue to be issued by Magistrates.

Speeding up the process for obtaining data access orders

497. Issue 68 in the Issues Paper was whether there are other ways of speeding up the process to obtain a data access order.

498. The Review Group notes that applications for data access orders must be made to a Magistrate in accordance with section 13 of the CIA. Section 13 allows an application to be made to a magistrate by remote communication if the order is needed urgently and the applicant reasonably suspects that a judicial officer is not available within a reasonable distance of the applicant. If an application is made by remote communication and it is not practicable to send the magistrate written material then the application may be made orally.

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413 Issues Paper at p.124.
499. The Review Group is of the view that this issue is process driven and not one that should be resolved by legislative amendment. However, the Review Group supports the provision of a duty Magistrate for urgent applications.

**Recommendation 58**
Funding should be provided for duty Magistrates to deal with urgent applications for data access orders (and other matters under the CIA).
Part 8: Searching People

500. Part 8 of the CIA contains provisions relating to the search of people.

501. There are two types of searches that may be carried out under the CIA: a basic search\(^{414}\) and a strip search\(^{415}\).

502. The following issues have arisen in relation to the operation and effectiveness of Part 8 of the CIA:
   (a) whether officers should be required to obtain the consent of a person before a search is undertaken;
   (b) whether a person conducting a basic search should be able to order the person to be searched to accompany them to a place where the search can be done;
   (c) whether a person the subject of a basic search may be asked to move, but not remove, an article of inner clothing or underwear; and
   (d) whether police officers should be able to search for, and take photographs of, an injury, marking or substance on a person.

503. There are various sections in the CIA that authorise a basic search or a strip search.\(^{416}\) These powers are detailed in the Table below.

Table 3: Powers in the CIA to search a person

<table>
<thead>
<tr>
<th>Section authorising search of person</th>
<th>Purpose of search</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 43(8)(b)</td>
<td>To do a basic search or a strip search of a person who is in the target place when the warrant is being executed for the target thing (but only if the warrant authorises search for a target thing). The officer may then seize the target thing.</td>
</tr>
<tr>
<td>Section 44(2)(g)(iv)</td>
<td>To do a basic search or a strip search of a person who is in the place (being searched under a search warrant) for any weapon or other thing that could endanger a person but only where the officer reasonably suspects it is necessary to do so to protect the safety of any person, including the officer, who is in the target place when the warrant is being executed. The officer may then seize and retain any such thing.</td>
</tr>
<tr>
<td>Section 68(1)(a)</td>
<td>To do a basic search or a strip search of a person if the officer reasonably suspects that a person has in his or her possession or under his or her control any thing relevant to an offence. The officer may seize any thing relevant to an offence that the officer finds, whether or not it is a thing the officer suspected was in the possession or under the control of the person.</td>
</tr>
<tr>
<td>Section 69A(1)(a)</td>
<td>To do a basic search of a person if the officer reasonably suspects that a person in a public place is</td>
</tr>
</tbody>
</table>

\(^{414}\) As to the meaning of a basic search, see section 63 of the CIA.

\(^{415}\) As to the meaning of a strip search, see section 64 of the CIA.

\(^{416}\) Sections 43(8)(b)(ii), 44(2)(g)(iv), 68(1)(a), 69A(1)(a), 69B(a), 69(6)(a), and 135(5)(a) of the CIA.
<table>
<thead>
<tr>
<th>Section authorising search of person</th>
<th>Purpose of search</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited Behaviour Orders Act 2010</td>
<td>prohibited by a prohibited behaviour order made under the Prohibited Behaviour Orders Act 2010 from having something in his or her possession (a prohibited thing) in that place (whether or not the officer suspects the person is in possession of a prohibited thing). The officer may seize any prohibited thing that the officer finds.</td>
</tr>
<tr>
<td>Section 69B(a)</td>
<td>To do a basic search of a person if the officer reasonably suspects that a person in a public place is prohibited by an interim control order or a control order from having something in his or her possession (a prohibited thing) in that place (whether or not the officer suspects the person is in possession of a prohibited thing). The officer may seize any prohibited thing that the officer finds.</td>
</tr>
<tr>
<td>Section 69(6)(a)</td>
<td>To do a basic search of a person who is about to enter or is in a public place with the person's consent, to search for any thing that the officer reasonably suspects does or may endanger the place or people who are in or may enter it. The officer may seize any such thing found.</td>
</tr>
<tr>
<td>Section 135(5)(a)</td>
<td>To do a basic search or a strip search of a person in custody for a security risk item. The officer may, amongst other things, seize the item.</td>
</tr>
</tbody>
</table>

**Obtaining informed consent to search**

504. Section 70(2) of the CIA provides that, before the searcher does a basic search or a strip search of a person, the searcher must, if reasonably practicable, request the person to consent to the search. If the person does not consent to the search or withdraws his consent, then the person must be informed that it is an offence to obstruct the searcher doing the search.

505. Issue 70 in the Issues Paper was whether section 70(2) of the CIA should be amended to remove two requirements. First, the requirement to request the person to consent to the search. Second, the requirement to inform the person that it is an offence to obstruct the searcher.418

506. The Commissioner for Children and Young People did not support the removal of the requirement for consent in respect to basic or strip searches for person under the age of 18 as he submitted that "this is a breach of fundamental human rights".419 The Commissioner supported the inclusion of an amendment that requires the searcher to inform the person the search to request cooperation.420

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417 Issues Paper at pp.127-129.  
418 Issues Paper at p.129.  
419 Commissioner for Children and Young People submission dated 29 March 2017.  
420 Commissioner for Children and Young People submission dated 29 March 2017.
507. The Review Group is of the view that the requirement to request the consent of the person to be searched should be repealed. This is for the following reasons:

(a) the requirement to seek the consent of the person to be searched is superfluous because a statutory authority to search (such as the power to search in sections 43(8)(b)(ii), 44(2)(g)(iv), 68(1)(a), 69A(1)(a), 69B(a), 69(6)(a), and 135(5)(a) of the CIA) obviates the need to obtain consent to the search; and

(b) the requirement to seek the consent of the person to be searched causes confusion amongst persons being searched and antagonism towards searchers as the person thinks that they have a choice as to whether or not they are searched when in fact there is no choice.

508. The Review Group is of the view that the requirement to inform the person that it is an offence to obstruct the searcher doing the search should also be repealed. This is because the requirement to inform the person only arises where the person does not consent to the search or withdraws their consent and, since the Review Group is of the view that section 70(2)(c) should be repealed, section 70(2)(d) would also be superfluous.

**Recommendation 59**
The requirements in section 70(2)(c) and (d) of the CIA to request the consent of the person to the search and to inform them that it is an offence to obstruct the searcher should be repealed.

Informing person to be search of what the search will entail and requesting their cooperation

509. Issue 71 in the Issues Paper was whether section 70(2) of the CIA should be amended to require the searcher to inform the person what the search will entail and request the person's cooperation.422

510. In other Australian jurisdictions, the searcher must ask for the cooperation of the person to be searched and inform them that he or she will be required to remove clothing.423

511. The Review Group did not consider that it was necessary for section 70(2) of the CIA to be amended to require the searcher to inform the person of what the search will entail and request the person's cooperation. This is for the following reasons:

a) the searcher must inform the person of the reason for the search as required by section 70(2)(b) of the CIA;

b) if the searcher proposes to remove any article that the person is wearing, then the searcher must tell the person why it is considered necessary to do so as required by section 70(3)(c) of the CIA; and

c) asking for a person's cooperation in circumstances where the search may be carried out without their consent and with the use of force is likely to cause the same confusion as asking them for their consent.

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421 Issues Paper at pp.127-129.
422 Issues Paper at p.129.
423 Section 32(2) and (3) of the LEPR Act (NSW); and section 630(1) of the PPR Act (Qld).
Recommendation 60
Section 70 of the CIA should not be amended to require the searcher to inform the person of what the search will entail and request the person's cooperation.

Searching for, and taking photographs of injuries of person being searched

512. During the course of the Review, an issue arose as to whether officers may search a person for evidence of injury sustained or inflicted by a victim or suspect during the commission of an offence and then take photographs of such injuries under sections 65 and 68 of the CIA.

513. The Review Group is of the view that sections 65 and 68 do not authorise officers to search a person for evidence of such injuries and take photographs of them. This is for the following reasons:
   (a) section 68 of the CIA is concerned with searching for things which a person has in his or her possession or under his or her control with a view to seizing those things or doing a forensic examination on them;
   (b) section 68 enables the forensic examination of a thing that has been found and/or seized from a person but does not extend to the forensic examination of the person who was the subject of the search;
   (c) a searcher who is conducting a basic search of a person under section 68 may photograph part or all of the search itself while it is being done using the ancillary power in section 65(3)(c), but the ancillary power does not extend to taking photographs of injuries or markings on a person that are uncovered during the search (albeit that such injuries or markings may be visible in photographs taken of the search);
   (d) a searcher who is conducting a strip search may photograph any thing that may be lawfully seized in the position it is found on the person's body using the ancillary power in section 65(4)(b), but the ancillary power does not extend to injuries or markings since injuries or markings cannot be seized.

514. Issue 72 in the Issues Paper was whether section 68 of the CIA should be amended to enable an officer to search for an injury on a person which he or she reasonably suspects was sustained by, or inflicted upon, the person during the commission of an offence and take photographs of those injuries during the search.425

515. The Commissioner for Children and Young People did not support the search of a child or young person's body for an injury as a means of collecting evidence as he submitted that this was a breach of rights that was not balanced by the public interest.426

516. SARC did not support an amendment to section 68 of the CIA. They submitted:

"Searching" the body of a person for an injury equates to a forensic examination. The forensic examination of a person, whether that person be a suspect or victim of an alleged offence, should be conducted by a trained forensic physician or nurse. Police may observe an injury on a person during the course of their interaction with them and may document their observations however the person

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426 Commissioner for Children and Young People submission dated 29 March 2017.
517. SARC also noted that "[i]mpartiality is essential when conducting a forensic examination and when observing, documenting and interpreting injuries in forensic medicine" and that a police officer as part of the investigatory component of a case, may bring bias or a conflict of interest to a search.428

518. PathWest noted that "[i]f such an amendment was made, then the police officer might also require the ability to swab the skin of the person to recover material for a subsequent forensic examination".429

519. The Review Group is of the view that a police officer should be able to take a photograph of, measure or otherwise make a record of any thing on the person's body such as an injury, marking or substance during the course of a search. This is for the following reasons:
   (a) in the case of a basic search, the searcher may photograph part or all of the search and, in the case of a strip search, the searcher may photograph any thing that may lawfully be seized in the position it is found on the person's body. Therefore, it is not a significant extension of power to allow a photograph to be taken of a thing relevant to an offence on a person's body;
   (b) the power to photograph any relevant thing in the position it is found on the external parts of the person's body, or in the person's mouth only applies when a non-intimate forensic procedure may be done on a person. However, it may not be necessary to take a swab, or use other means, to detect a thing relevant to an offence on a person's body such as an injury or marking;
   (c) section 71(2) applies to a basic search and section 73(3)(a) applies to a strip search; and
   (d) the forensic examination would be limited to the matters contained in section 21(1)(b) of the CIA.

520. The Review Group is of the view that any forensic procedures in relation to the injury, marking or substance should be carried out under Part 9 of the CIA.

Recommendation 61
Section 68 of the CIA should be amended:
(a) so that the section applies where an officer reasonably suspects that there is a thing relevant to an offence on a person's body (eg an injury, marking or substance); and
(b) to enable the officer to photograph, measure or otherwise make a record of the injury, marking or substance by way of forensic examination.

Ordering the person to accompany the searcher to a place where the search may be done431

521. In the case of a strip search, the searcher has the power to order the person to accompany the searcher to a place where the search can be done in

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429 PathWest submission dated 24 March 2017.
430 See paragraph (b) of the definition of "forensic examination" in section 21(1) of the CIA.
accordance with section 72(3). There is no similar power in the case of a basic search.

522. During the course of the Review, a question arose as to whether or not the ancillary power contained in section 65(2)(d) of the CIA (the power to order the person to do anything reasonable to facilitate the exercise by the searcher of any power in sections 63-65) would permit the searcher to require a person to accompany them to another place for the search to be conducted. For example, a searcher may wish to conduct the search in a place where there is better lighting.

523. Issue 73 in the Issues Paper was whether section 65(2) of the CIA should be amended to make it clear that the searcher may order the person to accompany the searcher to a pace where the search can be done.

524. The Review Group is of the view that whilst the ancillary power contained in section 65(2)(d) of the CIA appears to be broad enough to enable a searcher conducting a basic search to order a person to accompany them to another place for the search to be conducted, the existence of section 65(4)(a) might be seen as limiting the scope of section 65(2)(d) to orders other than orders to accompany the searcher to a place where the search can be done.

525. The Review Group is of the view that a searcher conducting a basic search should have the power to order a person to accompany the searcher to a place in the immediate vicinity so that the basic search can be done.

Recommendation 62
Section 65 of the CIA should be amended to:
  a) make it clear that a searcher may order the person to accompany the searcher to a place in the immediate vicinity where the basic search can be done; and
  b) give the searcher conducting a basic search or a strip search the power to photograph any thing on the person's body (eg an injury, marking or substance).

Moving but not removing an article of clothing

526. Following the publication of the Issues Paper, an issue was raised with the Review Group as to whether a person conducting a basic search or a strip search may ask the person being searched to move part of their clothing (for example, to roll down the top of underwear without exposing the person's private parts).

527. The Review Group is of the view that an officer who is authorised to do a basic search has no power to remove an article of inner clothing or underwear in order to facilitate the search and no power to order the person being searched to do so. However, an officer who is authorised to do a strip search may remove any article that the person is wearing, including any article covering his or her private parts, and order the person to do anything reasonable to facilitate the exercise by the searcher of that power.

528. The Review Group is of the view that if an officer wishes to see whether a person has something concealed in his or her inner clothing such as

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432 Section 65(4)(a) of the CIA.
433 Issues Paper at p.132.
underwear, then this may only be done when the officer is authorised to carry out a strip search.
Part 9: Forensic Procedures on People

529. Part 9 of the CIA provides a comprehensive regime for the carrying out of forensic procedures on people. Part 9 repealed and replaced section 236 of the Criminal Code.

530. Under Part 9, forensic procedures may be carried out on four classes of person: volunteers; deceased persons; involved persons (victim or witness); and suspects.

531. There are three classes of forensic procedures which may be carried out on a person under Part 9: a non-intimate forensic procedure; an intimate-forensic procedure; and an internal forensic procedure.

532. The Table below sets out what the different types of forensic procedures entail and who may exercise the power.

Table 4: Types of forensic procedures and who may do the forensic procedure

<table>
<thead>
<tr>
<th>Non-intimate forensic procedure (a procedure that complies with section 74(1))</th>
<th>Intimate forensic procedure (a procedure that complies with section 75(1))</th>
<th>Internal forensic procedure (a procedure that complies with section 76(1))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power: Take a swab, or use other means, to detect a relevant thing on the external parts of the person's body</td>
<td>Power: Take a swab, or use other means, to detect a relevant thing on the person's external private parts</td>
<td>Power: Search the person's internal parts for a relevant thing using x-rays, ultrasound or similar means</td>
</tr>
<tr>
<td>Person who may exercise the power: doctor, nurse or qualified person</td>
<td>Person who may exercise the power: doctor, nurse or qualified person</td>
<td>Person who may exercise the power: doctor or qualified person</td>
</tr>
<tr>
<td>Gender: either gender</td>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
</tr>
<tr>
<td>Power: Remove a relevant thing attached physically to those external parts</td>
<td>Power: Remove a relevant thing attached physically to those external private parts</td>
<td>Power: Search the person's orifices, other than the mouth, for a relevant thing</td>
</tr>
<tr>
<td>Person who may exercise the power: doctor, nurse or qualified person</td>
<td>Person who may exercise the power: doctor, nurse or qualified person</td>
<td>Person who may exercise the power: doctor, or a qualified person who is a</td>
</tr>
<tr>
<td>Gender: either gender</td>
<td>Gender: either gender</td>
<td></td>
</tr>
</tbody>
</table>

434 See sections 79-81 of the CIA.
435 See section 82 of the CIA.
436 Sections 83-90 of the CIA.
437 Sections 91-100 of the CIA.
438 See section 74(1) and the definition of "non-intimate forensic procedure" in section 73 of the CIA.
439 See section 75(1) and the definition of "intimate forensic procedure" in section 73 of the CIA.
440 See section 76(1) and the definition of "internal forensic procedure" in section 73 of the CIA.
<table>
<thead>
<tr>
<th>Non-intimate forensic procedure (a procedure that complies with section 74(1))</th>
<th>Intimate forensic procedure (a procedure that complies with section 75(1))</th>
<th>Internal forensic procedure (a procedure that complies with section 76(1))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
<td>nurse, midwife or other prescribed person</td>
</tr>
<tr>
<td><strong>Power:</strong> Take a sample of a relevant thing on those external parts</td>
<td><strong>Power:</strong> Take a sample of a relevant thing on those external private parts</td>
<td><strong>Power:</strong> Take a swab, or use other means, to detect a relevant thing in those orifices</td>
</tr>
<tr>
<td>Person who may exercise the power: doctor, nurse or qualified person</td>
<td>Person who may exercise the power: doctor, nurse or qualified person</td>
<td>Person who may exercise the power: doctor or qualified person</td>
</tr>
<tr>
<td>Gender: either gender</td>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
</tr>
<tr>
<td><strong>Power:</strong> Take an impression of a relevant thing on those external parts</td>
<td><strong>Power:</strong> Take an impression of a relevant thing on those external private parts</td>
<td><strong>Power:</strong> Remove a relevant thing from, or take a sample of a relevant thing in, any such orifice</td>
</tr>
<tr>
<td>Person who may exercise the power: qualified person</td>
<td>Person who may exercise the power: qualified person</td>
<td>Person who may exercise the power: doctor, or a qualified person who is a nurse, midwife or other prescribed person</td>
</tr>
<tr>
<td>Gender: either gender</td>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
<td>Gender: same gender unless the person who does it is a doctor or nurse</td>
</tr>
<tr>
<td><strong>Power:</strong> Take a sample of a relevant thing from under a nail of the person</td>
<td><strong>Power:</strong> Take a sample of blood from the person</td>
<td></td>
</tr>
<tr>
<td>Person who may exercise the power: doctor, nurse or qualified person</td>
<td>Person who may exercise the power: doctor, nurse or qualified person.</td>
<td></td>
</tr>
<tr>
<td>Gender: either gender</td>
<td>Gender: same gender unless the person who does it is a doctor, nurse or qualified person</td>
<td></td>
</tr>
<tr>
<td><strong>Power:</strong> Remove a relevant thing from, or take a sample of a relevant thing in, the person's mouth</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-intimate forensic procedure (a procedure that complies with section 74(1))</td>
<td>Intimate forensic procedure (a procedure that complies with section 75(1))</td>
<td>Internal forensic procedure (a procedure that complies with section 76(1))</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Person who may exercise the power: doctor, dentist, nurse or qualified person</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gender: either gender</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

533. The Table below sets out the additional powers which may be exercised when a forensic procedure is being done.

**Table 5: Additional powers when forensic procedure is being done**

<table>
<thead>
<tr>
<th>Additional powers when non-intimate forensic procedure is being done (s.74(2))</th>
<th>Additional powers when intimate forensic procedure is being done (s.75(2))</th>
<th>Additional powers when internal forensic procedure is being done (s.76(2))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power: remove any article that the person is wearing, other than any article covering his or her private parts</td>
<td>Power: remove any article that the person is wearing, including any article covering his or her private parts</td>
<td>Power: remove any article that the person is wearing, including any article covering his or her private parts</td>
</tr>
<tr>
<td>Power: search any article removed above</td>
<td>Power: search any article removed above</td>
<td>Power: search any article removed above</td>
</tr>
<tr>
<td>Power: search the person's external parts, other than his or her external private parts</td>
<td>Power: search the person's external parts, including his or her external private parts</td>
<td>Power: search the person's external parts, including his or her external private parts</td>
</tr>
<tr>
<td>Power: search the person's mouth but not any other orifice</td>
<td>Power: photograph any relevant thing in the position it is found on the person's external private parts</td>
<td>Power: photograph any relevant thing in the position it is found in the person's internal parts or orifices</td>
</tr>
<tr>
<td>Power: photograph any relevant thing in the position it is found on the external parts of the person's body, or in the person's mouth</td>
<td>Power: do a non-intimate forensic procedure on the person</td>
<td>Power: do an intimate forensic procedure on the person</td>
</tr>
</tbody>
</table>

534. A separate regime for the carrying out of identifying procedures to obtain identifying particulars is contained in the CIIP Act. In the Statutory Review of
the CIIP Act the distinction between the CIIP Act and the CIA was noted as follow:

_The Acts have different focuses. The Criminal Investigation (Identifying People) Act empowers police to obtain personal details (name, address etc) of suspects and to gather identifying particulars from people who may have been involved in a criminal event (including, suspects, victims and witnesses), to identify deceased people and to collect identifying information with respect to missing persons. This Act is exclusively concerned with the identity of the person from or with respect to whom the particulars are taken._

_The Criminal Investigation Act is concerned with the investigation of criminal activity and the search for evidence generally._

_While both Acts authorise police to carry out forensic procedures on people, a forensic procedure done under the Criminal Investigation Act is not to be done for the purpose of obtaining an identifying particular but only for the purpose of:_

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"...searching for a thing or evidence of a thing…the existence or absence of which on or in the body of the person is relevant to the investigation of the offence."
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_Forensic procedures which are done on a person for the purpose of identifying or verifying the identity of the person may only be done under and subject to the restrictions and safeguards in the Criminal Investigation (Identifying People) Act._

535. The following issues have arisen in relation to the operation and effectiveness of Part 9 of the CIA:

(a) whether Part 9 of the CIA should be repealed and re-enacted as part of the CIIP Act;
(b) the interaction between sections 74, 75, 76, 102 and 103;
(c) whether the CIA should be amended to permit a police officer to take a photograph of an injury on the body of a person;
(d) which types of guardians appointed under the GA Act should have the power to consent to an incapable person undergoing a forensic procedure;
(e) the capacity of an adult to consent to a forensic procedure; and
(f) restrictions on the use of DNA profiles under sections 62 and 65 of the CIIP Act.

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Whether Part 9 of the CIA should be repealed and re-enacted as part of the CIIP Act

536. In the Statutory Review of the CIIP Act, the Reference Group considered the question as to whether the separate legislative regimes (in the CIIP Act and Part 9 of the CIA) for forensic procedures should be maintained.442

537. The Reference Group concluded:

"We note that by section 157 of the Criminal Investigation Act the Minister must carry out a review of the operation and effectiveness of that Act after it has been in operation for five years, i.e. less than three years hence. That will afford an opportunity, perhaps, to consider whether Part 9 of the Criminal Investigation Act should be repealed and re-enacted as part of the Criminal Investigation (Identifying People) Act to form one simplified forensic procedures Act."443

538. At the time of the Statutory Review of the CIIP Act, the view of the WA Police was that the CIIP Act and Part 9 of the CIA should become a single Act "for the sake of simplicity and to avoid confusion."444

539. It is now over 8 years since the Statutory Review of the CIIP Act. The Review Group did not receive any submissions on this issue for inclusion in the Issues Paper. Accordingly, the Review Group is of the view that this is a matter which should be further considered by the WA Police.

Recommendation 63
The WA Police should undertake some preliminary scoping work to determine whether Part 9 of the CIA should be repealed and included in the CIIP Act.

Interaction between sections 74, 75, 76, 102 and 103

540. A non-intimate forensic procedure on a person is a procedure that complies with section 74(1) of the CIA. A person who is authorised under the CIA to do a non-intimate forensic procedure on a person may do any or all of the things referred to in paragraphs (a) to (f) inclusive of section 74(1) of the CIA. Further, a person who is authorised under the CIA to do a non-intimate forensic procedure on a person may in addition do any or all of the things referred to in paragraphs (a) to (e) inclusive of section 74(2) of the CIA. Section 102(1) of the CIA provides that a person who does a non-intimate forensic procedure on a person may be of either gender. Section 103(1) of the CIA and Items 3 to 8 inclusive of the Table in that subsection set out who may do a non-intimate forensic procedure.

541. Items 1 and 2 in the Table to section 103(1) refer to the additional powers which may be exercised in section 74(2)(a) and (b) of the CIA and state that those powers may be exercised by a person of either gender. However, these items are not part of a non-intimate forensic procedure so it is not clear why

they have been included in the table to section 103(1) when:

(a) a non-intimate forensic procedure is a procedure that complies with section 74(1) of the CIA (not section 74(2));

(b) section 74(2) of the CIA states that a person who is authorised under the Act to do a non-intimate forensic procedure (one or more of the things in section 74(1)) may in addition do any or all of the things referred to in paragraphs (a) to (e) inclusive of section 74(2); and

(c) section 102(1) of the CIA makes it clear that a person who does a non-intimate forensic procedure on a person may be of either gender.

542. An intimate forensic procedure on a person is a procedure that complies with section 75(1) of the CIA. A person who is authorised under the CIA to do an intimate forensic procedure on a person may do any or all of the things referred to in paragraphs (a) to (e) inclusive of section 75(1). Further, a person who is authorised under the CIA to do a non-intimate forensic procedure on a person may in addition do any or all of the things referred to in paragraphs (a) to (e) inclusive of section 75(2) of the CIA. Section 102(2) of the CIA provides that a person who does an intimate forensic procedure on a person must be of the same gender as that person unless the person who does it is a doctor or nurse, or if the intimate forensic procedure being done on the person is the taking of a sample of that person's blood, a doctor, nurse or qualified person. Section 103(2) of the CIA and Items 3 to 7 inclusive of the Table in that subsection set out who may do a non-intimate forensic procedure.

543. Items 1 and 2 in the Table to section 103(2) of the CIA refer to the additional powers that may be exercised in section 75(2)(a) and (b) of the CIA. They state that the power in section 75(2)(a) may be exercised by a person of the same gender as the person, but the power in section 75(2)(b) of the CIA may be exercised by a person of either gender. However, these items are not part of an intimate forensic procedure so it is not clear why they have been included in the table to section 103(1) when:

(a) an intimate forensic procedure is a procedure that complies with section 75(1) of the CIA (not section 75(2));

(b) section 75(2) of the CIA states that a person who is authorised under the Act to do an intimate forensic procedure (one or more of the things in section 75(1)) may in addition do any or all of the things referred to in paragraphs (a) to (e) inclusive of section 75(2); and

(c) section 102(2) of the CIA makes it clear that a person who does an intimate forensic procedure on a person must be of the same gender as that person unless the person who does it is a doctor or nurse, or if the intimate forensic procedure being done on the person is the taking of a sample of that person's blood, a doctor, nurse or qualified person.

544. An internal forensic procedure on a person is a procedure that complies with section 76(1) of the CIA. A person who is authorised under the CIA to do an internal procedure on a person may do any or all of the things referred to in paragraphs (a) to (d) inclusive of section 76(1). Further, a person who is authorised under the CIA to do a non-intimate forensic procedure on a person may in addition do any or all of the things referred to in paragraphs (a) to (f) inclusive of section 76(2) of the CIA. Section 102(2) of the CIA provides that a person who does an internal forensic procedure on a person must be of the same gender as that person unless the person who does it is a doctor or nurse. Section 103(3) of the CIA and Items 3 to 6 inclusive of the Table in that subsection set out who may do a non-intimate forensic procedure.
545. Items 1 and 2 in the Table to section 103(2) of the CIA refer to the additional powers that may be exercised in section 75(2)(a) and (b) of the CIA. They state that the power in section 75(2)(a) may be exercised by a person of the same gender as the person, but the power in section 75(2)(b) may be exercised by a person of either gender. However, these items are not part of an intimate forensic procedure so it is not clear why they have been included in the table to section 103(1) of the CIA when:

(a) an intimate forensic procedure is a procedure that complies with section 75(1) of the CIA (not section 75(2));
(b) section 75(2) of the CIA states that a person who is authorised under the Act to do an intimate forensic procedure (one or more of the things in section 75(1)) may in addition do any or all of the things referred to in paragraphs (a) to (e) inclusive of section 75(2); and
(c) section 102(2) of the CIA makes it clear that a person who does an intimate forensic procedure on a person must be of the same gender as that person unless the person who does it is a doctor or nurse, or if the intimate forensic procedure being done on the person is the taking of a sample of that person's blood, a doctor, nurse or qualified person.

546. The following examples illustrate the problem:

**Example 1:**
Police wish to have a swab taken to detect a particular substance on a female person's external private parts.

Taking a swab in such circumstances is an intimate forensic procedure (section 75(1)(a)) and may only be exercised by a doctor, nurse or qualified person (item 3 in the Table to section 103(2)).

A person who does an intimate forensic procedure on a person must be the same gender unless the person is a doctor or nurse (s.102(2)). So, according to section 102, either a male or a female doctor can take the swab.

Police ask a male doctor to take the swab. In order to take the swab, the female's clothing needs to be removed.

A person who is authorised under the CIA to do an intimate forensic procedure on a person may remove any article that the person is wearing, including any article covering his or her private parts (section 75(2)(a)). So, since the male doctor is a person who is authorised by sections 102(2) and 103(2) to do the intimate procedure, he is permitted under section 75(2)(a) to remove any article that the female is wearing.

However, section 103(2) provides that when an intimate forensic procedure is being done, the power to remove any article that the person is wearing may only be exercised by a person of the same gender as the person (item 1, Table to section 103(2)). So, according to section 103(2), the male doctor cannot remove any article that the person is wearing.

**Example 2:**
Police wish to search a male person's orifices (other than the mouth) for drugs.

Searching a person's orifices, other than the mouth, is an internal forensic procedure (s.76(1)(b)) and may only be exercised by a doctor or a qualified
person who is a nurse, midwife or other prescribed person (Item 4 in the table to section 103(3)).

Removing a relevant thing from an orifice (other than the mouth) is an internal forensic procedure (s.76(1)(d) and may only be exercised by a doctor or a qualified person who is a nurse, midwife or other prescribed person (Item 6 in the table to section 103(3)).

A person who does an internal forensic procedure on a person must be the same gender unless the person is a doctor or nurse (s.102(2)). So, according to section 102, either a male or a female doctor may, amongst others, search the orifices.

Police ask a female doctor to search the orifices. In order to search the orifices, the male’s clothing needs to be removed.

A person who is authorised under the CIA to do an internal forensic procedure on a person may remove any article that the person is wearing, including any article covering his or her private parts (section 76(2)(a)). So, since the female doctor is a person who is authorised by sections 102(2) and 103(3) to do the internal procedure, she is permitted under section 76(2)(a) to remove any article that the male is wearing.

However, section 103(3) provides that when an internal forensic procedure is being done, the power to remove any article that the person is wearing may only be exercised by a person of the same gender as the person (item 1, Table to section 103(3)). So, according to section 103(2), the female doctor cannot remove any article that the person is wearing.

A person who is authorised under the CIA to do an internal forensic procedure on a person may search any article that he or she has removed under section 76(2)(a) So, since the female doctor is a person who is authorised by sections 102(2) and 103(3) to do the internal procedure, she is permitted under section 76(2)(b) to search any article that she has removed. Similarly, section 103(3) provides that when an internal forensic procedure is being done, the power to search any article removed may be exercised by a person of either gender (item 2, Table to section 103(3)).

547. The Review Group is of the view that items 1 and 2 in each of the Tables in section 103 are inconsistent with sections 74, 75, 76, 102 and the rest of section 103 as illustrated by the above examples.

**Recommendation 64**

**Items 1 and 2 in each of the Tables in section 103 of the CIA should be deleted.**

Police officers taking photographs of an injury on the body of a person

548. Issue 74 was whether a provision should be inserted into the CIA that permits a police officer to take a photograph of an injury on the body of a person.

549. The Review Group is of the view that police officers should be able to take a photograph of an injury on the body of a person. This issue has also been addressed above in Chapter 8 and is the subject of recommendations 61 and 62.

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446 Issues Paper at p.137
Guardians as responsible persons\textsuperscript{447}

550. Under Part 9 of the CIA, a responsible person may be asked to consent to an incapable person undergoing a forensic procedure. The definition of "responsible person" includes "if the incapable person has reached 18 years of age-a guardian of the incapable person appointed under the [GA Act] or the Public Advocate.\textsuperscript{448}

551. The GA Act makes provision for the appointment of guardians in respect of persons who are 18 years of age or over. There are three types of guardian: plenary guardians;\textsuperscript{449} limited guardians;\textsuperscript{450} and enduring guardians\textsuperscript{451}. An enduring guardian may have the same functions as a plenary guardian or may have their functions limited.

552. A concern was raised about whether it was appropriate for a limited guardian to have the power to consent to a forensic procedure being carried out on an incapable person in circumstances where the limited guardian's functions would not ordinarily extend to the giving of such consent because of the limits on their functions under the GA Act. For example, if a limited guardian only had functions in relation to a represented person's employment, it might not be appropriate for the limited guardian to be able to consent to the incapable person undergoing a forensic procedure.

553. Issue 75 was whether paragraph (d) of the definition of responsible person in relation to an incapable person in section 73 of the CIA should be amended so that it refers to a plenary guardian of the incapable person, rather than a guardian.\textsuperscript{452}

554. The ALS and SARC both supported amending the reference to "guardian" to "plenary guardian."\textsuperscript{453}

555. The Public Advocate submitted that paragraph (d) of the definition of "responsible person" should be amended to refer to a plenary guardian, a guardian who has been given specific authority to consent to the collection of forensic specimens, and an enduring guardian.\textsuperscript{454}

556. The Public Advocate noted that in the \textit{Statutory Review of the Guardianship and Administration Act}, which was tabled in Parliament on 2 December 2015, a broader definition of treatment was proposed to include the collection of forensic specimens.\textsuperscript{455} However, to date the Review Group has not been able to locate any Bills for the amendment of the GA Act in this respect.

557. The Review Group is of the view that the functions conferred on a guardian should dictate whether or not it is appropriate for the guardian to consent to the incapable person undergoing a forensic procedure. Plenary guardians and enduring guardians who have the same functions as a plenary guardian should

\textsuperscript{447} Issues Paper at pp.137-139.
\textsuperscript{448} Paragraph (d) of the definition of "responsible person" in relation to an incapable person in section 73 of the CIA.
\textsuperscript{449} See Part 5 and, in particular, section 45 of the GA Act.
\textsuperscript{450} See Part 5 and, in particular, section 46 of the GA Act.
\textsuperscript{451} See Part 9A of the GA Act.
\textsuperscript{452} Issues Paper at p.139.
\textsuperscript{453} ALS submission dated 29 March 2017 and the SARC submission dated 24 March 2017.
\textsuperscript{454} Public Advocate submission dated 27 March 2017.
\textsuperscript{455} Public Advocate submission dated 27 March 2017.
be able to consent to an incapable person undergoing a forensic procedure. However, limited guardians and enduring guardians with limited functions should not be able to consent to an incapable person undergoing a forensic procedure unless the function of consenting to the person undergoing a forensic procedure is conferred upon them.

558. The Review Group notes the Public Advocate is an alternative "responsible person" referred to in paragraph (d) of the definition of "responsible person" in relation to an incapable person in section 73 of the CIA. Accordingly, any gap left by the removal of limited guardians from the definition of "responsible person" may be filled by the Public Advocate.

**Recommendation 65**

The reference to "guardian" in paragraph (d) of the definition of "responsible person" in relation to an incapable person in section 73 of the CIA should be amended to refer to the following guardians:

- (a) a plenary guardian;
- (b) a limited guardian but only if the limited guardianship includes the function of consenting to the person undergoing a forensic procedure; and
- (c) an enduring guardian who has the same functions as a plenary guardian or, if the functions of the enduring guardian are limited, the enduring power of guardianship includes the function of consenting to the person undergoing a forensic procedure.

### Capacity of adult to consent to forensic procedure

559. SARC raised the following issue

> The CIA is silent on the issue of establishing capacity to consent to forensic procedures other than in permanently incapable adults. This is particularly an issue when complainants have been under the influence of alcohol or drugs or severely sleep deprived. At the SARC, there have been a number of cases in which complainants have provided written consent to the police using the police CIA consent form for a forensic examination however, when assessed by the SARC doctor, it has become apparent that the person lacked capacity to provide informed consent due to ongoing intoxication, withdrawal from recent prolonged intoxication, or sleep deprivation. The intoxication or sleep deprivation resulted in decreased comprehension and a temporary limited capacity to consent.\(^{456}\)

560. The Review Group notes that doctors at SARC may be better placed than police officers to assess whether or not a person has the capacity to consent to a forensic procedure. Further, nothing in Part 9 of the CIA requires a person to do a forensic procedure on a person.\(^{457}\) The Review Group is of the view that if a SARC doctor concludes that a patient temporarily lacks capacity to consent to a forensic procedure, then he or she should not carry out the forensic procedure at that time and their concerns about capacity drawn to the attention of the WA Police. The Review Group is of the view that this is not an issue which requires amendment of the CIA. However, the WA Police should address this issue in policy.

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\(^{456}\) SARC submission dated 24 March 2017.  
\(^{457}\) See section 111 of the CIA.
Recommendation 66
The CIA should not be amended to deal with the issue of establishing capacity to consent to forensic procedures. However, WA Police Policy should provide direction on this issue.

Restrictions on the use of DNA profiles

561. The Sexual Assault Resource Centre raised an issue in relation to sections 62 and 65 of the CIIP Act. However, this issue falls outside the remit of the Review Group.
Part 10: Provisions about searches and forensic procedures on people

562. Part 10 of the CIA contains miscellaneous provisions in support of the powers in Parts 8 and 9 of the CIA.

563. No issues have been raised with the Review Group in relation to the operation and effectiveness of Part 10 of the CIA.

564. However, the Review Group notes that if Part 9 of the CIA is repealed and moved to the CIIP Act, then Part 10 of the Act will need to be amended as this Part currently applies to both Part 8 and Part 9 of the CIA.
Part 11: Interviewing suspects

565. Part 11 of the CIA replaced and updated the provisions in Chapter LXA of the Criminal Code dealing with videotaped interviews.

566. Section 118 of the CIA effectively requires the making of an audiovisual recording of an admission by a suspect in relation to a serious offence. This is because the admission is inadmissible at trial unless: the admission is the subject of an audiovisual recording; or the prosecution proves that there is a reasonable excuse for not recording the admission; or the court decides to admit the evidence under section 155 of the CIA.458

567. Police officers and CCC officers carry out thousands of interviews each year. Other than Part 11 of the CIA, the only other statutory requirements relating to interviews are contained in section 138(2) of the CIA.

568. The Review Group was not able to obtain information about the number of interviews that are recorded with suspects each year. This is because the information is included with recordings for other matters such as search warrants, child interviews and crime scene recordings. However, the total number of recordings for a 12 month period from April 2017 to April 2018 was 36,183, in 2016 it was 36,822 and the total number of recordings in 2015 was 33,470.459

569. The following issues have arisen in relation to the operation and effectiveness of Part 11 of the CIA:
   (a) whether the definitions of "admission", "suspect" and reasonable excuse require amendment;
   (b) whether interviews with persons other than suspects should be recorded;
   (c) whether special provision should be made for the conduct of interviews with Aboriginal Persons or Torres Strait Islanders;
   (d) whether provision should be made in the CIA for interview friends;
   (e) whether certificates should be provided for interpreters;
   (f) whether sections 154 and 155 of the CIA should apply to audiovisual recordings of interviews with suspects;
   (g) whether audiovisual recordings should be able to be played for research purposes; and
   (h) whether provision should be made for assessing the fitness for interview of suspects.

Definition of admission

570. An admission is "an admission made by a suspect to a police officer or a CCC officer, whether the admission is by spoken words or by acts or otherwise."461

571. Issue 120 in the CIA was whether the definition of "admission" in section 118(1) of the CIA requires amendment.462

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458 Section 118(3) of the CIA.
459 Information provided to the Review Group by the Video Interview of Suspects Unit.
461 Section 118 of the CIA.
572. In *Wright v The State of Western Australia*⁴⁶³ a majority held that a statement made by a suspect to a third party in the presence of a police officer was not an admission for the purposes of section 118 of the CIA.

573. The ALS submitted that "the current definition of "admission" is appropriate". ⁴⁶⁴

574. Notwithstanding the majority decision in *Wright* (supra), the Review Group is of the view that the definition of "admission" should be clarified.

**Recommendation 67**
The definition of "admission" in section 115(1) of the CIA should be amended to make it clear that it does not include:

a) an admission made by the suspect to a third party; or

b) an admission which the suspect makes when he or she is talking to himself or herself, which is overheard or observed by the police officer or CCC officer.

**Definition of "suspect"** ⁴⁶⁵

575. A suspect is "a person suspected of having committed an offence, whether or not he or she has been charged with the offence." ⁴⁶⁶

576. Issue 121 in the Issues Paper was whether the definition of "suspect" in section 115 of the CIA requires clarification. ⁴⁶⁷

577. The ALS submitted that "the current definition of 'suspect' is appropriate." ⁴⁶⁸

578. The Review Group shares the view of the ALS.

**Recommendation 68**
No amendment should be made to the definition of "suspect" in section 115 of the CIA.

**Definition of reasonable excuse** ⁴⁶⁹

579. Issue 122 in the Issues Paper was whether the definition of "reasonable excuse" in section 118(1) of the CIA requires amendment. ⁴⁷⁰

580. The ALS submitted that the definition "is not exhaustive and therefore no reform is required". ⁴⁷¹

581. The Review Group shares the view of the ALS.

**Recommendation 69**
No amendment should be made to the definition of "reasonable excuse" in section 118(1) of the CIA.

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⁴⁶⁴ ALS submission dated 29 March 2017.
⁴⁶⁶ Section 115 of the CIA.
⁴⁶⁹ Issues Paper at pp.214-216.
⁴⁷⁰ Issues Paper at p.216.
⁴⁷¹ ALS submission dated 29 March 2017.
Recording of interviews with persons other than suspects\textsuperscript{472}

582. There is nothing in the CIA that requires an interview with a person who is not a suspect to be recorded.

583. Issue 123 in the Issues Paper was whether interviews with persons other than suspects should be the subject of an audiovisual recording.\textsuperscript{473}

584. The Department of Health submitted that "interviews with persons, other than suspects, should also be audiovisually recorded" because "[t]his would provide a record of their evidence in the circumstance that their statements were to change over the course of an investigation".\textsuperscript{474}

585. The Review Group is of the view that, consistent with the recommendation in relation to the definition of suspect, officers should not be required to record interviews with persons other than suspects. However, the Review Group notes that there is nothing to prevent those officers from making such a recording with the consent of the person being interviewed.

\textbf{Recommendation 70}

No amendment should be made to the CIA to require the recording of interviews with persons other than suspects.

Interviews with Aboriginal Persons or Torres Strait Islanders\textsuperscript{475}

586. There are no special provisions in the CIA that govern the interview of Aboriginal persons or Torres Strait Islanders. However, there are guidelines in the Police Manual for questioning Aboriginal persons, including reference to interview friends and the Anunga Rules.\textsuperscript{476} In other jurisdictions, special provisions exist for the conduct of such interviews.\textsuperscript{477}

587. Issue 124 was whether special provision should be made in the CIA for the conduct of interviews with Aboriginal persons or Torres Strait Islanders.\textsuperscript{478}

588. The ALS submitted that special provision should be made in the CIA for the conduct of interviews with Aboriginal persons.\textsuperscript{479} In particular:

(a) "the police must notify [ALS] whenever an Aboriginal person is detained in police custody";
(b) "the questioning of an Aboriginal person must not take place without the presence of an appropriate interview friend (unless waived by the person)"; and
(c) "if a lawyer acting for an Aboriginal person formally advises the police that the Aboriginal person wishes to exercise his or her right to silence and does not wish to answer questions/participate in an interview, no further questioning of the Aboriginal person should occur".\textsuperscript{480}

\textsuperscript{472} Issues Paper at pp.216-217.
\textsuperscript{473} Issues Paper at p.217
\textsuperscript{474} Department of Health submission dated 17 March 2017.
\textsuperscript{475} Issues Paper at pp.217-220.
\textsuperscript{476} WA Police Policy QSO.1.02.5.
\textsuperscript{477} Section 420 of the PPR Act (Qld); and section 23H of the Crimes Act (Cth).
\textsuperscript{478} Issues Paper at p.220.
\textsuperscript{479} ALS submission dated 29 March 2017.
\textsuperscript{480} ALS submission dated 29 March 2017.
589. The ALS also submitted that "the Anunga Rules provide an appropriate framework for interviewing Aboriginal people and should continue to guide police in their interactions with Aboriginal people". Further, that the above recommendations "coupled with the other recommendations (eg right to an interpreter, right to reasonable refreshments, right to rest, right to reasonable facilities to communicate with a lawyer) should ensure that the rights of Aboriginal people are respected and that their special vulnerability in police custody is accommodated".

590. The DPP did "not support separate or special provisions in the CIA for the conduct of interviews with Aboriginal persons or Torres Strait Islanders "because “this would create more issues". The DPP submitted that "[o]fficers should abide by the existing provisions of the CIA".

591. The Review Group acknowledges the special vulnerability of Aboriginal people and Torres Strait Islanders. This was highlighted in *The State of Western Australia v Gibson* and *Gibson v The State of Western Australia*.

592. The Review Group notes that, in the CCC report on Operation Aviemore, the CCC made a number of recommendations relating to the interview of Aboriginal suspects and that the WA Police has responded to those recommendations. The CCC subsequently reported on the implementation of the recommendations by the WA Police and concluded that "police are taking seriously their responsibility to implement the Commission's recommendations and to address the issues arising out of Operation Aviemore." The CCC considered that 5 of the 7 recommendations had been implemented and intends to review progress on the remaining 2 recommendations in 2019.

593. The Review Group is of the view that it is not necessary to make special provision in the CIA for the conduct of interviews with Aboriginal people and Torres Strait Islanders. This is for the following reasons.

(a) any arrested suspect is entitled to a reasonable opportunity to communicate, or to attempt to communicate, with a legal practitioner and must be informed of this right;

(b) interviewing officers are entitled to ask further questions of an arrested suspect to determine whether a refusal to answer applies to particular questions, all questions, or questions on a particular topic;

(c) an arrested suspect is entitled not to be interviewed until the services or an interpreter or other qualified person are available if the suspect

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481 ALS submission dated 29 March 2017.
482 ALS submission dated 29 March 2017.
483 DPP submission dated 27 March 2017.
484 DPP submission dated 27 March 2017.
486 [2017] WASCA 141.
491 Section 138(2)(c) and (3)(a) of the CIA.
492 *The State of Western Australia v Smith* [2010] WASC 279 at [11]-[12] (Hall J); *The State of Western Australia v Couzens* [2017] WASC 208 at [67] (McGrath J)
is for any reason unable to understand or communicate in spoken English sufficiently and afford the suspect that right;\textsuperscript{493}

(d) if an arrested suspect is not informed of, or afforded, their rights, then any admissions made by the suspect are in danger of being held inadmissible;

(e) if an admission is not voluntary, then the admission is inadmissible;

(f) if an arrested suspect is treated unfairly then any admissions made by the suspect are in danger of being held inadmissible;

(g) the ALS does not operate 24 hours a day so notification after hours will pose difficulties;

(h) if an arrested suspect has been informed of his right to contact a legal practitioner and chooses not to do so, then it may not be appropriate for the police to inform the ALS

(i) WA Police policies currently make provision for interview friends (see WA Police Policy QS-01.02);

(j) an interview friend may not always be available;\textsuperscript{494} and

(k) the WA Police has responded to the recommendations of the CCC in relation to Operation Aviemore by, for example, introducing new training for investigative officers and creating a new Crime Investigation Standards and Family Violence Division (CISFV) that has been tasked with "identifying the best solution for the administration of a police caution to culturally and linguistically diverse community members."\textsuperscript{495}

594. However, the Review Group supports a trial of notifying the ALS whenever an Aboriginal person is detained in custody. This will allow the WA Police and the ALS to assess the advantages and disadvantages of such a notification process.

\textbf{Recommendation 71}

The CIA should not be amended to make special provision for the conduct of interviews with Aboriginal Persons or Torres Strait Islanders. However, the WA Police should conduct a trial of notifying the ALS whenever an Aboriginal person is detained in custody.\textsuperscript{496}

\textbf{Certificates of interpreters}

595. A submission was received during the course of the Review from First Class Constable Liam O'Connor that suggested that consideration be given to amending the Evidence Act or the CIA to make it easier to use an interview with a suspect that was conducted with the assistance of an interpreter.\textsuperscript{497} In particular, to allow for an interpreter to provide a certificate, that is admissible as evidence, that the interpreter is qualified to interpret in the relevant language and that the interpreter accurately interpreted during the interview in question.\textsuperscript{498}

\textsuperscript{493} Section 138(2)(d) and (3)(b) of the CIA.
\textsuperscript{494} Interview friends are discussed further below.
\textsuperscript{496} The Review Group are now aware that a custody notification scheme is planned to commence in Western Australia later this year. This scheme will give effect to recommendation 71.
\textsuperscript{497} Submission of First Class Constable Liam O'Connor dated 18 November 2016.
\textsuperscript{498} Submission of First Class Constable Liam O'Connor dated 18 November 2016.
596. The Review Group is of the view that this proposal is a matter which falls under the Evidence Act and accordingly, falls outside the scope of the statutory review.

**Recommendation 72**

No provisions should be inserted in Part 11 of the CIA for interpreter certificates.

**Interview friends**

597. There is nothing in the CIA to make provision for the presence of interview friends during interviews with suspects. However, guidelines in the Police Manual for interviewing Aboriginal people include the use of interview friends.

598. In the Crimes Act (Cth) there are provisions relating to the role of an interview friend.

599. In the *State of Western Australia v Gibson* Hall J made a number of points about an interview friend. First, an interview friend acts as a support person for the suspect particularly if the suspects want to remain silent. Second, the interview friend should be a person in whom the suspect has confidence, who can speak the suspect's language and who is independent of the police. Third, an interview friend should not urge or direct the suspect to answer questions. Fourth, the presence of an interview friend may bear upon the question of voluntariness.

600. Issue 89 in the Issues Paper was whether a provision should be inserted into the CIA that sets out when an interview friend may be required and the role of the interview friend.

601. In their submission, the CCC referred the Review Group to this report on operation Aviemore. In that report, the CCC raised concerns about the provision or offer of an interview friend of a person's own choosing, the expectations of that role and the conduct of the interview friend as a pseudo interpreter.

602. The ALS submitted that "the CIA should include specific provisions for Aboriginal people modelled on the provisions under sections 23H-23L of the Crimes Act 1914 (Cth)". Further, ALS submitted that "the CIA should provide that the questioning of an Aboriginal suspect should not occur in the absence of an appropriate interview friend (with relevant exclusions, such as the suspect waives the right to an interview friend, where necessary)". Finally, ALS submitted that there should be a mandatory requirement on the police to notify ALS whenever an Aboriginal person is detained in custody for an offence along with sufficient funding to enable ALS to operate a custody notification service.

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499 Issues Paper at pp.165-166.
500 WA Police Policy QS-01.02.
501 Sections 23H, 23JJ, 23K and 23L of the Crimes Act (Cth).
503 Issues Paper at p.166.
504 CCC submission dated 30 March 2017.
505 Report on Operation Aviemore: Major Crime Squad Investigation into the Unlawful Killing of Mr Joshua Warneke, 5 November 2015, at [32]-[34], [42], [180] and [201].
508 ALS submission dated 29 March 2017.
603. The Review Group is of the view that it is not necessary to include provisions in the CIA dealing with interview friends. This is for the following reasons:
   a) arrested suspects have the right to a reasonable opportunity to communicate, or attempt to communicate, with a relative or friend to inform that person of his or her whereabouts; and
   b) the WA Police do permit interview friends to be present during interviews of vulnerable people.

Recommendation 73
The CIA should not be amended to make provision for interview friends.

Application of sections 154 and 155 to audiovisual recordings of interviews

604. As set out in Part 14, the Review Group has recommended that sections 154 and 155 of the CIA should not apply to audiovisual recordings of interviews made under Part 11 of the CIA.

605. If that recommendation is accepted, then section 118(3)(b)(ii) of the CIA will require amendment to remove the reference to section 155 of the CIA. The Review Group is of the view that section 118(3)(b)(ii) should be amended so that it reflects section 570D(2)(c) of the Criminal Code prior to its repeal in 2006.

Recommendation 74
Section 118(3)(b)(ii) of the CIA should be deleted and replaced with the following: "the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence."

Playing of audiovisual recordings for research purposes

606. Part 11 of the CIA imposes restrictions on the possession, playing, supply, copying, broadcast and retention of an audiovisual record of an interview.

607. It is an offence for a person to play an audiovisual recording of an interview to another person except when:
   (a) the recording is played for purposes connected with the prosecution or defence of, or legal proceedings relating to, a charge to which the interview relates; or
   (b) the recording is played for purposes connected with proceedings before a coroner; or
   (c) the recording is played for purposes connected with proceedings under the Police Act 1892 to remove a member, as that term is defined in section 33K of that Act; or
   (d) the recording is played under a direction of a court; or
   (e) the recording is played under section 124.509

608. Section 124(2) of the CIA permits an audiovisual recording to be played to a prescribed person for the purposes of instruction in specified circumstances.

609. During the course of the Review Group meetings, an issue arose about the playing of audiovisual recordings for research purposes. In particular, research commissioned by the WA Police.

509 Section 120(3) of the CIA.
610. The Review Group is of the view that section 124 of the CIA should be amended to make it clear that an audiovisual recording of an interview may be played for research purposes. This is because playing such recordings for research purposes is distinct from playing a recording for the purposes of instruction.

611. However, given the stringent restrictions on access to audiovisual recordings of interviews, the Review Group is of the view that the playing of the recordings for research purposes should likewise be limited to a narrow class of researchers.

**Recommendation 75**

Section 124 of the CIA should be amended to enable an audiovisual recording of an interview to be played to a researcher for the purposes of research.

A researcher should be defined to mean a person who is:

(a) a police officer or a CCC officer carrying out research authorised by the Commissioner of Police or the Corruption and Crime Commissioner; or

(b) employed or engaged by the Police Force, the Police Department or the Corruption and Crime Commission to carry out research.

**Fitness for interview**

612. SARC submitted that the CIA "is silent on the issue of assessing a suspect's fitness for interview" and that "in other states of Australia forensic physicians are often involved in assessing the fitness of a suspect to be interview by police."510 It was also stated that "[i]t is unclear who is responsible and what processes are in place for assessing fitness of suspects for interview."511

613. The Review Group notes that a suspect's fitness for interview may be affected by a number of factors such as physical or mental impairment, intoxication or fatigue.

614. The Review Group accepts that there is nothing in the CIA to make provision for assessing a suspect's fitness to be interviewed. The Review Group notes that the Audiovisual Record of Interview (AVROI) Guide contains some questions pertaining to a suspect's fitness to be interviewed. However, there are no WA Police Policies that address the issue of a suspect's fitness to be interviewed.

615. The Review Group is of the view that it is the responsibility of the interviewing officer(s) to make a determination about whether or not a person is fit to be interviewed. Further, the Review Group is of the view that if an officer interviews a suspect who is unfit for interview (due to, for example, intoxication or fatigue) then it is likely that any confessional evidence obtained as a result of that interview would be held inadmissible in any subsequent court proceedings (due to involuntariness, unfairness). This is not a risk which most officers are prepared to take. Accordingly, the Review Group does not consider that it is necessary for the CIA to be amended to put processes in place for assessing fitness of suspects for interview. However, the WA Police should address this issue in policy.

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Recommendation 76
The CIA should not be amended to make provision for assessing a suspect's fitness for interview. However, WA Police Policy should provide direction on this issue.
Part 12: Arrest and related matters

616. Part 12 of the CIA deals with arrest and related matters.

617. The legislative scheme for the arrest and detention of persons under the CIA is set out in Chapter 10 of the Issues Paper.512

618. The following issues have arisen in relation to the operation and effectiveness of Part 12:
   (a) whether the power of arrest in section 128 requires amendment;
   (b) whether there should be a power to discontinue an arrest in circumstances other than those currently contained in the CIA;
   (c) whether the ancillary powers conferred by section 131 require amendment;
   (d) whether an audiovisual recording should be made of the exercise of powers under sections 132, 133 and 134 of the CIA and the giving of rights to a suspect;
   (e) whether the definition of "arrestable person" should include a person who may be arrested under section 54(2)(a) of the Bail Act;
   (f) whether the definition of "serious offence" in section 133(1) should be amended;
   (g) whether officers should be able to enter and search more than one place from which a person fled prior to their arrest;
   (h) whether officers should be obliged to tell a person whether or not they are a suspect;
   (i) whether suspects who are voluntarily assisting police should have the same rights as arrested suspects;
   (j) whether rights should be conferred on persons of interest;
   (k) whether additional rights should be conferred on suspects and when and how those rights should be facilitated;
   (l) whether a caution in terms similar to the UK caution or the special caution in New South Wales should be used;
   (m) whether there are any other purposes for which an arrested suspect should be detained;
   (n) whether the periods of detention for an arrested suspect should be extended;
   (o) whether there are any other factors that should be taken into account in determining a reasonable period of detention;
   (p) what it means to charge an arrested suspect with an offence;
   (q) whether there any other factors determining whether detention of a suspect in custody before being released unconditionally is reasonable; and
   (r) whether a person arrested under an arrest warrant should be able to be interviewed and charged in relation to a suspected offence prior to complying with the terms of the arrest warrant.

Arrest for serious and non-serious offences513

619. Section 128(2) of the CIA sets out the circumstances in which a police officer or a public officer may arrest a person in relation to a "serious offence", whereas section 128(3) of the CIA sets out the circumstances in which a police officer or a public officer may arrest a person in relation to an offence that is not a "serious offence".

513 Issues Paper at pp.174-175.
620. By way of contrast, the power to make a citizen’s arrest under section 25 of the CIA applies in relation to an “arrestable offence” (an offence the statutory penalty for which is or includes imprisonment).

621. In the Issues Paper reference was made to a number of other grounds for arresting a person\(^{514}\) such as:
   (a) to prevent the fabrication of evidence\(^{515}\);
   (b) because of the nature and seriousness of the offence\(^{516}\);
   (c) to obtain property in the possession of the person that is connected with the offence\(^{517}\);
   (d) to stop the person fleeing from the officer or from the location of the offence\(^{518}\);
   (e) to preserve public order\(^{519}\);
   (f) to ensure the person’s attendance at court\(^{520}\) and
   (g) to make inquiries to establish the person’s identity or if the officer suspects that the identity information provided is false\(^{521}\).

622. Issue 91 in the Issues Paper was whether section 128(2) of the CIA should be amended to apply to all offences and section 128(3) deleted with the Commissioner of Police issuing an instruction regarding the appropriate use of the arrest power for lesser offences\(^{522}\).

623. Issue 92 in the Issues Paper was whether, in the alternative to Issue 91, the definition of "serious offence" in section 128(1) of the CIA should be amended to include a paragraph which states that a serious offence means, *inter alia*, an offence which is prescribed for the purposes of this section\(^{523}\).

624. Issue 93 in the Issues Paper was whether section 128(3)(b) of the CIA should be recast\(^{524}\).

625. Issue 94 in the Issues Paper was whether section 128(3)(c) needs to be amended to provide for additional circumstances in which the power of arrest in that subsection may be exercised and, if so, what circumstances\(^{525}\).

626. Issue 95 in the Issues Paper was whether section 128(3)(b)(i) should be amended to reflect the investigative limitations in identifying an offender when officers are on the road\(^{526}\).

627. Issues 91-95 inclusive are dealt with together.

628. The ALS is of the view that the distinction between the power to arrest for serious offences and the power to arrest for less serious offences should be

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514 Issues Paper at pp.176-177.
515 Section 99(1)(b)(vi) of the LEPR Act (NSW); and section 221(1)(b)(v) of the Crimes Act (ACT); section 365(1)(f) of the PPR Act (Qld).
516 Section 99(1)(b)(ix) of the LEPR Act (NSW); and section 365(1)(k) of the PPR Act (Qld).
517 Section 99(1)(b)(v) of the LEPR Act (NSW).
518 Section 99(1)(b)(ii) of the LEPR Act (NSW); and section 365(1)(h) of the PPR Act (Qld).
519 Section 458(1)(a)(ii) of the Crimes Act (Vic).
520 Section 458(1)(a)(i) of the Crimes Act (Vic); section 365(1)(c) of the PPR Act (Qld); and section 212(1)(b)(i) of the Crimes Act (ACT).
521 Section 99(1)(b)(iii) of the LEPR Act (NSW); and section 365(1)(b) of the PPR Act (Qld).
522 Issues Paper at p.175.
523 Issues Paper at p.175.
525 Issues Paper at p.177.
526 Issues Paper at p.178.
maintained and that arrest should be used as a last resort. Moreover, the criteria for the power to arrest for non-serious offences should not be included in Commissioner of Police's instructions because "a legislative distinction is imperative to ensure that the power to arrest is not used oppressively, unnecessarily or too frequently".

629. The ALS did not support the prescription of offences for the purposes of the definition of "serious offence" in section 128(1).

630. The ALS expressed their opposition to the extension of the power of arrest to where arrest is considered reasonably necessary to ensure that person's attendance at Court.

631. The ALS was of the view that the current provision in section 128(3)(b)(i) is appropriate and that resources such as DNA, retinal scanning and facial recognition will only be available, if at all, at a police station.

632. The Commissioner for Children and Young People expressed concern at "the recent trend towards arrest and detention rather than diversion for children and young people". The Commissioner did not support the application of section 128(2) to all offences or the removal of section 128(3).

633. The Commissioner for Children and Young People noted that "[s]ection 128(3) provides important considerations in relation to the arrest of persons suspected of committing an offence" and "provides police officers with additional guidance before arresting a person who has committed a less serious offence". The Commissioner was concerned that the removal of section 128(3) "will see more children and young people arrested and detained, rather than being dealt with by other means."

634. The Commissioner for Children and Young People added that, if the amendment is supported, then he recommended that the provision not apply to children and young people or, in the alternative, "additional safeguards will need to be included to protect children and young people from unnecessary arrest and detention".

635. The CCC submitted that section 128(2) "should be amended so that for the purpose of the section, a 'serious offence' is referred to as an 'arrestable offence' and is defined as an offence attracting a penalty of a term of imprisonment of 2 years or more".

636. The Department of Parks and Wildlife recommended that 'section 128(3) of the CIA not be deleted but recast in accordance with the proposals made in issues 93 and 94, with the definition of serious offence amended as per the proposal in issue 92(a)."

527 ALS submission dated 29 March 2017.
528 ALS submission dated 29 March 2017.
529 ALS submission dated 29 March 2017.
530 ALS submission dated 29 March 2017.
531 ALS submission dated 29 March 2017.
532 Commissioner for Children and Young People submission dated 29 March 2017.
533 Commissioner for Children and Young People submission dated 29 March 2017.
534 Commissioner for Children and Young People submission dated 29 March 2017.
536 Commissioner for Children and Young People submission dated 29 March 2017.
537 CCC submission dated 30 March 2017.
538 Department of Parks and Wildlife submission dated 16 March 2017.
637. The DPP submitted that "[w]hich offences should be arrestable offences under the CIA is a matter of policy" and that "there is no valid reason to remove this provision and repose a discretionary power in the Commissioner of Police to determine what an arrestable offence is". The DPP did not support the prescription of offences for the purposes of the definition of "serious offence" in section 128(1).

638. Senior Constable Cliff Daurat submitted that "[t]he arrest powers under section 128 should be amended and returned to the original powers of arrest police had under the repealed section 43 of the Police Act".

639. Sergeant Brett Fletcher recommended that the powers of arrest for a non-serious offence be expanded to include the graffiti offence under section 5 of the Graffiti Vandalism Act.

640. The WA Police Union "would strongly support including offences similar in nature to breaching a restraining order or involving family or domestic violence (FDV) under section 28(1) of the CIA." The WA Police Union submitted that "expanding the number of FDV-related offences under "serious offences" would arguably align with the recommendations from the Ombudsman WA's November 2015 Report into violence restraining orders."

641. The Review Group notes the recommendations made in relation to the definition of "serious offence" in Part 1 of the Final Report.

642. The Review Group is of the view that the definition of "serious offence" in section 128(1) should not be changed to "arrestable offence" because such a change might cause confusion. In particular, it might lead officers to believe that other offences were not arrestable offences in circumstances where section 128(3) makes provision for officers to arrest for offences other than arrestable offences. Further, the term "arrestable offence" is already used in section 25 of the CIA.

643. The Review Group is aware that in some cases powers of arrest for particular offences are being conferred in legislation other than the CIA. For example:

- the power conferred on a police officer under the RTA to arrest an offender who is reasonably suspected of having committed an offence against section 60 or 60A of the RTA;

- the power conferred on a security officer or member of the Police Force under the Public Transport Authority Act to take a person into custody if they witness an offender committing a specified offence, or reasonably suspect that a specified offence has been committed by an offender (the specified offences are offences contrary to section 74A of the Criminal Code committed in or on Authority property; offences contrary to section 70A of the Criminal Code committed in respect of premises that are Authority property; offences contrary to section 445 of the Criminal Code committed in respect of Authority property; and offences contrary to

539 DPP submission dated 27 March 2017.
540 DPP submission dated 27 March 2017.
541 Submission from Senior Constable Cliff Daurat dated 30 March 2017.
542 Submission from Sergeant Brett Fletcher dated 16 February 2017.
543 WA Police Union submission dated 6 March 2018.
544 WA Police Union submission dated 6 March 2018.
545 Section 60C of the RTA inserted in 2016 by the Road Traffic Amendment (Impounding and Confiscation of Vehicles) Act 2016 (WA).
section 5 of the Graffiti Vandalism Act committed in relation to Authority property, a conveyance or a facility.  

644. In some cases, the inclusion of a particular power of arrest in legislation other than the CIA may lead to a situation where a person cannot be arrested for an offence under the CIA but can, in certain circumstances, be arrested for the same offence under other legislation. For example, a person who commits an offence contrary to section 5 of the Graffiti Vandalism Act can only be arrested if section 128(3) of the CIA applies. However, if the offence is committed in relation to Authority property, the person may be arrested under section 58 of the Public Transport Authority Act (which is similar to the power of arrest in section 128(2) of the CIA).

645. The Review Group is firmly of the view that the power to arrest in section 128(2) of the CIA should not apply to all offences and that the inclusion of specific offences or a class or offences in the definition of "serious offence" should be achieved by lowering the statutory threshold or enabling the prescription of offences for the purposes of the section.

646. The Review Group is of the view that section 128(2) of the CIA should remain in its current form but that section 128(3) should be recast.

Recommendation 77
The WA Police should give consideration to amending sections 128(1) of the CIA by:
(c) lowering the statutory threshold of 5 years in paragraph (a) of the definition of serious offence; or
(d) enabling the prescription of offences for the purposes of the definition of "serious offence".

Section 128(2) of the CIA should not be amended.

Section 128(3) of the CIA should be amended so that it reads:
A police officer or a public officer may arrest a person for an offence that is not a serious offence if:
(a) the officer reasonably suspects that the person has committed, is committing, or is just about to commit, the offence; and
(b) the officer:
(i) has not been able to obtain or verify the person's name and other personal details; or
(ii) reasonably suspects that if the person is not arrested:
(a) the person will continue or repeat the offence; or
(b) the person will commit another offence; or
(c) the person will endanger another person's safety or property; or
(d) the person will interfere with witnesses or otherwise obstruct the course of justice; or
(e) the person will conceal or disturb a thing relevant to the offence; or
(f) the person’s safety will be endangered.

546 Section 58 of the Public Transport Authority Act inserted in 2016 by the Graffiti Vandalism Act.
How to effect an arrest

647. In Cox v The State of Western Australia\textsuperscript{548} the Court noted that, although Part 12 of the CIA specifies when a person may be arrested, the CIA does not specify how an arrest is to be made. An arrest must be made in accordance with the common law, namely by making it plain by what is said or done that the suspect is no longer a free person.\textsuperscript{549}

648. Issue 98 in the Issues Paper was whether section 128 of the CIA should be amended to set out how an arrest is to be made.\textsuperscript{550}

649. The ALS is of the view that "the common law test is sufficient and no reform of the CIA is justified".\textsuperscript{551}

650. The Emergency Preparedness Unit submitted that setting out how an arrest is to be effected may be a "risky approach".\textsuperscript{552}

651. The Review Group is of the view that section 128 of the CIA does not need to be amended to set out how an arrest is to be made.

\textbf{Recommendation 78}
Section 128 of the CIA should not be amended to set out how an arrest is to be made.

Discontinuance of an arrest

652. Section 125(2) of the CIA sets out the circumstances in which, for the purposes of Part 12, a person who is under arrest, ceases to be under arrest, namely:
   (a) if the person was arrested under an arrest warrant — when the person is delivered into the custody of the relevant court; or
   (b) if the person is arrested under section 128 —
      (i) when the person is released, whether on bail or unconditionally; or
      (ii) if the person is not released, when the person is delivered into the custody of a court; or
   (c) if at the time of being arrested the person was at large having escaped from lawful custody — when the person is returned to that lawful custody; or
   (d) in any event — if the person escapes from lawful custody.

653. In other Australian jurisdictions, there are separate provisions for the discontinuance of an arrest.\textsuperscript{554}

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\textsuperscript{547} Issues Paper at pp.182-183.
\textsuperscript{550} Issues Paper at p.183.
\textsuperscript{551} ALS submission dated 29 March 2017.
\textsuperscript{552} Emergency Preparedness Unit submission dated 1 March 2017.
\textsuperscript{553} Issues Paper at pp.178-182.
\textsuperscript{554} Section 105 of the LEPR Act (NSW); and sections 376-380 of the PPR Act (Qld).
654. Issue 96 in the Issues Paper was whether the CIA should be amended to make it clear that an officer may discontinue an arrest at any time and, if so, in what circumstances.555

655. Issue 97 in the Issues Paper was whether, if an officer is able to discontinue an arrest, the CIA should be amended to make it clear that the arrested person is not entitled to rights under sections 137 and 138; the officer in charge of the investigation is not obliged to inform the arrested suspect of their rights; and section 142 of the CIA does not apply.556

656. Issues 96 and 97 are dealt with together.

657. The ALS expressed the view that "if an officer reasonably believes that the grounds for arrest no longer exist, then the arrest should be discontinued."557 The ALS is of the view that sections 137 and 138 do not require change "because the rights of arrested people and arrested suspects logically arise at particular stages of the arrest process" and "if the arrest is discontinued before any interview is planned, then the right to be cautioned prior to the interview and the right to an interpreter naturally fall away".558

658. The Commissioner for Children and Young People stated that he was "supportive of provisions that permit police officers to unarrest a person, particularly a child or young person, once the situation that led to the arrest has been resolved or settled down".559

659. The DPP does not support the proposal to amend the CIA to allow an officer to discontinue arrest so as to avoid obligations imposed by the CIA.560

660. Senior Constable Daurat supported a power to discontinue an arrest in the circumstances described in section 105 of the LEPR Act (NSW) but did not think that it was necessary to amend sections 137, 138 and 142.561

661. The Review Group is of the view that sections 125 and 142 of the CIA make adequate provision for the circumstances in which a person who is under arrest ceases to be under arrest. In particular, if it is decided not to charge an arrested suspect with an offence (for example, because the officer no longer suspects that the person has committed an offence), then the officer who has custody of the suspect must release the suspect unconditionally.562 The rights conferred by sections 137 and 138 of the CIA only apply to a person who has been arrested. Accordingly, a person who has been released unconditionally is no longer entitled to the rights in section 137 and 138.

**Recommendation 79**

The CIA should not be amended to make express provision for the discontinuance of an arrest.

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555 Issues Paper at p.182.
556 Issues Paper at p.182.
559 Commissioner for Children and Young People submission dated 29 March 2017.
560 DPP submission dated 27 March 2017.
561 Submission from Senior Constable Cliff Daurat dated 30 March 2017.
562 Section 142(3) of the CIA.
Ancillary powers to making an arrest\textsuperscript{563}

662. Division 3 of Part 12 of the CIA contains a number of powers, which are ancillary to an arrest. These powers may be exercised without a warrant.\textsuperscript{564}

663. Section 131 of the CIA provides that an officer who is authorised under Division 3 of Part 12 to enter and search a place may, for the purpose of doing so, exercise any of the ancillary powers in section 44 (namely, the powers ancillary to the execution of a search warrant).

Exercise of ancillary powers in section 44 when acting under section 131\textsuperscript{565}

664. Section 44 of the CIA refers to a "target place" and a "target thing"\textsuperscript{566} and these terms are consistent with the references to target things and target places in search warrants. However, there are no references in sections 132-134 of the CIA to either "target things" or "target places".

665. Issue 99 in the Issues Paper was whether section 131 of the CIA should be amended to make it clear that when police officers are exercising the ancillary powers in section 44:
   a) a reference in section 44 to a "target thing" should be interpreted as a reference to "a thing relevant to an offence"; and
   b) a reference in section 44 to a "target place" should be interpreted as a reference to the place the subject of a search under section 132, 133 or 134.\textsuperscript{567}

666. The Review Group agreed that section 131 should be amended to clarify the application of the ancillary powers in section 44 to the exercise by officers of the powers contained in sections 132-134 of the CIA.

\textbf{Recommendation 80}

Section 131 of the CIA should be amended to make it clear that when officers are exercising the ancillary powers in section 44:
   (a) a reference in section 44 to a "target thing" should be interpreted as a reference to a "thing relevant to an offence"; and
   (b) a reference in section 44 to a "target place" should be interpreted as a reference to the place the subject of a search under section 132, 133 or 134.

Exercise of ancillary powers in relation to a vehicle\textsuperscript{568}

667. The ancillary powers in section 44 of the CIA may only be exercised for the purposes of entering and searching a place under Division 3 of Part 12. The definition of the term "place" does not include a vehicle.\textsuperscript{569} Accordingly, the ancillary powers do not apply in relation to a vehicle the subject of a search under sections 132 and 133 of the CIA.

668. Issue 100 in the Issues Paper was whether section 131 of the CIA should be amended to enable police officers to exercise the ancillary powers in section 44.

\textsuperscript{563} Issues Paper at pp.183-185.
\textsuperscript{564} Section 129 of the CIA.
\textsuperscript{565} Issues 99-101 in the Issues Paper.
\textsuperscript{566} Section 44(1), (2) and (6) of the CIA.
\textsuperscript{567} Issues Paper at pp.184.
\textsuperscript{568} Issues Paper at p.184.
\textsuperscript{569} See the definition of "place" in section 3(1) of the CIA.
of the CIA when searching a vehicle without a warrant under sections 132 or 133 of the CIA.\textsuperscript{570}

669. The Review Group is of the view that the ancillary powers in section 44 of the CIA should apply to the search of a vehicle under sections 132 or 133 of the CIA.

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\textbf{Recommendation 81}
Section 131 of the CIA should be amended so that officers who are authorised under Division 3 of Part 12 to enter and search a vehicle may, for the purpose of doing so, exercise any of the ancillary powers in section 44.
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\textbf{Audiovisual recordings of entry and searches}\textsuperscript{571}

670. Section 45(2) of the CIA requires an audiovisual recording to be made of the execution of a search warrant, if reasonably practicable. There is no similar requirement in relation to the exercise of powers under sections 132, 133 and 134 of the CIA.

671. Issue 101 in the Issues Paper was whether section 131 of the CIA should be amended to require an audiovisual recording to be made of the exercise of the powers of entry and search under sections 132, 133 and 134 of the CIA if reasonably practicable.\textsuperscript{572}

672. The ALS agreed that “the CIA should be amended to require an audiovisual recording to be made if reasonably practicable whenever a place or vehicle is being searched.”\textsuperscript{573}

673. The Review Group is of the view that a police officer should have a discretion to make an audiovisual recording of the exercise of the powers of entry and search under sections 132, 133 and 134 of the CIA. Such a requirement would be consistent with the requirement in section 45(2) of the CIA to make an audiovisual recording of the execution of a search warrant. However, the Review Group does not consider that the requirement to make an audiovisual recording should be mandatory because, unlike a search warrant, police officers may not have sufficient advance notice of exercising the statutory powers to enable them to obtain the necessary equipment to make an audiovisual recording.

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\textbf{Recommendation 82}
Section 131 of the CIA should be amended to provide that an audiovisual recording may be made of the exercise of powers under sections 132, 133 and 134 of the CIA.
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\textbf{Powers exercisable on search}\textsuperscript{574}

674. The only power to search a person when a search is being conducted under section sections 133 and 134 is contained in section 44(2)(g)(iv) of the CIA and this is limited to searching a person who is in the place for any weapon or other thing that could endanger a person.

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\textsuperscript{570} Issues Paper at p.184.
\textsuperscript{571} Issues Paper at pp.184-185.
\textsuperscript{572} Issues Paper at p.185.
\textsuperscript{573} ALS submission dated 29 March 2017.
\textsuperscript{574} Issues Paper at pp.40-42.
675. Issue 14 was whether section 131 of the CIA should be amended to provide a power to search persons (other than the arrested person or escapee) when exercising powers in section 133 and 134 and, if so, what limits should be imposed on the exercise of this power.

676. The ALS is opposed to "any extension of the power to search a person, other than the person police wish to arrest". They submitted that "to enable police to search anyone who may have been in contact with a suspect is unjustifiably wide and is likely to impinge on the rights of members of the community beyond what is necessary for the investigation of offences, or the protection of the community." Further, "[s]uch an extension of the power to search is likely to further enmesh Aboriginal people in the criminal justice system as a result of their interactions with police."

677. PathWest submitted, in relation to issues 14 and 15, that if section 131 is amended "then it would be important to ensure that, as is permitted by sections 133(7) and 134(5), that anything recovered as a result of exercising the power can subsequently undergo a forensic examination (of any type) if necessary". PathWest notes that the officer who seizes the item might not be the person who does the actual forensic examination and that forensic examination may be undertaken by non-police personnel.

678. The Review Group is of the view that it would be a significant extension of power to allow an officer to search a person merely because they have been in contact with a person who has been arrested for a serious offence, or who is an escapee. Whilst such a power of search may be justified in relation to terrorism even then a warrant is required to exercise such a power. The Review Group is of the view that if neither the ancillary power to search in section 44(2)(g)(iv) nor the power to search in section 68 apply then no search of a person should be permitted.

**Recommendation 83**

Section 131 of the CIA should not be amended to provide a power to search persons when exercising powers under sections 133 and 134.

**Entry of places and stopping of vehicles**

679. Section 132 of the CIA gives police officers and public officers powers to enter and search a place and to stop and enter a vehicle for the purposes of arresting an "arrestable person."

680. An accused who fails to comply with a condition imposed for a purpose mentioned in clause 2(2)(a), (b) or (e) of Part D of Schedule 1 to the Bail Act does not commit an offence, cannot be arrested under section 128 of the CIA and is not an arrestable person for the purposes of section 132 of the CIA. A police officer may be able to arrest the person without warrant under section 54(2)(a) of the Bail Act, or arrest the person with a warrant or summons under

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575 Issues Paper at p.42.
578 ALS submission dated 29 March 2017.
579 PathWest submission dated 24 March 2017.
580 PathWest submission dated 24 March 2017.
581 See section 13 of the TEP Act.
582 Issues Paper at pp.43-50.
583 See the definition of "arrestable person" in section 132(1) of the CIA.
section 54(2)(b) of the Bail Act, but that section does not give police the power to enter a place or stop a vehicle to arrest the person.

681. Issue 16 was whether the definition of "arrestable offender" in section 132 of the CIA should be amended to include a person who may be arrested under section 54(2)(a) of the Bail Act.584

682. The Commissioner for Children and Young People did not support an amendment to the definition of "arrestable person" in the CIA to include a person who may be arrested under the Bail Act.585

683. The ALS is of the view that the power of arrest contained in section 54(2) of the Bail Act "is sufficient" and that "if the only basis for arresting a person is a failure to comply with a condition of bail (which does not amount to the commission of an offence of breaching bail), then police should not be authorised to enter premises without a warrant."586 The ALS also noted that "section 54(2)(b) of the Bail Act enables police to apply for a warrant and if a warrant is granted, then police will have all the powers in s132 of the CIA because the person will be an 'arrestable person'."587

684. The Review Group agrees with the ALS that if an arrest warrant is issued under section 54(2)(b) of the Bail Act then the person is a person who may be arrested under an arrest warrant within paragraph (e) of the definition of "arrestable person".

685. However, the Review Group is of the view that a person who may be arrested under section 54(2)(a) should be an "arrestable person" for the purposes of section 132 of the CIA. This is for the following reasons:
   a) if a person who may be arrested under a warrant under section 54(2)(b) of the Bail Act is an "arrestable person" then a person who may be arrested under section 54(2)(a) of the Bail Act should also be an "arrestable person"; and
   b) there is little point in having a power to arrest a person if the police officer or public officer cannot enter a place or stop and enter a vehicle to locate the person to be arrested.

Recommendation 84
The definition of "arrestable person" in section 132 of the CIA should be amended to include a person who may be arrested under section 54(2)(a) of the Bail Act.

Search of places and vehicles of arrested suspects

686. If a person is under arrest for a serious offence, then a police officer or a public officer may enter the place in which the person was when he or she was arrested, or from which the person fled immediately before being arrested, or any person against whom the serious offence was committed.588

Definition of serious offence

687. When the CIA was first enacted, the powers of search in section 133 of the CIA could be exercised in relation to any person who was arrested for a serious

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584 Issues Paper at p.50.
585 Commissioner for Children and Young People submission dated 29 March 2017.
588 Section 133(2)(a), (d) and (e) of the CIA.
offence under section 128(2) of the CIA. This was because the definition of "serious offence" for the purposes of sections 128 and 133 was the same (namely, "an offence the statutory penalty for which is or includes imprisonment for 5 years or more or life").

688. However, whilst the definition of "serious offence" for the purposes of section 128 has been amended\(^{589}\), the definition of serious offence for the purposes of section 133 remains the same.\(^{590}\)

689. The Review Group is of the view that if an offence is serious enough to warrant arrest under section 128(2) of the CIA, then an officer who arrests a person under that section should be able to exercise the powers in section 133 of the CIA. Accordingly, the definition of "serious offence" in section 133 of the CIA should be the same as the definition of "serious offence" in section 128(1) of the CIA.

**Recommendation 85**

The definition of "serious offence" in section 133(1) of the CIA should be amended to correspond with the definition of "serious offence" in section 128 of the CIA.

**Searching more than one place following arrest**\(^{591}\)

690. In some cases a person who is under arrest for a serious offence may, prior to arrest, have entered and fled from several successive properties with police in hot pursuit. The offender may have left evidence behind in any of those properties. However, under section 133(2) of the CIA, police are only be able to search the place in which the person was arrested or from which the person fled.

691. Issue 15 was whether the power to search a place under section 133(2) of the CIA should be extended to include any place the person is suspected of having fled prior to being arrested and, if so, what limits should be imposed on the exercise of this power.\(^{592}\)

692. The ALS "does not agree that the power to search a place without warrant should be extended to include any place the person is suspected of having fled prior to being arrested" because this "may potentially authorise the search without warrant of the premises of any family member, friend or colleague of an arrested suspect".\(^{593}\) The ALS submitted that "[s]uch an infringement on the right to privacy of members of the community in circumstances where there is no evidence that a search of the premises is in any way connected to the investigation of an offence, is not justified".\(^{594}\)

693. The comments of PathWest in relation to Issue 15 are set out above in relation to Issue 14.

694. Senior Constable Cliff Daurat submitted that "[i]t is currently totally impractical to seek informed consent from every property owner where the offender has fled to search for things relevant to the offence".\(^{595}\) Senior Constable Daurat

\(^{589}\) See the additional offences set out in paragraphs (b), (c) and (d) of the definition of "serious offence" in section 128(1) of the CIA.

\(^{590}\) See the definition of "serious offence" in section 133(1) of the CIA.

\(^{591}\) Issues Paper at pp.42-43.

\(^{592}\) Issues Paper at p.43.

\(^{593}\) ALS submission dated 29 March 2017.

\(^{594}\) ALS submission dated 29 March 2017.

\(^{595}\) Submission of Senior Constable Cliff Daurat dated 30 March 2017.
stated that, "[a]s a matter of practice, officers will generally jump into other properties in pursuit of the offender and, whenever possible, will inform the respective property owners". Senior Constable Daurat thought that the power to search "should be limited to the areas where police would reasonably suspect the offender fleeing has been (ie the backyard of a house) and not be an open licence to search the entire house and property without warrant". Further, the respective property owner "would be fully informed".

695. The Review Group notes that statutory powers of search and search under a warrant are generally confined to a specific place rather than multiple places and that it would be a significant extension of power to allow an officer to search, without warrant, more than one place where an arrestable person has been prior to his or her arrest. However, the Review Group considers that the power to search should be extended to any place the suspect has been in immediately before arrest but only in circumstances of hot pursuit (that is, where the officer was in physical pursuit of the person prior to their arrest and had entered one or more places under section 132(2) to try and locate the arrestable person).

**Recommendation 86**
Section 133(2) of the CIA should be amended to enable a police officer or a public officer to enter and search any place or places from which the person fled immediately before being arrested.

Dealing with arrested people

696. The Review Group is of the view that there are three categories of person for the purposes of a criminal investigation. These are:

1. persons who are not suspects (eg a victim or a witness);
2. suspects who are voluntarily assisting investigating officers but who have not been arrested; and
3. arrested suspects.

697. The Review Group is concerned that, in some cases, a person who is assisting investigating officers may not know what their status is (that is, whether or not they are a suspect). The Review Group considers that it is important for a person to know their status when dealing with investigating officers particularly in circumstances where a person's status may change during the course of an investigation.

**Recommendation 87**
The WA Police and other agencies whose officers exercise powers under the CIA should introduce a policy to oblige an investigating officer to inform a person whether or not they are a suspect where:

(a) the officer has requested the person to accompany the officer or another officer for the purposes of assisting in the investigation of the offence; and

(b) the person asks the officer whether or not he or she is a suspect or requests information about his or her status.

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596 Submission of Senior Constable Cliff Daurat dated 30 March 2017.
598 Submission of Senior Constable Cliff Daurat dated 30 March 2017.
599 See, for example, section 15 of the TEP Act. However, it is noted that a Commissioner's warrant is a prerequisite to the exercise of the power in section 15.
600 In his submission about section 28 of the CIA, Detective Inspector Brad Jackson made a point about putting the onus on the officer involved to identify the person's status.
Rights of persons voluntarily assisting investigating officers

698. Currently, a person who is voluntarily assisting an officer is entitled to be told: 
   (a) that he or she is not under arrest; 
   (b) that he or she does not have to accompany the officer concerned; and 
   (c) that if he or she accompanies the officer concerned, he or she is free to leave at any time unless he or she is then under arrest.602

699. Issue 77 in the Issues Paper was whether section 28 should be clarified to make it clear that the section only applies to a suspect who is voluntarily assisting police or what additional rights apply when a suspect is voluntarily assisting police.603

700. The submissions in relation to this issue are set out in Part 4 above.

701. In Part 4 of the Final Report, the Review Group expressed the view that section 28 of the CIA should be moved to Part 12 of the CIA and limited to suspects voluntarily assisting officers (that is, suspects who are not under arrest).

702. Issue 76 in the Issues Paper was whether there are any other rights that should be conferred on a person who is voluntarily assisting an officer.604

703. The submission of the ALS in relation to Issue 76 is set out above in relation to Issue 75.

704. In Part 4 of the Final Report, the Review Group expressed the view that suspects voluntarily assisting officers should have additional rights conferred on them. This is for the following reasons: 
   (a) the application of section 28 to victims or witnesses creates confusion; and 
   (b) there is a large gap between the limited rights conferred by section 28 on a suspect voluntarily assisting an officer and the rights conferred on an arrested suspect under sections 137 and 138.

705. The Review Group is of the view that a suspect who is voluntarily assisting investigating officers should, as far as applicable, be entitled to the same rights as an arrested suspect.

Recommendation 88

The CIA should be amended to provide that:
   (a) a suspect who is not under arrest and who is requested to accompany the officer or another officer for the purposes of assisting in the investigation of an offence is to be notified of the following: 
      (i) that he or she is not under arrest; and 
      (ii) that he or she does not have to accompany the officer concerned; and 
      (iii) that if he or she accompanies the officer concerned, he or she is free to leave at any time unless he or she is then under arrest. 
   (b) If the suspect referred to in paragraph (a) above accompanies the officer or another officer for the purposes of assisting in the investigation of an offence, then he or she is entitled to: 
      (i) the rights in section 137(3)(a), (b), (c) and (d) and section

601 Issues Paper at pp.143-144. 
602 Section 28(1) of the CIA. 
603 Issues Paper at p.-144. 
604 Issues Paper at p.144.
(ii) the right to be informed of any offences that he or she is suspected of having committed.

(c) The officer in charge of the investigation must:
(i) inform the suspect of his or her rights under sections 137 and 138;
(ii) afford the suspect his or her rights under sections 137(a), (b) and (d) and 138(b) and (d); and
(iii) afford the suspect his or her rights under sections 137(3)(c) and 138(2)(c) if so requested.

Rights of various categories of person

706. The rights of arrested persons and arrested suspects are set out in sections 137 and 138 of the CIA respectively.

707. In other jurisdictions, additional rights are conferred on arrested persons. For example:
(a) the right to be treated with humanity and respect for human dignity;
(b) the right of non-Australian nationals to communicate with an embassy or consular official;
(c) the right to be provided with reasonable refreshments and reasonable access to toilet facilities; and
(d) the right to be told of any request for information as to his or her whereabouts by any of his or her relatives, friends or legal representatives; and
(e) the right to be provided with facilities to wash, shower, bathe and, if appropriate, to shave.

708. Issue 78 in the Issues Paper was whether there are any other rights that should be conferred on an arrested person or an arrested suspect.

709. Issue 79 in the Issues Paper was whether the rights in section 138 should be expanded to include the common law rights relating to the principles of voluntariness and fairness.

710. Issues 78 and 79 are dealt with together.

711. The ALS is of the view that the following additional rights for suspects and arrested suspects should be included in the CIA:
(a) the right to reasonable refreshments, reasonable access to toilets and facilities to wash; and a reasonable opportunity to rest;
(b) the right to confidential communications with a lawyer; and
(c) the right to communicate with a lawyer in person if the suspect is under the age of 14.

712. The ALS is of the view that "the common law rights in relation to the principles of voluntariness and fairness are appropriate". The ALS did not support "any attempt to codify the factors to be taken into account when determining whether

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605 Issues Paper at pp.144-147.
606 See Issues Paper at p.146
607 Issues Paper at p.147.
608 Issues Paper at p.147.
609 ALS submission dated 29 March 2017.
610 ALS submission dated 29 March 2017.
an admission was made voluntarily, or whether its admission into evidence would be unfair.611

713. The Review Group is of the view that the rights conferred by section 137 and 138 of the CIA are sufficient. There is no evidence to suggest that arrested suspects are being deprived of refreshments, toilet and washing facilities or an opportunity to rest such that a statutory entitlement should be conferred.

714. The Review Group does not support amending the CIA to provide that suspects have the right to confidential communications with a lawyer. This is because the facilities for private communication may not always be available.

715. The Review Group does not support amending the CIA to provide that suspects aged less than 14 years should have the right to communicate with a lawyer in person. This is because such an entitlement would put a strain on the already stretched resources of the ALS and Legal Aid.

**Recommendation 89**
The CIA should not be amended to confer additional rights on suspects.

**Rights of suspects or persons of interest voluntarily assisting officers with their investigations**612

716. Issue 81 in the Issues Paper was whether a new section should be inserted into the CIA that confers rights on suspects or persons of interest (but not arrested suspects) who are voluntarily assisting police with their investigations.613

717. Issue 82 in the Issues Paper was what rights should be conferred on a suspect or person of interest who is voluntarily assisting police with their investigations.614

718. Issues 81 and 82 are dealt with together.

719. In relation to Issues 81 and 82, the ALS agreed that a suspect who is voluntarily assisting police (as distinct from an arrested suspect) should be afforded the rights listed in the Issues Paper. The ALS is of the view that persons voluntarily assisting the police, who are not suspected of being involved in the offence, should be afforded the rights in section 28 and the rights in sections 137 and 138.615 Further, the ALS noted that they preferred an approach that avoids the use of the term "person of interest".616

720. In relation to Issues 81 and 82, the Commissioner of Children and Young People submitted that "[c]hildren and young people may find it difficult to understand the difference between being arrested and voluntarily assisting police".617 The Commissioner supported "clarity regarding the rights of young people voluntarily assisting police" consistently with the CFRC and the Beijing Rules.618

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611 ALS submission dated 29 March 2017.
614 Issues Paper at p.150.
615 ALS submission dated 29 March 2017.
616 ALS submission dated 29 March 2017.
617 Commissioner of Children and Young People submission dated 29 March 2017.
618 Commissioner of Children and Young People submission dated 29 March 2017.
721. The rights which should be conferred on a suspect who has not been arrested are set out in recommendation 88 above.

722. The Review Group notes that the term "person of interest" is not a term which appears in the CIA.

723. On 10 March 2017 a directive was issued by the Assistant Commissioner, State Crime to amend the WA Police Investigation Doctrine to remove the term "person of interest" because this term had been replaced with the term "suspect" in the CIA.

724. Accordingly, the Review Group is of the view that it is not necessary to confer any rights on a person of interest.

**Recommendation 90**

The CIA should not be amended to confer any rights on a person of interest.

**Separation of rights into post-arrest and pre-interview**

725. Issue 80 in the Issues Paper was whether some of the rights in section 137 and 138 should be detached from applying as minimum requirement of arrest and instead attach to Part 11 of the CIA as pre-requisites for the interview of a suspect. If so, which rights should apply post-arrest and which rights should apply pre-interview. Further, which rights should be continuing rights.

726. The ALS submitted that "[a]ll of the rights contained in sections 137 and 138 should apply from the time a suspect is arrested or voluntarily accompanies police and these rights should be continuing rights." They noted that "some of the rights will only apply to particular categories of person".

727. The Review Group is of the view that the rights contained in sections 137 and 138 should not be split into post-arrest and pre-interview. The Review Group considers that it is appropriate for an arrested suspect to be informed of their rights as soon as practicable after arrest as required by section 138(3)(a) and to be afforded their rights as required by section 137(2)(b). The facilitation of the rights of an arrested suspect naturally arises at different stages of the investigation following the arrest. For example, an arrested suspect should be told as soon as practicable after his or her arrest that he or she has the right to be cautioned before being interviewed and then, prior to interview, the arrested suspect should be issued with a caution.

728. The Review Group is of the view that the rights conferred by sections 137 and 138 are continuing rights.

**Recommendation 91**

The CIA should not be amended to separate rights into post-arrest and pre-interview rights.

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619 Issues Paper at pp.144-147.
620 Issues Paper at p.147.
621 ALS submission dated 29 March 2017.
622 ALS submission dated 29 March 2017.
623 See Kernahan v The State of Western Australia [2015] WASC 306 at [53] (Corboy J).
Arrest of suspects voluntarily assisting investigating officers with their investigations

729. Issue 83 in the Issues Paper was whether provision needs to be made for the arrest of a suspect, or a person of interest who becomes a suspect, who is voluntarily assisting police, but subsequently withdraws their assistance and cannot be arrested under section 128.

730. The ALS submitted that "[i]f a person is voluntarily assisting police and they choose to leave or withdraw their assistance, that person should only be arrested if the grounds for arrest under s 128 are made out". This is because "the right to leave at any time … would be rendered meaningless". Further, in the view of the ALS, "[f]ailure or refusal to cooperate with police can never be grounds for an arrest".

731. The Review Group is of the view that a suspect voluntarily assisting police should only be able to be arrested in the circumstances set out in section 128 of the CIA.

Recommendation 92
The CIA should not be amended to provide for the arrest of a person voluntarily assisting police but who subsequently withdraws their assistance.

Right to an interpreter

732. An arrested suspect is entitled not to be interviewed until the services of an interpreter or other qualified person are available if he or she is unable to understand or communicate in spoken English sufficiently. That is, section 138(2)(d) acts as a prohibition on interviewing an arrested suspect who cannot understand or communicate sufficiently.

733. In The State of Western Australia v Gibson Hall J noted that:  

What the police need to consider is not whether the person can make themselves understood in English in casual conversation, but whether they have the capacity to understand their rights and the types of questions that will be put to them in the police interview. They also need to consider whether the person has the ability to express themselves in English such that they are able to fairly and accurately given their own account if they wish to do so.

734. Issue 86 in the Issues Paper was whether section 138(2)(d) of the CIA should be amended to clarify the right of an arrested suspect to not be interviewed until the services of an interpreter or other qualified person are available.

735. The DPP noted that section 138(2)(d) of the CIA currently makes it clear that an arrested suspect should not be interviewed until the services of an

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624 Issues Paper at p.150.
625 Issues Paper at p.150.
626 ALS submission dated 29 March 2017.
630 Section 138(2)(d) of the CIA.
The DPP also noted that issues that have arisen in relation to this section "relate to training of officers, a lack of interpreters and potentially of lack of resources in regional areas, not the wording of the CIA".

736. The CCC submitted that the CIA does not require amendment in relation to the use of interpreters "because the current provisions are clear and provide the ultimate protection to suspects that they cannot be interviewed unless all criteria are met".

737. The ALS noted that "[f]or the right to an interpreter to be effective in practice, it is vital that police receive proper training and have access to appropriate resources to ensure that they are able to identify whether a suspect is unable to understand or communicate in spoken English sufficiently". The ALS submitted that a suspect who has not been arrested should have the right to an interpreter and that a suspect should have the right to request the services of an interpreter.

738. SARC submitted that section 138(2)(d) of the CIA should be amended to clarify the right of an arrested suspect to not be interviewed until the services of an interpreter or other qualified person are available.

739. The Review notes that pursuant to WA Police Policy IT-01-00 "[i]t is the policy of WA Police that if a suspect or an arrested suspect is unable to understand or communicate in spoken English sufficiently, they are not to be interviewed until the services of an interpreter have been afforded". This policy is consistent with sections 10, 137(3)(d) and 138(2)(d) of the CIA.

740. The circumstances in which police will provide an interpreter or translator to a suspect are set out below:

- A suspect requests an interpreter
- Police determine that the suspect does not speak English as a first language and does not understand English sufficiently
- Police determine that the suspect has a vulnerability which impacts on communications with police
- The suspect is deaf …or hard of hearing
- Police determine that an interpreter is requested to fully understand their legal rights and responsibilities
- A translator is required for the production of any written document

741. WA Police Policy IT-01.00 also makes specific reference to the interview of Aboriginal people and culturally and linguistically diverse people.

742. The Review Group is of the view that the right conferred by section 138(2)(d) of the CIA is clear and that any admission obtained from an arrested suspect in contravention of that right will likely be held inadmissible. Further, that there is nothing to prevent an arrested suspect from requesting the services of an interpreter. Accordingly, the Review Group is of the view that section 138(2)(d)

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634 DPP submission dated 27 March 2017.
635 CCC submission dated 30 March 2017.
639 WA Police Policy IT-01.00 Interpreters and Translators-Use of (Professionals).
640 WA Police Policy IT-01.00 Interpreters and Translators-Use of (Professionals).
does not require amendment. However, the Review Group is of the view that officers should receive additional training in relation to obtaining the services of an interpreter for an arrested suspect who is not able to understand or communicate in spoken English sufficiently.

**Recommendation 93**

Section 138(2)(d) of the CIA should not be amended to clarify the right of an arrested suspect not to be interviewed until the services of an interpreter or other qualified person are available. Instead, the WA Police and other agencies exercising powers under the CIA should:

(a) develop a method of assessing a person’s capacity to understand English via policy; and

(b) ensure that officers receive additional training in relation to the application of the policy.

**Changing the content of the caution**

743. The caution which is usually given to a suspect is not set out in the CIA or any other legislation but is usually expressed in the following terms.

744. You are not obliged to say anything unless you wish to do so, anything you say or do will be recorded and may be given in evidence.

745. In *The State of Western Australia v Gibson* Hall J emphasised the importance of the suspect understanding the caution.

746. In the United Kingdom and in New South Wales special cautions are now given that impact on the right to silence.

747. Issue 87 in the Issues Paper was whether the Western Australian police caution should be amended to reflect the United Kingdom caution or the special caution in New South Wales.

748. The ALS expressed their opposition to any legislative reform modelled on the United Kingdom and New South Wales special caution provisions and noted that "[t]he experience in New South Wales indicates that any change to the current law is fraught with difficulties". They added that "[t]he requirement for the special caution to be administered in the presence of a lawyer acting for the suspect is not practically achievable in Western Australia given the vast geographical size of the Western Australia, the number and conditions of police stations across the state and the current resourcing constraints of the [ALS] and Legal Aid WA". The ALS also emphasised "that difficulties experienced in understanding the special caution will be compounded for Aboriginal people".

749. The CCC submitted that "the police caution does not need to be amended to reflect the UK caution of the NSW special caution". They submitted that "the current form of the caution is sufficient, with no case made for changing the

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642 WA Police Audiovisual Record of Interview (AVROI) Guide Version 1.4; WA Police Policy QS 01.02 Questioning Suspects (last reviewed Sept 2017) at 01.02.3.
644 See sections 34, 36 and 37 of the CJPO Act and section 89A of the Evidence Act 1995 (NSW) which are referred to in the Issues Paper at pp.154-160.
646 ALS submission dated 29 March 2017.
standard caution" but "if the caution were to be changed, criminal procedure would also need to be amended". The CCC holds the view that "the issue of concern is not the form of words used in administering the caution, but that police on occasion, fail to ensure that the caution is properly understood".650

750. Senior Constable Daurat submitted that "the current caution is well established, well understood generally and has been extensively covered by a number of case law judgments". Further, Senior Constable Daurat noted that "[a] departure from the current caution … is likely to create difficulties in its application and interpretation by police and legal practitioners". However, Senior Constable Daurat submitted that the special caution of New South Wales could be adopted in purely indictable cases.653

751. The Review Group supports the development of the caution in this state but only if the developments are matched with appropriate resourcing. However, the Review Group is of the view that, at this point of time, no changes should be made to the caution which is used in Western Australia and that "[t]he existing prohibition on any adverse comment at trial concerning a defendant's exercise of the right to silence under police questioning should be maintained."654 This is because the WA Police resource base is not currently capable of supporting the pre-interview disclosure obligations which the new caution would entail.

Recommendation 94
The CIA should not be amended at this point of time to require a caution in terms similar to the UK caution or the special caution in New South Wales.

Cautioning a suspect during an interview

752. During the course of an interview, an interviewing officer may form a suspicion that a suspect has committed another offence (that is, an offence other than the offence(s) for which he or she was arrested and other than the offence(s) in relation to which the interview was being conducted).

753. Once that suspicion is formed during the course of the interview, then the suspect is entitled to be informed of the offence that he or she is suspected of having committed. A failure to do so would result in non-compliance with section 138(2)(a) of the CIA.655

754. An arrested suspect is also entitled to be cautioned before being interviewed as a suspect in accordance with section 138(2)(b) of the CIA. If during the course of the interview, the suspect is informed of another offence that he or she is suspected of having committed, then a question arises as to whether or not the original caution (given prior to the suspect being interviewed) applies or whether the suspect should again be issued with a caution.

755. The Review Group is of the view that whilst a caution is not specific to any offence that the suspect is suspected of having committed, but applies generally to the interview process, the suspect may not realise that the caution

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651 Submission from Senior Constable Cliff Daurat dated 30 March 2017.
652 Submission from Senior Constable Cliff Daurat dated 30 March 2017.
653 Submission from Senior Constable Cliff Daurat dated 30 March 2017.
655 For example, The State of Western Australia v Hart [2017] WADC 29 at [59] (Bowden J).
also applies to the new suspected offence. Accordingly, as a matter of
fairness, the suspect should be reminded that the caution given in compliance
with section 138(2)(b) of the CIA applies to the new suspected offence.

Recommendation 95
Section 138(2) of the CIA should be amended to provide that if, during the course of
an interview, the officer suspects that the suspect has committed another offence
and informs the suspect of the offence as required by section 138(2)(a), then it is
sufficient compliance with section 138(2)(b) for the officer to inform the suspect that
the caution given before the interview commenced now applies to the new suspected
offence.

Affording suspects their rights

756. Whilst the officer in charge of an investigation has a duty to inform the arrested
suspect of his or her right to communicate with a relative or friend and a legal
practitioner, there is no duty to afford the suspects those rights under section
137(3)(c) and 138(2)(c) of the CIA.

757. In other jurisdictions, the investigating officer must facilitate the exercise of
those rights.

758. Issue 88 in the Issues Paper was whether section 138 of the CIA should be
amended to require the officer in charge of the investigation to afford the
arrested suspect his or her right to communicate with a relative or friend and a
legal practitioner, and to set out how those rights are to be facilitated.

759. The ALS agreed that "the CIA should be amended to provide that police have a
positive duty to provide reasonable facilities to enable a suspect, arrested
suspect or arrested person to exercise their right to communicate with a lawyer,
relative or friend". The ALS submitted that "[t]he reasonable facilities should
specify as a minimum the provision of a telephone and contact details for
relevant legal practitioners" and that where a person does not nominate their
own lawyer, the contact details for Legal Aid WA and ALS must be provided to
the person. Furthermore, the ALS submitted that "the CIA should state (as is
the case in other jurisdictions) that the police must allow the communication to
take place in circumstances where that communication cannot be overheard,
unless it is not reasonably practicable". Finally, for young people under the
age of 14 years, they submitted that the communication must be in person.

760. The CCC submitted that section 138 "should be amended to require an officer
in charge to make reasonable efforts as are practicable in the circumstances to
afford an arrested suspect the right to communicate with a relative, friend or
legal practitioner".

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658 Section 419 of the PPR Act (Qld); section 123 of the LEPR Act (NSW); section 6 of the
CLDI Act (Tas); section 464(2) of the Crimes Act (Vic); section 140 of the PA Act (NT); and
section 23G of the Crimes Act (Cth).
659 Issues Paper at p.165
661 ALS submission dated 29 March 2017.
663 ALS submission dated 29 March 2017.
761. The Review Group is of the view that the conferral of a right upon an arrested suspect to communicate with a relative or friend or a legal practitioner should be matched by a corresponding obligation on the part of the officer in charge of the investigation to afford the arrested suspect those rights in the same way as the other rights conferred by sections 137 and 138 if the suspect so requests.

**Recommendation 96**

Section 138(3)(a) of the CIA should be amended to make it clear that the officer in charge of the investigation must afford the suspect his or her rights under section 137(3)(c) and 138(2)(c) if so requested.

Refusing suspects their right to communicate with another person

762. Section 138(4) of the CIA sets out the circumstances in which an officer may refuse an arrested suspect his or her right to communicate or to attempt to communicate with a person. These circumstances are where the officer reasonably suspects that the communication would result in:

(a) an accomplice taking steps to avoid being charged;
(b) evidence being concealed, disturbed or fabricated; or
(c) a person's safety being endangered.

763. Issue 84 in the Issues Paper was whether there are any other circumstances in which an officer should be able to refuse an arrested suspect the right to communicate with another person.

764. In other jurisdictions, an officer may refuse an arrested suspect the right to communicate with another person where the communication would or is likely to result in:

(a) an accomplice escaping or taking steps to avoid being arrested/apprehended;

(b) an accomplice or accessory being present during questioning;

(c) hindering the recovery of any person or property concerned in the offence under investigation;

(d) evidence being, *inter alia*, destroyed or lost; and

(e) a witness being intimidated.

765. The ALS suggested that section 138(4) of the CIA be amended to provide:

*An officer may refuse an arrested suspect his or her right to communicate or to attempt to communicate with a person if he officer reasonably believes that the communication would result in-

(a) an accomplice taking steps to avoid being arrested or charged; or

(b) evidence being lost, concealed, disturbed or fabricated;*

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665 Issues Paper at pp.150-151.
666 The term "disturb" is defined in section 3(1) of the CIA to include "damage, destroy, interfere with and remove."
668 Section 6(3)(b) of the Criminal Law (Detention and Interrogation) Act 1995 (Tas).
669 Section 441(1)(a) of the PPR Act (Qld); section 125(1)(a) of the LEPR Act (NSW); and section 23L(1)(a)(i) of the Crimes Act (Cth).
670 Section 441(1)(b) of the PPR Act (Qld).
671 Section 125(1)(c) of the LEPR Act (NSW).
672 Section 441(1)(c) of the PPR Act (Qld); section 125(1)(b) of the LEPR Act (NSW); and section 23L(2)(a)(ii) of the Crimes Act (Cth).
673 Section 125(1)(b) of the LEPR Act (NSW).
674 Section 441 of the PPR Act (Qld) and section 125(1)(b) of the LEPR Act (NSW).
766. The ALS submitted that "refusing an arrested suspect his or her right to communicate (especially with a lawyer) should not be taken lightly and it has therefore focussed on the most pressing reasons why such a refusal may be justified".\(^{676}\) They also changed "reasonably suspects" to "reasonably believes" in "light of the serious consequences of such a refusal".\(^{677}\)

767. The Emergency Preparedness Unit suggested the addition of the circumstance of "the realisation or commission or planned offence".\(^{678}\)

768. The Review Group is of the view that no amendments are required to section 138(4) of the CIA. This is because there does not appear to be a need to broaden the circumstances currently contained in section 138(4) of the CIA.

\begin{center}
\textbf{Recommendation 97}
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Section 138(4) of the CIA should not be amended to set out any other circumstances in which an officer may refuse an arrested suspect his or her right to communicate or to attempt to communicate with a person.

Making an audiovisual recording of a person being informed of his or her rights\(^{679}\)

769. There is nothing in the CIA that requires an officer to make a recording of the officer informing a person of their rights under section 28, 137 and 138 of the CIA and any responses the person may make.

770. In other jurisdictions, the giving of information to a person about their rights must be recorded\(^{680}\) or the person who is informed of their rights must acknowledge in writing that he or she has been so informed.\(^{681}\)

771. In \textit{The State of Western Australia v Cox}\(^{682}\), Martin CJ made two suggestions. First, that a general practice be adopted whereby police identify on the record of interview the precise status of the interviewee under the CIA (namely, whether the person is a suspect or voluntarily assisting police with their inquiries). Second, that a general practice be adopted whereby the rights conferred on each category of person are conferred in the course of the recorded interview. His Honour the Chief Justice was of the view that the latter practice would eliminate the scope for debate about whether or not those rights were conferred.

772. Issue 90 in the Issues Paper was whether the CIA should be amended to require the officer informing the person of his or her rights to make an audiovisual recording, if practicable, of the giving of the information about the rights and the responses of the person (if any).\(^{683}\)

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\(^{675}\) ALS submission dated 29 March 2017.
\(^{676}\) ALS submission dated 29 March 2017.
\(^{677}\) ALS submission dated 29 March 2017.
\(^{678}\) Emergency Preparedness Unit submission dated 1 March 2017.
\(^{679}\) Issues Paper at pp.166-168.
\(^{680}\) Section 435 of the PPR Act (Qld), section 464G of the Crimes Act (Vic); and section 141 of the PA Act (NT).
\(^{681}\) See, for example, section 123(10) of the LEPR Act (NSW).
\(^{682}\) [2008] WASC 287 at [69]-[70].
\(^{683}\) Issues Paper at p.168.
773. The ALS submitted that "the CIA should be amended to require the officer informing the person of his or her rights to make an audio-visual recording, if practicable, of the giving of the information and the responses provided (if any)". They also submitted that "where an audiovisual recording is not reasonably practicable, the provision of information about rights should be recorded in writing and signed by the person".

774. The Review Group agrees with his Honour the Chief Justice that the making of a recording will eliminate argument about whether or not rights were conferred upon that person in circumstances where a failure to confer those rights could result in any admissions being held to be inadmissible.

775. However, the Review Group notes that there is nothing in the CIA that would prevent such a recording being made. Further, the Audiovisual Record of Interview (AVRIO) Guide (version 1.4) issued by the Office of Investigative Practices is drafted on the basis that the suspect is to be informed of their rights under section 28 or sections 137 and 138 during the audiovisual record of interview (that is, after the recording has commenced).

776. Accordingly, the Review Group is of the view the CIA should not be amended to require that, where practicable, an audiovisual recording should be made of a person being informed of their status (that is, a suspect) and the conferral of rights on that suspect. However, agency policies should address this issue.

**Recommendation 98**
The CIA should not be amended to require an officer to make an audiovisual recording of the giving of information to a person in relation to their rights and their responses (if any). However, the policies of WA Police and other agencies should be amended to require an officer at the commencement of the interview to confirm the status of the person being interviewed (ie suspect) and to confirm with the person being interviewed that they have been informed of their rights or, if they have not been so informed, to be given their rights.

**Purposes for which an arrested suspect should be detained**

777. Section 139(2) of the CIA limits the purposes for which an arrested suspect may be detained in custody.

778. Issue 102 was whether there are any other purposes for which an arrested suspect should be detained following arrest.

779. The ALS did not consider that there were any other purposes for which an arrested suspect should be detained.

780. The Review Group notes that section 139(2)(a) of the CIA only enables an arrested suspect to be detained for the purposes of doing a search under section 133 or 135 of the CIA. However, it may be necessary to progress an investigation by conducting a search under other provisions of the CIA or another written law.

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686 Issues Paper at p.185.
687 Issues Paper at p.185.
Recommendation 99
Section 139(2)(a) of the CIA should be amended to enable a police officer or a public officer to detain an arrested suspect in custody after the suspect is arrested for the purposes of doing a search under the CIA or any other written law.
Detention periods of arrested suspects\textsuperscript{689}

781. The detention periods for an arrested suspect are governed by section 140 of the CIA as follows:

(a) initial period of detention: this period must not exceed 6 hours from arrest;\textsuperscript{690}

(b) a further period of detention authorised by a senior officer: this period must not exceed 6 hours and commences at the end of the initial detention period;\textsuperscript{691} and

(c) a further period or periods of detention authorised by a Magistrate: not more than 8 hours for each further period (which period commences at the end of the further period authorised by a senior officer or a further period previously authorised by a magistrate).\textsuperscript{692}

782. Issue 103 was whether the length of the initial period of detention for an arrested suspect should be increased.\textsuperscript{693}

783. Issue 104 was whether a senior officer should be able to authorise more than one further period of detention.\textsuperscript{694}

784. Issues 103 and 104 are dealt with together.

785. His Honour Chief Magistrate Heath informed the Review Group that:

(a) one of the most frequent after hour commitments for Magistrates is the extension of investigation periods and that these are often made very close to the expiry, requiring Magistrates to make a decision before the period expires;

(b) there is no provision for a further extension to be made after the investigation period expires;

(c) there are far less applications by the Australian Federal Police for extension of investigation periods under the Crimes Act (Cth). His Honour was of the view that this was due to section 23C(7), which automatically allows the deduction of time necessarily spent;

(d) His Honour would support an amendment to the CIA to allow similar matters to be removed from the calculation of the investigation period; and

(e) there should also be a provision that enables an application for extension to be made after the expiry of the initial investigation period where it is not practicable for it to be heard before it expires.\textsuperscript{695}

786. The ALS noted that the Issues Paper provided "no justification for increasing the length of the initial period of detention" and that "[n]o examples were provided to explain why the current period was insufficient".\textsuperscript{696} Similarly, the ALS could see no basis for enabling a senior officer to authorise a further period of detention.\textsuperscript{697}

\textsuperscript{689} Issues Paper at pp.185-186.

\textsuperscript{690} Section 140(3)(a) of the CIA.

\textsuperscript{691} Section 140(3)(b), (4) and (5) of the CIA.

\textsuperscript{692} Section 140(3)(b), (6)-(9) of the CIA.

\textsuperscript{693} Issues Paper at p.186.

\textsuperscript{694} Issues Paper at p.186.

\textsuperscript{695} Submission of the Chief Magistrate dated 7 April 2017.

\textsuperscript{696} ALS submission dated 29 March 2017.

\textsuperscript{697} ALS submission dated 29 March 2017.
787. The Commissioner for Children and Young People did not support increasing the periods of detention after arrest for children and young people. In the Commissioner's view, "any form of detention, either on remand or as a sentence, should only be considered as a last resort and for the shortest time possible."\(^{698}\)

788. The CCC did not support any increases in the periods of detention. The Commission submitted that "the provisions are sufficient to enable officers to carry out their duties with respect to an arrested suspect."\(^{699}\)

789. The Department for Parks and Wildlife supported "consideration being given to reviewing the detention periods for arrested suspects and potentially bringing them into line with those provided in other jurisdictions (for example in the United Kingdom)".\(^{700}\)

790. Detective Inspector Brad Jackson submitted that: a first extension of 6 hours should be issued by a sergeant; a second extension of 6 hours should be issued by an Inspector and a third extension of 6 hours should be issued by a Superintendent; and further extensions should be issued by a Magistrate.\(^{701}\)

791. Senior Constable Cliff Daurat submitted that the initial period of detention should be extended to 8 hours.\(^{702}\)

792. The Review Group decided that in order to assess whether the detention periods were adequate it would be appropriate to request information about the investigation of homicides, given that such investigations are amongst the most complex undertaken by the WA Police. Accordingly, information was requested from the Officer in Charge of the Homicide Squad to provide some examples of the use of Magistrate's extensions in homicide investigations. That information is set out in the Table below:

**Table 6: Examples of extensions of detention periods granted in homicide matters**

<table>
<thead>
<tr>
<th>Abbreviated name of operation(^{703})</th>
<th>Number of suspects</th>
<th>Number of Magistrate's extensions</th>
<th>Reason for extensions</th>
<th>Was/were the suspect(s) charged?</th>
</tr>
</thead>
<tbody>
<tr>
<td>S</td>
<td>2</td>
<td>4 (for each suspect)</td>
<td>Investigation requirements (completion of forensic procedures and interviews)</td>
<td>Yes</td>
</tr>
<tr>
<td>A</td>
<td>2</td>
<td>2 (for each suspect)</td>
<td>Investigation requirements</td>
<td>Yes</td>
</tr>
<tr>
<td>H</td>
<td>1</td>
<td>6</td>
<td>Hospital admissions whilst in custody and</td>
<td>Yes</td>
</tr>
</tbody>
</table>

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\(^{698}\) Commissioner for Children and Young People submission dated 29 March 2017.

\(^{699}\) CCC submission dated 30 March 2017.

\(^{700}\) Department for Parks and Wildlife submission dated 16 March 2017.

\(^{701}\) Submission from Detective Inspector Brad Jackson dated 6 February 2017.

\(^{702}\) Submission from Cliff Daurat dated 30 March 2017.

\(^{703}\) The names of the particular operations were provided to the Review Group but have been abbreviated for the purposes of this Review.
<table>
<thead>
<tr>
<th>Abbreviated name of operation</th>
<th>Number of suspects</th>
<th>Number of Magistrate's extensions</th>
<th>Reason for extensions</th>
<th>Was/were the suspect(s) charged?</th>
</tr>
</thead>
<tbody>
<tr>
<td>HS</td>
<td>1</td>
<td>7</td>
<td>Investigation requirements, examination of crime scene, interviewing the suspect, forensic procedures, awaiting a nurse to obtain blood, fatigue of suspects, suspect under the influence of a substance, interview of witnesses</td>
<td>No</td>
</tr>
<tr>
<td>Y</td>
<td>1</td>
<td>3</td>
<td>Rest and travel from Perth to Broome and further suspect interview</td>
<td>Yes</td>
</tr>
<tr>
<td>E</td>
<td>1</td>
<td>6</td>
<td>Rest of the suspect, crime scene examinations and suspect interview</td>
<td>Yes</td>
</tr>
<tr>
<td>J</td>
<td>1</td>
<td>4</td>
<td>Fatigue of suspect, interview of suspects</td>
<td>No</td>
</tr>
</tbody>
</table>

793. The Review Group is of the view that the initial and subsequent detention periods in complex investigations are inadequate in light of the number of extensions sought in the examples referred to above.

794. The Review Group does not consider that it is appropriate to adopt the regime for calculating detention periods under the Crimes Act (Cth). The Review Group considered that the regime would introduce an additional layer of complexity to the calculation of detention periods and that the simpler approach in the CIA is preferable.

795. The Review Group is of the view that instead of increasing the initial period of detention, a senior officer should be permitted to authorise the detention of an arrested suspect for a further period of 8 hours instead of the current 6 hours.

**Recommendation 100**
Section 140(4) of the CIA should be amended to permit a senior officer to authorise the detention of an arrested suspect for a further period of not more than 8 hours.

796. The Review Group is of the view that a Magistrate should be permitted to authorise the detention of an arrested suspect for a further period exceeding the current detention period of 8 hours. The Review Group notes that the Magistrate must be satisfied that detention of the suspect for the further period
is justified. The Review Group is of the view that this will reduce the number of applications for extensions being made to Magistrates whilst ensuring that the decision as to whether or not an extension is granted remains with Magistrates.

**Recommendation 101**
Section 140(6)(b) of the CIA should be amended to permit a Magistrate to authorise the detention of a suspect for a period up to 16 hours.

Factors determining whether period of detention is reasonable\textsuperscript{704}

797. The detention of an arrested suspect is justified if the detention is for a purpose referred to in section 139(2) and is for a period that is reasonable having regard to the factors in section 141.

798. In other Australian jurisdictions, the following factors may be taken into account in determining whether the period of detention is reasonable:
   (a) a person's age, physical capacity and condition and mental capacity and condition\textsuperscript{705}
   (b) whether the person's detention is necessary for the investigation of an indictable offence\textsuperscript{706}
   (c) whether the person has indicated a willingness to make a statement or to answer questions\textsuperscript{707}
   (d) any time spent questioning the person before the arrest\textsuperscript{708}

799. Issue 105 was whether there are any other factors which should be taken into account in determining a reasonable period of detention\textsuperscript{709}

800. The ALS noted that the factors in section 141 were "extensive and comprehensively cover the time needed to conduct investigations and gather evidence".\textsuperscript{710} However, the ALS also submitted that "the factors are skewed in favour of police".\textsuperscript{711} The ALS submitted that "factors relating to the arrested suspect should also be included" such as a person's cognitive impairment or mental illness.\textsuperscript{712} Further, the ALS submitted that the determination of a reasonable period should take into account whether the purpose for which the detention is sought could reasonably be postponed and accommodated without the need to hold the arrested suspect in police custody.\textsuperscript{713}

801. The Review Group agrees with the ALS that none of the factors in section 141 of the CIA require the senior officer or the Magistrate to consider whether the period of detention is justified having regard to the special vulnerability of the arrested suspect. The Review Group is of the view that this deficiency should be remedied.

802. The Review Group is of the view that it is not necessary to include factors such as whether the person's detention is necessary for the investigation or whether the person has been questioned before arrest or is willing to make a statement or to answer questions. This is because arrested suspects may, by virtue of

\textsuperscript{704} Issues Paper at pp.186-186.
\textsuperscript{705} Section 404(1)(e) of the PPR Act (Qld); and section 116(2)(a) of the LEPR Act (NSW).
\textsuperscript{706} Section 404(1)(a) of the PPR Act (Qld); and section 116(2)(b) of the LEPR Act (NSW).
\textsuperscript{707} Section 404(1)(d) of the PPR Act (Qld); and section 116(2)(b) of the LEPR Act (NSW).
\textsuperscript{708} Section 404(1)(f) of the PPR Act (Qld).
\textsuperscript{709} Issues Paper at p.186.
\textsuperscript{710} ALS submission dated 29 March 2017.
\textsuperscript{711} ALS submission dated 29 March 2017.
\textsuperscript{712} ALS submission dated 29 March 2017.
\textsuperscript{713} ALS submission dated 29 March 2017.
section 139(2)(b) and (c) of the CIA be detained for the purposes of investigating any offence or interviewing the suspect.

803. The Review Group does not agree with the ALS that the senior officer or Magistrate should consider whether the purpose for which the detention is sought could reasonably be postponed and accommodated without the need to hold the arrested suspect in custody. This is because the CIA contemplates either a suspect voluntarily assisting police or a suspect being arrested. If a suspect is arrested, then he or she may be detained for the purposes in section 139(2) for the periods permitted under section 140 having regard to section 141 of the CIA. The arrested suspect only ceases to be under arrest as set out in section 125 of the CIA. If a suspect is not arrested, then he or she is free to leave at any time unless he or she is then arrested. A senior officer or a Magistrate should not be required to consider a factor which effectively requires them to consider whether or not the suspect should have been arrested.

**Recommendation 102**
Section 141 of the CIA should be amended to include an additional factor to be taken into account under section 140, namely the special vulnerability of the arrested suspect due to age or physical or mental impairment.

Charging an arrested suspect

804. During the meetings of the Review Group, an issue was raised about the interaction between the CIA, the Bail Act and the CP Act in relation to the charging of an arrested suspect and the need for consistency across all three pieces of legislation.

805. One of the purposes for which an arrested suspect may be detained under section 139 of the CIA is to decide whether or not to charge the suspect with an offence.

806. The factors to be taken into account in deciding whether the detention of an arrested suspect is justified under section 140 are listed in section 141 of the CIA. One of the factors is the time needed to complete any of the matters, or any matter reasonably connected with the matters in section 139(2), including "deciding whether or not to charge the suspect with an offence."  

807. If a decision is made not to charge the arrested suspect, then the suspect must be released unconditionally.

808. If a decision is made to charge the arrested suspect, then section 139 of the CIA no longer authorises the detention of the arrested suspect. The continuing detention of the arrested suspect is only authorised in the circumstances set out in section 142 of the CIA.

809. Section 142(7) of the CIA provides that if it is decided to charge an arrested suspect with an offence and the suspect is not released unconditionally, then the officer who has custody of the suspect must ensure the suspect is charged as soon as practicable and is dealt with, relevantly, under section 6 of the Bail Act.

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714 Section 28 of the CIA.
715 Section 139(2)(d) of the CIA.
716 See sections 141(m) and section 139(2)(d) of the CIA.
717 Section 142(2) of the CIA.
719 See section 142(4)-(6) and (7)-(8).
810. Section 142(8) of the CIA provides that if it is decided to charge an arrested suspect with an offence, the suspect may be detained in custody before being released unconditionally or being dealt with under section 142(7), for a reasonable period that is to be determined having regard to the following factors: the time needed to complete any identifying procedure under Part 7 of the CIIPA; the time needed to complete any forensic procedure on the suspect under Part 9; if it is decided not to release the suspect unconditionally, the time needed to comply with the Bail Act and, in particular, section 6; section 157 of the Mental Health Act 2014 or any other written law.

811. Section 6 of the Bail Act applies to a police officer or other person ("the arrester") who charges a person who is under arrest with an offence and does not release the accused unconditionally under section 142 of the CIA. In particular, as soon as practicable after the accused is charged, section 6(4) of the Bail Act requires the arrester to bring the accused or cause the accused to be brought before a court, or perform the other duties of the arrester under section 6 (including considering bail).

812. Under the CP Act, a prosecution is commenced:
   (a) on the day on which a prosecution notice is signed under section 23 by the prosecutor and either a JP or a prescribed court officer, or on the day on which the notice is lodged with the court in which the prosecution is being commenced (in the case of a prosecution notice signed under section 23 by an authorised investigator alone); or
   (b) on the day on which an indictment that alleges the offence is lodged with a superior court (that is, where the accused has not been charged with the offence in a court of summary jurisdiction or committed to a superior court on a charge of the offence).720

813. The prosecution notice must then be lodged in the court in which the prosecution is being commenced in accordance with section 24 of the CP Act.

814. If an accused is under arrest or otherwise in custody, the prosecutor must ensure that the accused is given a copy of the prosecution notice.721

815. The Review Group notes that there is nothing in section 142 of the CIA that sets out when an arrested suspect is charged. The Review Group is of the view that this deficiency should be remedied in light of the interaction between the CIA, the Bail Act and the CP Act. The Review Group considers that an arrested suspect should be considered to have been charged when he or she is told that he or she is to be charged with an offence or offences and a record is made to that effect. This might, for example, take place at the conclusion of an audiovisual recording or when the arrested suspect is given a copy of a prosecution notice.

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720 Sections 21 and 83 of the CP Act; See Palumbo v The State of Western Australia [2014] WASCA 55 at [43] (Buss JA with McLure P and Pullin JA agreeing).
721 Section 27 of the CP Act.
Recommendation 103
Section 142 of the CIA should be amended to make it clear that, for the purposes of that section and compliance with section 6 of the Bail Act, an arrested suspect is charged with an offence when:
(a) the arrested suspect is notified by an officer that he or she is to be charged with one or more offences; and
(b) the officer makes a record of that notification.

Definition of obstruct the course of justice

816. Following the publication of the Issues Paper, it was suggested that a definition of "obstruct the course of justice" be inserted in section 142(1) of the CIA.722

817. The Review Group is of the view that it is not necessary to insert a definition of "obstruct the course of justice" in the CIA. This is because the courts have made it clear that the expression "the course of justice" is concerned with proceedings or the exercise of jurisdiction in a court or competent judicial authority.723 Further, a police investigation into a possible offence against the criminal law is not part of the course of justice.724

Recommendation 104
Section 142(1) of the CIA should not be amended to include a definition of "obstruct the course of justice".

Circumstances in which not releasing a suspect unconditionally is justified725

818. Section 142(2) of the CIA sets out the circumstances in which not releasing a suspect unconditionally is justified.

819. Issue 106 in the Issue Paper was whether there are any other factors that would justify a suspect not being released unconditionally.726

820. The ALS was of the view that "the factors listed in section 142(2) of the CIA are sufficient and no further factors should be included".727

821. Senior Constable Cliff Daurat submitted that one factor that should be included is the "difficulty in locating the suspect to issue a Court Hearing Notice" (because many persons are transient and have no fixed address).728

822. The Review Group is of the view that there is no need to include any additional factors in section 142(2) of the CIA. Further, that if problems have arisen with respect to the service of court hearing notices, then this should be dealt with by way of amendment to section 33 and Schedule 2 of the CP Act.

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722 The term "obstruct the course of justice" also appears in section 128(3)(b)(v) of the CIA.
723 See, for example, R v Rogerson [1992] HCA 25; (1992) 174 CLR 268 at 276 (Mason CJ); at 283 (Brennan and Toohey JJ); and at 302-304 (McHugh J); and Palumbo v The State of Western Australia [2014] WASCA 55 at [42] (Buss JA, with McLure P and Pullin JA agreeing).
728 Submission of Senior Constable Cliff Daurat dated 30 March 2017.
Dealing with an arrested suspect under section 142(7)\textsuperscript{729}

823. Section 142(7) of the CIA originally provided that:

> If it is decided to charge an arrested suspect with an offence and the suspect is not released unconditionally, the officer who has custody of the suspect —
> (a) must ensure the suspect is charged as soon as practicable and is dealt with:
>   (i) under the Bail Act 1982 section 6; or
>   (ii) under the Mental Health Act 1996 section 196;
> and
> (b) may detain the suspect in a lock up or other place of confinement until that happens, subject to subsection (8).

824. Section 142(7) of the CIA was then amended by the  \textit{Criminal Investigation Amendment Act 2014}\textsuperscript{730} to read:

> If it is decided to charge an arrested suspect with an offence and the suspect is not released unconditionally, the officer who has custody of the suspect must ensure the suspect is charged as soon as practicable and is dealt with —
> (a) under the Bail Act 1982 section 6; or
> (b) under the Mental Health Act 1996 section 196.

825. Section 52 of the  \textit{Mental Health Legislation Amendment Act 2014} provided for section 142(7)(a)(ii) of the CIA to be amended to refer to section 157 of the \textit{Mental Health Act 2014}\textsuperscript{731}. However, by the time the  \textit{Mental Health Legislation Amendment Act 2014} came into force, section 142(7)(a)(ii) of the CIA was no longer in existence having been replaced by section 142(7)(b) of the CIA. The consequence is that the proposed amendment has not taken effect so that the reference to section 196 of the  \textit{Mental Health Act 1996} in section 142(7)(b) of the CIA has not been replaced with a reference to section 157 of the  \textit{Mental Health Act 2014}\textsuperscript{732}.

826. Issue 108 in the Issues Paper was whether section 142(7) of the CIA should be amended to delete the reference to section 196 of the  \textit{Mental Health Act 1996} and replace it was a reference to section 157 of the  \textit{Mental Health Act 2014}\textsuperscript{733}.

827. The ALS and the Department of Health both agreed that section 142(7)(b) of the CIA should be amended to refer to section 157 of the  \textit{Mental Health Act 2014}\textsuperscript{734}.

\textsuperscript{729} Issues Paper at pp.187-188.
\textsuperscript{730} The  \textit{Criminal Investigation Amendment Act 2014} came into operation on 28 January 2015.
\textsuperscript{731} The  \textit{Mental Health Legislation Amendment Act 2014} came into operation on 30 November 2015.
\textsuperscript{732} It is noted that the amendment to section 142(8)(c)(ii) of the CIA took effect so that this subparagraph now refers to section 157 of the  \textit{Mental Health Act 2014}.
\textsuperscript{733} Issues Paper at p.188.
\textsuperscript{734} ALS submission dated 29 March 2017 and Department of Health submission dated 17 March 2017.
828. The DPP also agreed that the CIA should be amended. However, in their submission, "the CIA should be amended to reference the application of the *Mental Health Act 1996* up to 30 November 2015\(^{735}\) and the application of the *Mental Health Act 2014* from 1 December 2015".\(^{736}\)

829. The Review Group is of the view that section 141(7) of the CIA needs to be amended to refer to section 157 of the *Mental Health Act 2014* in addition to section 196 of the *Mental Health Act 1996*. This is because the previous attempt to amend the section failed.

**Recommendation 106**

Section 142(7) of the CIA should be amended to refer to section 157 of the Mental Health Act 2014 in addition to section 196 of the Mental Health Act 1996.

Factors determining whether detention of suspect in custody before being released unconditionally is reasonable\(^{737}\)

830. Section 142(8) of the CIA sets out the factors which determine whether the detention of a suspect in custody is reasonable after it is decided to charge the suspect but before he or she is released unconditionally.

831. Issue 107 in the Issues Paper was whether section 142(8) of the CIA should be amended to enable an arrested suspect to be detained in custody for a reasonable period that is to be determined having regard to the time needed: (a) to conduct any further interview with the suspect; (b) to undertake any further investigation; (c) for the suspect to comply with a data access order.\(^{738}\)

832. The ALS noted that "police already have the power to detain an arrested suspect for the purpose of interviewing the suspect" and "investigate the offence before deciding whether to charge the arrested suspect".\(^{739}\) The ALS "does not consider that any extension of the power to detain an arrested suspect after charge is appropriate".\(^{740}\)

833. Section 139(2) of the CIA sets out the purposes for which an arrested suspect may be detained prior to charge including investigating any offence suspected of having been committed by the suspect and interviewing the suspect in relation to any offence that the suspect is suspected to have committed.\(^{741}\) By way of contrast, the focus of section 142 of the CIA is upon release of a suspect after a decision is made to charge him or her. The Review Group does not consider that it is appropriate for the factors referred to in Issue 107 to be included in section 142(8) of the CIA as this would allow investigating officers to detain arrested suspects for the same purposes contained in section 139(2) of the CIA without the necessary safeguards contained in section 140.

834. However, the Review Group is of the view that section 142(8) of the CIA requires amendment to make it clear that if it is decided to charge an arrested suspect with an offence and the suspect is being detained in custody, then one of the factors to which regard is to be had in determining whether the detention is for a reasonable period is the time needed to charge the arrested suspect with an offence or offences (that is, the time needed to inform the arrested

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\(^{735}\) The date when the earlier Act was repealed.

\(^{736}\) DPP submission dated 27 March 2017.

\(^{737}\) Issues Paper at p.187.

\(^{738}\) Issues Paper at p.187.

\(^{739}\) ALS submission dated 29 March 2017.

\(^{740}\) ALS submission dated 29 March 2017.

\(^{741}\) See section 139(2)(b) and (c) of the CIA.
suspect that he or she is to be charged with an offence or offences and the

time needed to make a record to that effect). This is for the reasons outlined

above in relation to charging an arrested suspect.

**Recommendation 107**
Section 142(8) of the CIA should be amended to refer to the time needed to:
(a) notify the arrested suspect that he or she is to be charged with one or

more offences; and
(b) make a record of that notification.

**Arrest under process or warrant**

835. Section 225 of the Criminal Code makes it lawful for a person charged by law
with the duty of executing the lawful process of a court, and who is required to
arrest or detain another person under the process, to arrest or detain that other
person according to the terms of the process. Similarly, section 226 of the
Criminal Code makes it lawful for a person charged by law with the duty of
executing a lawful warrant issued by any court or justice or other person having
jurisdiction to issue it, and who is required to arrest or detain another person
under the warrant, to arrest or detain that other person according to the terms
of the warrant.

836. Under the CP Act, a police officer must obey any warrant or other order of
direction of a court and if he or she fails to do so, he or she is to be dealt with
under section 23 of the Police Act.

837. An arrest warrant for a person issued by a court remains in effect until the
person concerned is brought before the court under the warrant or appears
voluntarily in the court.

838. A person who is arrested under an arrest warrant remains under arrest until the
person is delivered into the custody of the relevant court.

839. A person arrested under an arrest warrant is entitled to the rights of an arrested
person in section 137 of the CIA. A person arrested under an arrest warrant
on suspicion of having committed an offence is an arrested suspect for the
purposes of section 138 of the CIA and hence entitled to the rights contained in
that section.

840. A person who is arrested under any process or warrant must be dealt with
according to the process or warrant. Section 143(1) of the CIA does not
prevent Part 12 from applying to a person who is so arrested if he or she is
reasonably suspected of having committed an offence that is unrelated to the
process or warrant. However, a person who has been arrested under an
arrest warrant is not an "arrested suspect" for the purposes of sections 139, 140 and 142 of the CIA. Accordingly, it is not clear what section 143(2) of
the CIA was designed to do.

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742 Section 177(2) of the CP Act.
743 Section 177(3) of the CP Act.
744 Section 177(1)(a) of the CP Act.
745 Section 125(2)(a) of the CIA. See also section 177(6) of the CP Act.
746 Section 137(2) of the CIA.
747 See the definition of "arrested suspect" in section 138(1) of the CIA.
748 Section 143(1) of the CIA.
749 Section 143(2) of the CIA.
750 See the definition of "arrested suspect" in sections 139(1), 140(1) and 142(1) of the CIA.
841. If an arrest warrant issued under the CP Act requires a person to be brought before a court, then the person must be brought before the court as soon as practicable.\textsuperscript{751}

842. Following the publication of the Issues Paper, Sergeant Gareth Reed raised an issue about the detention of a person who is the subject of an arrest warrant in circumstances where they are also the subject of an outstanding inquiry. Sergeant Reed said:

\begin{quote}
There is an issue with the detention of arrested suspects, where they are the subject of an arrest warrant, yet have outstanding inquiries requiring interview or further investigation whilst detained in custody. The warrant has the effect that we have a requirement to bring the arrested person before the first available court, which essentially means that we cannot detain the person in order to deal with the outstanding matters.

In practice, it is most especially a problem during business hours where courts are open and able to receive the person. During the time outside of business hours, the person would normally be held in custody anyway so there is time to deal with the other matters.

It is recommended that section 139 be amended to enable the requirements of the warrant to be deferred, in circumstances where the detention of arrested suspects is required in order to complete outstanding inquiries.\textsuperscript{752}
\end{quote}

843. The Review Group is of the view that obedience to the process or warrant must take precedence over any outstanding inquiry. So, for example, a police officer who has arrested a person under an arrest warrant cannot delay taking the person to court in compliance with the warrant in order to interview or charge the person in relation to a suspected offence which is unrelated to the warrant.

844. The Review Group accepts that this results in an anomalous situation where the ability of the investigating officers to deal with outstanding inquiries will depend on whether or not the arrested person may be brought before a court, having regard to opening hours of the court and the availability of a duty Magistrate or Judge. If the arrested person can be brought before a court, then the investigating officers will not be able to deal with outstanding inquiries because this would lead to a delay in bringing the person before the court.

845. The Review Group is of the view that section 143(2) of the CIA is uncertain in operation because a person arrested under an arrest warrant is expressly excluded from the definition of "arrested suspect" for the purposes of section 139, 140 and 142 of the CIA. Accordingly, section 143(2) of the CIA should be amended to clarify how the subsection is intended to operate with respect to persons arrested under a warrant or process.

\textsuperscript{751} Section 177(4)(a) of the CP Act.
\textsuperscript{752} Submission from Sergeant Gareth Reed dated 1 February 2017.
Recommendation 108
The WA Police should consult with the Courts as to whether the CIA and the CP Act should be amended to enable compliance with the requirements of a warrant or process to be delayed to enable officers to deal with an arrested person under Part 12, whether or not they are an arrested suspect, provided that:

(a) the person has been:
   (i) arrested under the CIA, or another written law, on suspicion of having committed an offence and the officer subsequently becomes aware that there is a process or warrant requiring the person's arrest; or
   (ii) arrested under any process or warrant and, at the time of the person's arrest, the officer could also have arrested the person under section 128 of the CIA, or another written law, on suspicion of having committed an offence; and
(b) the offence that the person is reasonably suspected to have committed is unrelated to the process or warrant; and
(c) the process or warrant permits compliance with the warrant to be delayed.
Part 13: Seizing things and related matters

846. Part 13 of the CIA contains provisions that apply to and in respect of the seizing under the CIA of a thing that is relevant to an offence.753

847. The following issues have arisen in relation to the operation and effectiveness of Part 13 of the CIA:
   (a) whether the provisions relating to dealing with privileged material require amendment; and
   (b) whether the CFPD Act should be amended to enable the CEO of a prescribed agency to determine a claim relating to disputed property or to refer a question of law to a Court.

Procedure on seizure of privileged material

848. Prior to the enactment of the CIA, common law claims for legal professional privilege were dealt with in accordance with a protocol agreed between the Law Society of Western Australia and the WA Police.754

849. Section 151 of the CIA applies to records which are privileged because of either or both LPP and PIP. In AW v Rayney755 McLure P noted the differences between a claim of LPP and a claim of PIP. Her Honour said:

   First, in a claim of public interest immunity, the court is required to undertake a balancing of competing public interests in its determination. Legal professional privilege on the other hand is a substantive common law right which is itself the product of a balancing exercise between competing public interests; given the application of the privilege, no further balancing exercise is required: Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49, 64 - 65. Secondly, it is likely that a court will be in a much better position to make a determination on legal professional privilege, by examining the documents if necessary, than in making a value judgment about the variety of matters that can attract public interest immunity. Thirdly, a claim of public interest immunity is usually made by a third party with no interest, direct or indirect, in the outcome of existing or pending litigation.

850. Section 151 of the CIA sets out the procedure for dealing with records:
   (a) which have been seized under the CIA; or
   (b) produced under an order to produce a business record issued under section 53 of the CIA,
   in circumstances where a person entitled to possession of the record claims that all or some of the information in it is privileged, or the officer seizing the record reasonably suspects that all or some of the information in it is privileged.

851. There do not appear to be any similar provisions elsewhere in Australia.

852. If a claim for privilege is made or the officer seizing the record has the requisite reasonable suspicion, then the officer must secure the record and apply to the Magistrates Court for a determination as to whether the information is privileged.

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753 Section 145 of the CIA.
754 Referred to in CC v Rayney [2012] WASC 56 at [55] (per Commissioner Sleight).
755 [2010] WASCA 161 at [69].
853. Section 151 "does not modify or abrogate the common law principles of procedural fairness". In particular, it is noted that section 151(7) of the CIA gives the applicant and any person entitled to possession of the records an entitlement to be heard. The onus of establishing privilege rests with the party claiming privilege.

854. If the Magistrates Court decides:
   (a) that the records are not privileged, then the court must make the record available for collection by the applicant;
   (b) that the records are privileged, then the court must make the record available for collection by the person from whom it was seized;
   (c) that some of the information is privileged, the court must make orders to enable the applicant to have access to the information in the records that is not privileged.

855. Section 151 of the CIA does not apply unless a record is seized under the CIA.

856. Further, nothing in section 151 of the CIA "displaces or alters the scope or application of the common law principles relating to legal professional privilege".

857. In *AW v Rayney* Murray J said:

  … s 151, is concerned to preserve the privilege in a case where otherwise the consequence of the lawful seizure of records would be their use to further, or in the course of, a criminal investigation. Despite the lawful seizure the privilege is maintained, and therefore until it is determined in respect of which records seized and to what extent in respect of such records, the privilege exists, the records are to be handled in such a way as to prevent access to the information, 'by any person who would not be entitled to the information if it were privileged': s 151(3)(c). That is a requirement which is obviously designed to prevent the ultimate determination about the existence of the privilege being a pyrrhic victory because of the involuntary disclosure of the information. It is accepted that the persons who are prevented from having access are any persons other than those within the confidential process of communication and the court and its officers.

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756 *AW v Rayney* [2010] WASCA 161 at 129 (Buss JA).
757 *AW v Rayney* [2010] WASCA 161 at 132 and 182 (Buss JA); *Rayney v CC* [2012] WASC 149 at 30 (Commissioner Sleight).
758 Section 151(9) of the CIA.
759 Section 151(10) of the CIA.
760 Section 151(11) of the CIA.
761 *CC v Rayney* [2012] WASC 56 at 55 (Commissioner Sleight).
762 *AW v Rayney* [2010] WASCA 161 at 16 (McLure P with whom Buss and Newnes JJA agreed); *CC v Rayney* [2013] WASCA 125 at 6 (McLure J with whom Buss and Newnes JJA agreed).
Time limitation periods for prosecution of offences where claim for privilege is made but not determined

858. A prosecution of a person for an indictable offence may be commenced at any time, unless another written law provides otherwise. However, a prosecution for a simple offence must be commenced within 12 months after the date on which the offence was allegedly committed, unless another written law provides otherwise, or the person consents to it being commenced at a later time.

859. In some cases, it may not be appropriate to charge a person with an offence until after any claim to privilege had been determined. However, the determination of a claim to privilege may take over 12 months by which time the limitation period for the prosecution of the offence has expired.

860. Issue 109 was whether section 151 of the CIA should be amended to include maximum time frames to determine a claim for privilege.

861. Issue 110 was whether a provision should be inserted in section 151 of the CIA that provides for the suspension of limitation periods until a claim for privilege is finalised.

862. Issue 111 was whether a provision should be inserted into section 151 of the CIA that allows a prosecutor to apply to an appropriate court to extend a limitation period where a claim for privilege was lodged prior to but determined after the expiration of the limitation period.

863. Issues 109-11 are dealt with together.

864. As noted in the Issues Paper, in Report 107 Privilege in Perspective: Client Legal Privilege in Federal Investigations, the ALRC considered whether there should be an automatic suspension of a limitation period each time a privilege claim is challenged. The ALRC did not consider that automatic suspension was necessary but instead recommended that Federal client legal privilege legislation should enable superior courts to authorise the extension of a limitation period where a federal body intends to challenge a privilege claim, if granting an extension is in the interests of justice. The Review Group agrees with the position taken by the ALRC in relation to claims for both LPP and PIP.

**Recommendation 109**

Section 151 of the CIA should be amended to enable an officer to apply to a court for the extension of a limitation period for the commencement of a prosecution for an offence, either prior to or after the expiration of the limitation period, in circumstances where a claim for privilege has been, or is to be, determined under the CIA.

Process for determining claims for privilege

865. Issue 112 was whether section 151 of the CIA should be amended to include the specific process to be followed by a court in dealing with a claim of LPP in

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765 Section 21(1) of the CP Act.
766 Section 21(2) of the CP Act.
accordance with the procedure for LPP that applies in the context of discovery and inspection between parties to litigation and whether a similar process should apply in relation to a claim for immunity.\textsuperscript{772}

866. In \textit{Rayney v AW}\textsuperscript{773} McLure J said:

\begin{quote}
Ordinarily, the person claiming and carrying the onus of establishing legal professional privilege is required to: (a) list each communication the subject of the claim for privilege; (b) state the form in which each communication is contained, stored or recorded, whether it is an original or a copy and the date when each was made; (c) identify the persons between whom the communication or communications were made; and (d) provide evidence as to the basis of the claim for legal professional privilege…
\end{quote}

867. In \textit{AW v Rayney}\textsuperscript{774} Buss J expressed the opinion that:

\textit{the procedure for claiming legal professional privilege that applies in the context of discovery and inspection between parties to civil litigation should ordinarily be applied, by analogy, to proceedings relating to a claim for privilege in respect of 'records' (as defined in s 3(1) of the CIA) seized or produced in accordance with the CIA. In particular, that means the person claiming privilege should, ordinarily:

\begin{itemize}
\item[(a)] list each record in respect of which privilege is claimed;
\item[(b)] state the form of the record;
\item[(c)] state whether the record is an original or a copy, and the date on which it came into existence;
\item[(d)] identify the person who brought the record into existence;
\item[(e)] identify the persons between whom any communication or communications embodied in the record were made; and
\item[(f)] state the basis on which the privilege is claimed, and provide any evidence necessary to substantiate the claim.\textsuperscript{775}
\end{itemize}

This procedure should not involve the disclosure, directly or indirectly, of any communication the subject of the claim for privilege.

A court may examine records where there is a disputed claim of legal professional privilege. However, it generally should not do so until "after the court has examined the material filed by the person claiming the privilege and served on the other party or parties, and the court entertains a doubt as to whether the claim for privilege has been made out or wishes to inspect the documents for the purpose of confirming its view."\textsuperscript{776}

\textsuperscript{772} Issues Paper at p.195.
\textsuperscript{773} [2009] WASCA 203 at [42].
\textsuperscript{774} [2010] WASCA 161 at [135]-[136].
\textsuperscript{775} It is noted that the ALRC made similar recommendations in Report 107, Recommendation 8-3. See generally [8.141]-[8.153].
868. In the Issues Paper it was noted that one concern which had been raised was that privilege may be waived by providing the details referred to above.\textsuperscript{777}

869. The Review Group is of the view that the process for dealing with claims of LPP and PIP should be prescribed in Regulations made under the CIA. The prescribed process should reflect the comments made by members of the Court of Appeal and be developed in consultation with the Court(s) which determine such claims.

<table>
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<tr>
<th>Recommendation 110</th>
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<tr>
<td>Section 151 of the CIA should be amended to:</td>
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<td>(a) require claims for LPP and PIP to be dealt with in accordance with the process prescribed in Regulations made under the CIA; and</td>
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<td>(b) make it clear that nothing done in compliance with the prescribed process constitutes a waiver of privilege.</td>
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<td>Further, Regulations setting out the process for the determination of claims should be developed in consultation with the Court(s).</td>
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<th>Scope of section 151\textsuperscript{778}</th>
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<tr>
<td>870. Section 151 of the CIA applies to records which have been seized (whether under a search warrant or pursuant to a statutory authorisation) and business records which have been produced under an order to produce.</td>
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<td>871. A search warrant issued under section 42 of the CIA authorises the officer executing it to:</td>
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<td>(a) if it authorises a search for a target thing, search the target place for the target thing; and</td>
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<td>(b) subject to section 146, seize the target thing.\textsuperscript{779}</td>
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<td>872. Further, if an officer doing a search under a search warrant finds a thing which is not a target thing but which is a thing relevant to an offence, the officer may, subject to section 146, seize it.\textsuperscript{780}</td>
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<td>873. An officer exercising the powers of entry in respect of a place or vehicle contained in section 133(2) of the CIA may search the place for a thing relevant to the serious offence for which the person is under arrest. An officer exercising the power of entry in section 133(3) of the CIA may search the place for any thing relevant to the serious offence or any thing relevant to an offence that is connected with, or of the same character as, the serious offence. If an officer doing a search under sections 133(2) or (3) finds a thing relevant to an offence, whether the serious offence or another offence, the officer may, subject to section 146, seize the thing.</td>
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<tr>
<td>874. An officer to whom a business record is produced under an order to produce is permitted to retain the record for a reasonable time in order to decide whether it is a thing relevant to an offence.\textsuperscript{781} If a business record is a thing relevant to an offence, then the officer may, subject to section 146, seize it.\textsuperscript{782}</td>
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\textsuperscript{777} Issues Paper at p.194.
\textsuperscript{778} Issues Paper at pp.195-197.
\textsuperscript{779} Section 43(8)(b)(i) and (iii) of the CIA.
\textsuperscript{780} Section 43(9) of the CIA.
\textsuperscript{781} Section 56(1) of the CIA.
\textsuperscript{782} Section 56(2)(a) of the CIA.
applies to and in respect of a record that is seized after being produced under an order to produce.\textsuperscript{783}

875. If a person whose place is the subject of a search warrant claims privilege before the target thing is seized then section 151 does not apply. Similarly, if a person whose place is the subject of a search warrant claims privilege before the officer is able to form a reasonable suspicion that a thing, which is not a target thing, is a thing relevant to an offence, then the officer cannot seize the thing and hence section 151 does not apply.

876. If a person to whom an order to produce is issued claims privilege prior to the production of the business record, then the officer is not in a position to decide whether the business record is relevant to an offence and then seize it.

877. Issue 113 was whether section 151 of the CIA should be amended to provide that an item claimed to be subject to privilege is not to be considered seized until such time as the privilege application has been dealt with and a decision is made by the relevant officer as to whether it is a "thing relevant to an offence".\textsuperscript{784}

878. Issue 114 was whether section 151 of the CIA should be amended to provide for officers to conduct an examination of a thing over which privilege is claimed to determine whether it is something relevant to an offence (without a loss of privilege).\textsuperscript{785}

879. Issues 113 and 114 are dealt with together.

880. The CCC submitted that section 151 of the CIA should be amended to provide that an item claimed as being privileged is not to be considered seized until such time as the privilege application is dealt with and a decision made as to whether it is a thing relevant to an offence. They submitted that this would preserve the integrity of the potentially privileged item until such time that a determination has been made.\textsuperscript{786}

881. The CCC submitted that section 151 of the CIA "should not be amended to provide for officers to conduct an examination of things over which privilege is claimed to determine whether it is relevant to an offence".\textsuperscript{787} The CCC noted "the potential for the proposed procedure to be abused and privilege to be lost if such an amendment were made".\textsuperscript{788}

882. The DPP's submission was to the same effect as the CCC.\textsuperscript{789}

883. The Review Group is of view that officers should be able to seize records in relation to which a claim for privilege has been made. Further, section 151 of the CIA should be amended to deal with the situation where a claim for privilege is made prior to any seizure. In either situation, section 151(3) of the CIA provides appropriate protection for the records seized.

\textsuperscript{783} Section 56(3) of the CIA.
\textsuperscript{784} Issues Paper at p.197.
\textsuperscript{785} Issues Paper at p.197
\textsuperscript{786} CCC submission dated 30 March 2017.
\textsuperscript{787} CCC submission dated 30 March 2017.
\textsuperscript{788} CCC submission dated 30 March 2017.
\textsuperscript{789} DPP submission dated 27 March 2017.
884. The Review Group does not consider that officers should be allowed to examine things over which a claim of privilege has been made because this would defeat the purpose of the claim to privilege.

**Recommendation 111**
Section 151 of the CIA should be amended so that it applies not only where records are seized but in the following circumstance:

1. where a search warrant has been issued, a statutory search power is being exercised or a notice to produce has been issued; and
2. a claim for privilege is made by a person prior to any seizure being made or prior to the record being produced.

**Determination of claims to privilege by the Supreme Court**

885. One problem which has been identified in relation to the determination of claims to privilege is the length of time which it takes for such matters to be resolved.

886. In one investigation by the WA Police, the claims for LPP took almost 6 years to be determined (including various appeals).

887. In his submission to the Review, His Honour the Chief Magistrate noted that claims for LPP "can be complex and time consuming, particularly when a large number of computerised records are involved". His Honour also noted that "in the Magistrates Court, the delay in listing times to enable a Magistrate to deal with lengthy programming and substantive hearings will inevitably mean that a determination will not be made in less than 12 months and that "[c]omplex matters inevitably result in an appeal to a single judge of the Supreme Court". His Honour was of the view that it "would seem more appropriate if these claims could be referred immediately to a single Supreme Court Judge".

888. The Review Group agrees with the Chief Magistrate that it would be preferable for claims for privilege to be dealt with by the Supreme Court particularly where the determination of the claim is likely to be a lengthy process.

**Recommendation 112**
Section 151 of the CIA should be amended to either require claims for privilege to be determined by a Supreme Court Judge or give Magistrates the power to refer a claim for privilege to the Supreme Court.

**Seizure of electronic material**

889. Issue 115 in the Issues Paper was whether section 151 of the CIA should be amended, or Regulations inserted into the CI Regulations, to provide a clear set of statutory procedures for determining LPP, where electronic records have been seized, and whether similar procedures should apply in relation to a claim for PIP.

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792 Submission of the Chief Magistrate dated 3 April 2017.

793 Submission of the Chief Magistrate dated 3 April 2017.

794 Issues Paper at pp.197-203.

795 Issues Paper at p.203.
890. Issue 116 in the Issues Paper was whether the set of statutory procedures should be in accordance with the proposal set out in the Issues Paper.\footnote{Issues Paper at p.203.}

891. Issues 115 and 116 are dealt with together.

892. The DPP submitted that "there is no warrant to amend the CIA to allow officers to conduct an examination of things, including electronic records, over which privilege has been or may be claimed, for the purposes of determining whether it is relevant to an offence".\footnote{DPP submission dated 27 March 2017.}

893. The Review Group does not consider that officers should be allowed to examine things over which a claim of privilege has been made because this would defeat the purpose of the claim to privilege.

894. The Review Group is of the view that the process for dealing with claims of LPP and PIP in respect of electronic records should be prescribed in Regulations made under the CIA. The prescribed process should be based on the proposal set out in the Issues Paper and be developed in consultation with the Supreme Court.

895. The Review Group is also of the view that the Court should be permitted to order the party claiming privilege to pay for the costs of any expert appointed to assist the court in determining the claim to privilege in respect of electronic records.

**Recommendation 113**

Section 151 of the CIA should be amended to:

(a) require claims for LPP and PIP in respect of electronic records to be dealt with in accordance with the process prescribed in Regulations made under the CIA;

(b) give the Court the express power to make orders to facilitate the determination of the claim to privilege including the appointment of an expert to assist the Court;

(c) give the Court the power to order the party claiming privilege to pay for the costs of any expert appointed to assist the Court; and

(d) make it clear that nothing done in compliance with the prescribed process constitutes a waiver of privilege.

Further, Regulations setting out the process for the determination of claims in respect of electronic records should be based on the proposal in the Issues Paper and should be developed in consultation with the Supreme Court.

**Application of the CFPD Act\footnote{Issues Paper at pp.203-205.}**

896. If any thing is seized under the CIA, other than a sample taken or seized under Part 9, then the CFPD Act applies to it and in relation to it.\footnote{Section 152 of the CIA.}

897. In the Issues Paper two issues were raised with respect to the ability of a Chief Officer of a prescribed agency, including the Commissioner of Police, to deal with competing claims to things seized under the CIA.\footnote{Issues 117 and 118 in the Issues Paper.}
898. Issue 117 was whether the CFPD Act should be amended to enable the Chief Officer of a prescribed agency to determine a claim where both claimants are "persons entitled" within the meaning of section 3 of the CFPD Act as follows:

- The Chief Officer would determine the claim on the balance of probabilities and admit the claim that has the superior claim to the property;
- The "person entitled" who has their claim rejected would still be entitled to apply to an appropriate court for an order pursuant to section 26; and
- If a claimant makes that application, the Chief Officer would maintain possession of the property until such time that the matter is finally determined by a Court.801

899. Issue 118 was whether, in the alternative, the CFPD Act should be amended so that the Commissioner of Police can simply refer a question of law to the appropriate court where a dispute arises, rather than burden the Court with the task of determining the entire claim.802

900. The Review Group is of the view that Issues 117 and 118 in the Issues Paper fall outside the scope of the Review and, in particular, could not be given effect by an amendment to section 152 of the CIA. However, the proposals should be given further consideration by the WA Police in the context of amendments to the CFPD Act.

**Recommendation 114**

No amendments should be made to section 152 of the CIA to allow the CEO of a prescribed agency to determine a claim to property or refer a question of law to a Court. However, WA Police should give further consideration to the proposals to amend the CFPD Act as part of a review of the CFPD Act.

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801 Issues Paper at p.205.
802 Issues Paper at p.205.
Part 14: Miscellaneous

901. Part 14 of the CIA contains a number of miscellaneous provisions and, in particular, provisions relating to evidence that has been improperly obtained.

902. The only issue which has arisen in relation to the operation and effectiveness of Part 14 is whether sections 154 and 155 should apply to confessional evidence.

903. Prior to the enactment of the CIA, the admissibility of confessional evidence was determined in accordance with the common law. First, in order to be admissible, the confession must be voluntary. Second, even if the admission was voluntary, the evidence may be excluded in the exercise of one or more of the common law discretions, namely:
   (a) that it would be unfair to the accused to admit the confession;
   (b) public policy considerations make the admission of evidence unacceptable; and
   (c) the prejudicial effect of the statement outweighs its probative value.803

904. Following the enactment of the CIA, the admissibility of confessional evidence also requires regard to be had to sections 154 and 155 of the CIA.

905. Accordingly, the current position is that a party seeking to have a confession either excluded from, or admitted into, evidence, will contend either that the CIA applies, the common law applies, or both apply.804 This means that a Court in Western Australia is considering admitting evidence of a confession must consider:
   (a) first, whether the confession was voluntary;
   (b) second, whether there have been breaches of the CIA and, if so, whether the discretion to admit the confessional evidence under section 155 of the CIA should be exercised; and
   (c) third, whether any of the common law discretions to exclude evidence should be exercised.

906. The key difference between the common law discretions and the discretion in section 155(2) of the CIA, is that the discretion in section 155(2) is to admit otherwise inadmissible evidence, whereas at common law the discretion is to exclude otherwise admissible evidence.805

907. Further, as His Honour Blaxell J pointed out in Wright v The State of Western Australia, the considerations and principles outlined in the case law in respect of the common law discretions, may necessarily inform the considerations under section 155, particularly, section 155(3)(f) of the CIA.806

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805 Wright v State of Western Australia [2010] WASCA 199; (2010) 43 WAR 1 at [12] (McLure P; Buss JA agreeing) and [186] (Blaxell J).
Application of sections 154 and 155 to confessional evidence

908. Section 154 acts as a prohibition on the admissibility of evidence seized or obtained in contravention of a requirement of the CIA, unless the person does not object to the admission of the evidence or the court decides otherwise under section 155. Section 155 applies when any other section of the CIA makes it applicable to evidence that is otherwise inadmissible, namely sections 48, 118 and 154. Section 155 enables a Court to admit evidence if satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

909. Issue 119 in the Issues Paper was whether sections 154 and 155 of the CIA should apply to confessional evidence obtained in contravention of the CIA.

910. The ALS expressed their view that the current law in relation to sections 154 and 155 of the CIA "is appropriate and no reform is required".

911. The Review Group is of the view that the admission of confessional evidence should be determined in accordance with the common law only (that is, whether the confession was voluntary; and whether the evidence should be excluded in the exercise of one or more of the common law discretions). This is for the following reasons:

(a) at the present time, the Court must have regard to both the common law and statute in deciding whether to admit confessional evidence; and

(b) irrespective of section 154, a contravention of the CIA may render evidence inadmissible at common law.

Recommendation 115
Sections 154 and 155 should be amended to state that they do not apply to confessional evidence. Instead the common law discretions should apply.

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809 See The State of Western Australia v Yarran [2014] WASC 1 at [80] (Simmons J) for a summary of the principles relating to the exercise of discretion to admit otherwise inadmissible evidence under section 155 of the CIA.
810 Issues Paper at p.213.
Part 15: Other matters considered for inclusion in the CIA

912. During the course of the Review, a number of topics were considered for inclusion in the CIA, namely:
   (a) provisions relating to the disclosure of confidential information to the Police;\footnote{Chapter 6 of the Issues Paper.}
   (b) provisions relating to public disorder and other emergencies;\footnote{Chapter 13 of the Issues Paper.}
   and
   (c) provisions relating to compensation for damage.\footnote{Chapter 14 of the Issues Paper.}

Disclosure of confidential information to the WA Police\footnote{Issues Paper at pp.99-110.}

913. There are a number of statutory provisions permitting or requiring the disclosure of confidential information to a police officer, the Commissioner of Police or the WA Police Force.\footnote{See the Issues Paper at pp.101-105.} Confidential information may also be disclosed in the public interest.\footnote{Issues Paper at p.105.}

914. In 2016, the State Coroner made the following recommendation:

   I recommend that Parliament consider whether legislative change is required in order to allow medical clinicians to provide the Western Australia Police Service with sufficient medical information to manage a detainee’s care whilst in police custody. Allied to this is a consideration of the safeguards concerning that information.\footnote{Recommendation 5 of the Findings in relation to the Inquest into the Death of Ms Dhu (delivered on 16 December 2016).}

Permitting and requiring the disclosure of confidential information\footnote{Issues Paper at pp.99-107.}

915. Issue 51 in the Issues Paper was whether a provision should be inserted in the CIA that permits a person to disclose confidential information to a police officer.\footnote{Issues Paper at p.106.}

916. Issue 52 in the Issues Paper was what types of confidential information should or should not be able to be disclosed.\footnote{Issues Paper at p.107.}

917. Issues 51 and 52 are dealt with together.

918. The ALS noted, in relation to issues 51-55, that there are a number of statutory provisions permitting or requiring the disclosure of confidential information to a police officer.\footnote{ALS submission dated 29 March 2017.} The ALS did not agree that these provisions are ad hoc but suggested that “the current provisions have been enacted after consideration of competing interests”\footnote{ALS submission dated 29 March 2017.}. The ALS did not consider that there is any need to extend existing provisions.\footnote{ALS submission dated 29 March 2017.} Furthermore, they added that “there are
adequate powers to compel witnesses to attend court and provide evidence and documents". 825

919. The Commissioner for Children and Young People noted, in relation to Issues 51-61, that he "supported additional clarity in the legislation regarding confidential information" but did not support "the making of an offence for the non-disclosure of confidential information for any person under the age of 18 years". 826

920. In their submission, the Department of Health stated that they had "considered the disclosure of medical information to police in the context of motor vehicle accidents, care in custody and in the reporting of injuries resulting from the use of firearms." 827 They noted that "whilst there are various provisions for the relaying of this information, it is not always clear to clinical personnel what can be divulged to police in any given situation." 828 The Department of Health supported the inclusion of provisions in the CIA "which clearly set out the circumstances where clinical personnel are permitted to disclose confidential information to police". 829

921. In their submission, the Department of Health noted that they were progressing the making of Regulations to facilitate the provision of health information to the WA Police. 830

922. PathWest noted that the CIA does not contain a definition of what constitutes "confidential information" and queried whether this would be necessary. 831 PathWest noted that this could be of relevance if a forensic DNA profile was defined as being an example of confidential information. 832

923. The Review Group is of the view that a provision should be inserted into the CIA that permits confidential information to be disclosed to a police officer in certain circumstances to assist in the investigation of a criminal offence or to prevent the commission of a criminal offence.

924. The Review Group is of the view that a provision should be inserted into the CIA that requires confidential health information to be disclosed to a police officer in certain circumstances. The Review Group is of the opinion that this will give full effect to the recommendation of the State Coroner, which is referred to above.

925. The Review Group notes that the Health Services (Information) Regulations 2017 made under the Health Services Act 2016 authorise the collection, use or disclosure of information in certain circumstances, including where the collection, use or disclosure is reasonably necessary to lessen or prevent: a serious risk to the life, health or safety of any individual 833 or immediate risk of danger to the public. 834 Whilst these Regulations go some way towards enabling the provision of confidential health information to the WA Police, there are no provisions which enable information to be provided to a police officer

825 ALS submission dated 29 March 2017.
826 Commissioner for Children and Young People submission dated 29 March 2017.
827 Department of Health submission dated 17 March 2017.
828 Department of Health submission dated 17 March 2017.
829 Department of Health submission dated 17 March 2017.
830 Department of Health submission dated 17 March 2017.
831 PathWest submission dated 24 March 2017.
832 PathWest submission dated 24 March 2017.
834 Regulation 5(1)(b) of the Health Services (Information) Regulations 2017.
simply to manage a detainee’s care whilst in police custody. Further, the Health Services Act 2016 and Health Services (Information) Regulations 2017 would not permit the provision of confidential health information to the WA Police by health professionals who are not subject to those pieces of legislation.

926. No Regulations have been made under the Mental Health Act 2014 that would permit confidential health information to be provided to the WA Police.

**Recommendation 116**

A provision should be inserted into the CIA that:

(a) defines the terms "serious offence" and confidential information" as follows:

- **"serious offence"** means an offence the statutory penalty for which is or includes imprisonment for 5 years or more or life; and
- **"confidential information"** means information the disclosure of which is not permitted due to a duty of confidentiality arising at law, in equity or by virtue of professional obligations; and

(b) permits a person to disclose confidential information to a police officer whether or not the information has been requested by the police officer where:

(i) the information relates to an act or omission that constitutes a serious offence that the person making the disclosure reasonably suspects has been, is being or is about to be committed;

(ii) the information relates to an act or omission that involves, or is likely to involve: a risk of injury to, or prejudice to the safety of, one or more persons or the public generally; or a risk of damage to, or destruction of, property;

(iii) the information relates to an investigation into the death of a person or the identification of a deceased person;

(iv) the information relates to an investigation into the whereabouts of a person reported as missing, lost or in distress;

(v) the information relates to an investigation into the identification of, a person who has been found but not identified;

(vi) the information is about the medical condition of, and injuries sustained by, a person injured in an incident involving a vehicle; or

(vii) the information is about a person who is seeking or has sought medical assistance for an injury which is suspected to have been inflicted as a result of the use of a firearm, a controlled weapon or a prohibited weapon.

(c) requires a health professional to disclose health information about a person ("the detainee") to an authorised person (eg police officer, police auxiliary officer, or health professional employed or engaged by the WA Police) where such information is requested by the authorised person to assist in managing the care of the detainee whilst the detainee is in the custody of the WA Police or another agency;

(d) provides that the provision does not limit the provision of information to the WA Police under any other law.

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835 The Review Group notes that this recommendation would require the repeal of section 23B of the Firearms Act 1973 (WA) and the insertion of such a provision in the CIA.
Form of information

927. In the Issues Paper, it was noted that:

*Information has been defined as "knowledge communicated or received concerning some fact or circumstance; news."*

*Information exists in many forms. Information may be verbal, in writing or in electronic form. Information may also be in the form of a photograph or drawing.*

*Information may also be contained in something such as a tissue sample (eg a blood sample) which requires scientific examination to extract information from it.*

*If a provision is to be inserted in the Criminal Investigation Act 2006 (WA) which permits a person to disclose confidential information to a police officer, then it will be necessary to decide whether there are any limits on the form the information takes.*

928. Issue 53 in the Issues Paper was what forms of information should be able to be disclosed to a police officer.

929. PathWest noted that DNA profiles are a form of information that does need to be disclosed to police officers and that the provision of this information is guided by section 73 of the CIIP Act and that they would expect that the CIA not create conflict with this.

930. The Review Group is of the view that the disclosure of confidential information should extend to any information other than blood or tissue samples. This is because forensic information may be obtained under the CIA and identifying information may be obtained under the CIIP Act.

**Recommendation 117**

The provision of confidential information should extend to information in any form. However, whilst a person may disclose the existence of a sample (eg blood) taken from a person, the provision should not extend to the provision of the sample itself.

Further disclosure, use and recording of information provided to the police

931. If a provision is to be inserted in the CIA that permits a person to disclose confidential information to a police officer, then once the information is disclosed, the police officer will need to deal with the information in various ways. There may need to be restrictions imposed on the use, recording and disclosure of that information by the police officer.

932. Issue 54 in the Issues Paper was what restrictions (if any) should there be on the use, recording and disclosure of confidential information received by police officers.

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840 PathWest submission dated 24 March 2017.
The Review Group is of the view that restrictions should be placed on the use of use, recording and disclosure of confidential information provided to police officers. This is consistent with many other statutory regimes.

**Recommendation 118**

A provision should be inserted in the CIA that restricts the use, recording and disclosure of confidential information provided to a police officer for specified purposes such as:

(a) use, recording and disclosure for the purposes of the investigation of any suspected offence;
(b) use, recording and disclosure for the purposes of preventing the commission of a suspected offence;
(c) use, recording and disclosure for the purposes of an investigation into any person who has been reported missing, lost or in distress;
(d) use, recording and disclosure for the purposes of an investigation into the identification of a person who has been found but not identified;
(e) use, recording and disclosure for the purposes of an investigation into the death of any person;
(f) use, recording and disclosure for the purposes of the conduct of proceedings against any person, including proceedings for the prosecution of an offence;
(g) use, recording and disclosure for the purposes of providing the information to another law enforcement agency; a Coroner; the CCC;
(h) use, recording and disclosure for the management of a person in the lawful custody of the WA Police or another person or another agency;
(i) use, recording and disclosure otherwise within the course of duty of the police officer; and
(j) use, recording and disclosure authorised by the Commissioner of Police.

**Protection of person making a disclosure of confidential information**

A person who makes a disclosure of confidential information could be civilly or criminally liable for the disclosure. A disclosure of confidential information may also constitute unprofessional conduct, a breach of professional ethics or standards or principles of conduct applicable to a person's employment.

The potential legal consequences arising from a disclosure of confidential information may inhibit a person from making such a disclosure. Accordingly, if a provision is to be inserted in the CIA that permits a person to disclose confidential information to a police officer, then it will be necessary to provide some protection to the person making the disclosure.

Issue 55 in the Issues Paper was what protections should be available to a person who discloses confidential information to the WA Police.

The Review Group is of the view that a provision should be inserted in the CIA that protects not only the person who discloses the confidential information to a police officer, but also the police officer who may use, record or disclose the information received.

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844 Issues Paper at p.110.
Recommendation 119
A provision should be inserted in the CIA that protects a person who discloses confidential information to the police. In particular:

a) no civil or criminal liability is incurred in respect of the disclosure; and

b) the disclosure is not to be regarded as —

(i) a breach of any duty of confidentiality or secrecy imposed by law; or

(ii) a breach of professional ethics or standards or any principles of conduct applicable to a person’s employment; or

(iii) unprofessional conduct.

A similar provision should be inserted in the CIA to protect a police officer who uses, records or discloses confidential information provided to him or her by another person.

Public disorder

938. Police officers in Western Australia have a variety of common law and statutory powers at their disposal to deal with public disorder.846

939. Police powers to deal with public disorder are contained in both the CIA and the Criminal Code. The CIA has powers for dealing with out-of-control gatherings847 whereas the Criminal Code has powers for dealing with unlawful assemblies and riots.848 It is noted that the powers in the Criminal Code are limited to the giving of an order to disperse and the use of force.

940. In New South Wales new powers were conferred on police officers to deal with public disorder in the wake of the Cronulla riots in 2005.849 These powers were set out in the Issues Paper.850

941. In the Northern Territory and South Australia special powers may be used to prevent serious violence.851 These powers were also set out in the Issues Paper.852

942. Issue 125 in the Issues Paper was whether the common law and statutory powers of police officers to deal with public order should be codified in the CIA (in whole or in part).853

943. Issue 126 in the Issues Paper was whether the CIA should be amended to include additional powers to deal with public disorder and, if so, what additional powers should be included in the CIA.854

944. Issues 125 and 126 are dealt with together.

945. The Review Group notes that the CIA confers powers for both the investigation and prevention of offences and that the inclusion of powers relating to public

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845 Chapter 13 of the Issues Paper.
846 These powers were outlined in Chapter 13 of the Issues Paper.
847 See sections 24, 27, 34, 35, 38A-38C and 69 of the CIA and Part 5 of this Report.
848 See sections 64, 66, 238-242 and 254 of the Criminal Code.
849 Part 6A of the LEPR Act (NSW).
851 Section 72B and 72C of the SO Act (SA); and section 148 of the PA Act (NT).
852 Issues paper at pp.229-231.
854 Issues Paper at p.231.
disorder in the CIA would be consistent with the inclusion of powers relating to out-of-control gatherings in the CIA. The Review Group also notes that the inclusion of such powers in the CIA is consistent with the trend in recent years to remove police powers from the Criminal Code.

946. The Review Group did not receive any submissions which suggested that the powers of police officers to deal with public disorder should be extended. However, the Review Group is of the view that further consideration should be given to whether police powers to deal with public disorder should be contained in the CIA instead of the Criminal Code and whether those powers need to be modernised in line with powers available to deal with out-of-control gatherings.

**Recommendation 120**

The WA Police should consider whether powers for dealing with unlawful assemblies and riots should be modernised and included in the CIA.

### Standing by on private property

947. An issue was raised by Inspector Jenny O'Connell about a "grey area" in situations where police are tasked to "stand by" on private property. For example, where police officers are tasked to "stand by" while a public utility carries out work on private property.

948. There are a number of statutes that confer powers on various persons to enter private property without the consent of the owner or occupier for matters connected to the provision of utility services (in particular to carry out works). However, not all of these statutes confer powers on police officers to provide assistance.

949. The Review Group is of the view that police officers may, in accordance with the common law, enter upon private property in the performance of their duty to prevent a breach of the peace. However, the High Court has made it clear that the power does not extend to entry for the purposes of investigating whether there had been a breach of the peace or determining whether one is threatened.

950. The Review Group notes that police officers have power under section 35 of the CIA to enter a place, or to stop and enter a vehicle, in order to prevent certain acts of violence or a breach of the peace. However, the police officer must reasonably suspect that the act of violence or a breach of the peace "is occurring or is just about to occur". That section does not, having regard to the meaning of "reasonably suspects", cover the situation where officers of the WA Police are placed on standby just in case an act of violence or a breach of the peace occurs.

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856 See, for example, section 14 and clause 7 of Schedule 3 of the Energy Coordination Act 1994 (WA); sections 28(3)(c), 46 and 48 of the Energy Operators (Powers) Act 1979 (WA) sections 70-73 of the Water Agencies (Powers) Act 1984 (WA); section 18 of the Electricity Act 1945 (WA).
860 See section 4 of the CIA.
951. The Review Group also notes that the power conferred by section 24 of the CIA on a citizen to use force to prevent a breach of the peace does not authorise the entry of any place or vehicle.861

952. The Review Group is of the view that there should be no grey areas in respect of the power of police officers to enter private property on standby tasks because of the potential risk of liability for trespass. Accordingly, further consideration should be given to the circumstances in which police officers are being asked to conduct standby tasks and whether they require additional powers to carry out those tasks.

**Recommendation 121**
The WA Police should give consideration to amending the CIA to clarify the circumstances in which police officers may enter private property in circumstances where they are conducting "stand by" tasks.

**Emergencies**862

953. Police officers in Western Australia have a variety of common law and statutory powers at their disposal to deal with emergencies.863

954. In some Australian jurisdictions, there is a clear statement of the role of the Police Force with respect to the protection of life and property in emergencies.864

955. Issue 127 in the Issues Paper was whether the common law and statutory powers of police officers to deal with emergencies should be codified in the CIA (in whole or in part).865

956. Issue 128 in the Issues Paper was whether the CIA should be amended to include additional powers to deal with emergencies (other than an emergency under the EM Act).866

957. Issue 129 in the Issues Paper was whether provisions should be inserted in the CIA that set out the role and responsibilities of police officers in relation to the protection of life and property and emergencies.867

958. Issues 127-129 are dealt with together.

959. The Emergency Preparedness Unit submitted, in relation to issues 128-129 that there would appear to be benefits in addressing such gaps to, for example, "provide a legislative framework for responsibilities for day to day responses to road crashes, searches, suspicious packages outside of the context of the EM Act".868 They also noted that if provisions for public safety and emergency response were to be added to the CIA, then "it would seem prudent to seek a consequential change to the title of the Act, (e.g Criminal Investigation and

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861 Section 24(2) of the CIA.
862 Issues Paper at pp.231-235.
864 Section 6 of the Police Act 1990 (NSW); section 5 of the PA Act (NT); section 2.3 of the PSA (Qld); section 5 of the Police Act 1998 (SA); and section 9 of the Victoria Police Act 2013 (Vic).
865 Issues Paper at p.234.
867 Issues Paper at p.238.
Public Safety Act”). The Emergency Preparedness Unit suggested that a better fit for such provisions might be within the Police Act or the EM Act.

960. The Department of Health submitted that "there is a lack of clarity on the role and responsibilities of police officers in relation to the protection of life and property in an emergency incident" and indicated full support for any amendment to clarify the issue.

961. The Review Group is of the view that any statements about the role of police officers in relation to emergencies should be included in the Police Act.

962. The Review Group's recommendation in relation to public safety situations is contained in Part 5 of the Final Report. Aside from new powers for dealing with public safety situations, the Review Group is of the view that powers relating to emergencies (other than emergencies arising from the commission of a criminal offence or the prevention of a criminal offence) should be included in the Police Act or the EM Act rather than the CIA.

963. The Review Group notes that the Emergency Management Amendment Bill 2016 lapsed and has not been reintroduced.

Recommendation 122
The CIA should not be amended to:
(a) codify the powers of police officers to deal with emergencies;
(b) include additional powers for police officers to deal with emergencies; or
(c) include a statement about the role of the Police Force with respect to the protection of life and property or additional powers for dealing with emergencies.

Compensation for damage

964. In some cases, the exercise of powers under the CIA may result in interference with, or damage to, land or goods. This is primarily because officers exercising those powers are expressly provided with power to use force. In other cases, the exercise of powers under the CIA may result in a person being inconvenienced because they are not able to enter their home where, for example, a protected forensic area is established or a search warrant is being executed. Finally, items may be damaged or destroyed during a forensic examination.

965. In one case in Western Australia, a man claimed that his house had been left uninhabitable after police searched his property as part of the ongoing investigation into the disappearance of a missing person.

966. There are no provisions in the CIA that provide for compensation to be paid to a person who suffers loss or damage as a result of the exercise of powers

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871 Department of Health submission dated 17 March 2017.
872 Proposed section 67B of the Emergency Management Amendment Bill 2016 provided for emergency management officers (including police officers) to exercise powers of movement and evacuation prior to the declaration of an emergency situation or a state of emergency: see Issues Paper at p.233.
873 Chapter 14 in the Issues Paper.
under the CIA. By way of contrast, it is noted that under the EM Act, a person who suffers loss or damage because of the exercise, or purported exercise, of a power under various sections of the EM Act is entitled to be paid just and reasonable compensation for the loss or damage.875

967. In Queensland, provision has been made for compensation to be paid by the State to a person whose property is damaged in consequence of the exercise of powers under the PPR Act (Qld). However, compensation is not payable to a person if the person is found guilty of the commission of an indictable offence because of the exercise of the powers, or in respect of the lawful seizure of a thing.876

Compensation for damage caused during search877

968. There are a number of provisions in the CIA that authorise entry to, and search of, places.878 When a person is exercising a power under the CIA, including the power to enter and search, he or she may use force against any thing that it is reasonably necessary to use in the circumstances to exercise the power.879 Further, if a person uses force, the force may be such as to cause damage to the property of another person.880

969. The circumstances in which payments for forced entry repairs may be made under WA Police Policy PR 1.2.19.3 apply where: temporary repairs are required in order to secure premises; where unnecessary or unreasonable force was used to gain entry; where no offender or other evidence was found and no charges result from the search; or where an innocent third party is financially disadvantaged as a result of damage caused on entry or during the search.

970. Issue 130 in the Issues Paper was whether the CIA should be amended to provide a process for an occupier of a place to make a claim for compensation for damage caused as a result of using unnecessary force in the execution of a search warrant or the exercise of a statutory power or entry/search. If so, what sort of process.881

971. In their submission, the Emergency Preparedness Unit expressed concerns about "over-legislating".882

972. The Review Group is of the view that it is not necessary to amend the CIA to provide for compensation for damage caused by the use of unreasonable force during the execution of a search warrant. This is because WA Police Policy PR 1.2.19.3 makes more than adequate provision for payments for forced entry repairs. Further, any claims for compensation should be dealt with on a case by case basis.

875 Section 78(1) of the EM Act.
876 Section 804 of the PPR Act (Qld).
878 Sections 35-37, 38B, 38-40, 43(8) and 132-134 of the CIA.
879 Section 16(1)(a) of the CIA.
880 Section 16(2) of the CIA.
Recommendation 123
The CIA should not be amended to make provision for compensation for damage caused by the use of unreasonable force during a search.

Compensation for damage caused during a forensic examination

973. A person conducting a forensic examination on a thing may:

(a) examine or operate it;
(b) photograph, measure or otherwise make a record of it;
(c) take an impression of it;
(d) take samples of or from it;
(e) do tests on it, or on any sample taken under paragraph (d), for forensic purposes.

974. Further, if it is reasonably necessary to do so in order to exercise a power in section 21(1), the thing may be dismantled, damaged or destroyed.

975. Issue 131 in the Issues Paper was whether the CIA should be amended to provide a process for an owner of a thing to make a claim for compensation for damage caused as a result of the thing being unnecessarily dismantled, damaged or destroyed. If so, what sort of process.

976. In their submission, PathWest noted that PathWest Forensic Biology staff “examine goods (eg clothing, jewellery or possessions) on a daily basis” and “their primary goal is to identify biological material and then sample that biological material in a manner most likely to permit the recovery of DNA for subsequent DNA profiling”. PathWest also noted that “[t]here are a number of techniques available to staff to permit them to perform this task and some of these techniques are necessarily destructive”. PathWest submitted that their view would be that “the decision about how to sample an exhibit for subsequent forensic analysis would not ever be swayed by the risk of a subsequent compensation claim” and that “the sampling method that is most likely to afford a result will be chosen, irrespective of the damage that might be caused”.

977. PathWest also submitted that, if the CIA was amended to permit claims for compensation, then they assumed that the process would be similar as for the EM Act, whereby claims are directed to the appropriate Minister.

978. The Review Group is of the view that it is not necessary to amend the CIA to provide for compensation for the unnecessary dismantling of, damage to, or destruction of, a thing as a result of a forensic examination. This is because the Review Group is not aware of any instances in which a person has taken civil action against the WA Police in respect of a thing that has been the subject of a forensic examination. Further, any claims for compensation should be dealt with on a case by case basis.

884 Section 21(1) of the CIA.
885 Section 21(2) of the CIA.
887 PathWest submission dated 24 March 2017.
888 PathWest submission dated 24 March 2017.
889 PathWest submission dated 24 March 2017.
890 PathWest submission dated 24 March 2017.
Recommendation 124
The CIA should not be amended to make provision for compensation for the unnecessary dismantling of, damage to, or destruction of, a thing as a result of a forensic examination.

Alternative accommodation for persons affected by establishment of a protected forensic area891

979. The establishment of a protected forensic area may cause inconvenience to the occupier(s) of a place who may not be able to reside at that place whilst the warrant is executed or the PFA remains in existence.

980. The CIA gives occupiers some measure of protection in that a person who is aggrieved by the establishment of a PFA may apply to the Magistrates Court to review the grounds for the continued establishment of the area. On such an application, the Court may make any orders it thinks fit, including:
   (a) an order as to the period for which the protected forensic area may continue to be established;
   (b) an order to mitigate any inconvenience caused by the protected forensic area;
   (c) if the court is satisfied that the protected forensic area should not continue, an order that it be disestablished.892

981. In Queensland, the Commissioner of Police must in certain circumstances provide alternative accommodation to an occupier who is affected by the establishment of a crime scene or the exercise of powers in relation to the crime scene.893

982. Issue 132 in the Issues Paper was whether the CIA should be amended to place the Commissioner of Police or the CEO of another Department whose officers may establish a PFA, under an obligation to provide suitable alternative accommodation to the occupier of a place, other than an occupier who is detained in lawful custody, who cannot live in the place because of one or more of the following:
   (a) the establishment of a PFA under section 44(2)(f) under a search warrant;
   (b) a measure, taken under section 47(2) of the CIA while a PFA is granted; and
   (c) damage caused to the place by the exercise of powers under Part 5 of the CIA.894

983. The Review Group is of the view that it is not necessary to amend the CIA to make provision for the provision of alternative accommodation for persons affected by the establishment of a PFA, or who cannot live in their place as a result of the execution of a search warrant. The Review Group considers that section 49(7) provides an appropriate remedy for a person who is aggrieved by the establishment of a PFA.

891 Issues paper at pp.243-244.
892 Section 49(7) of the CIA.
893 Section 179 of the PPR Act.
894 Issues Paper at p.244.
Recommendation 125
The CIA should not be amended to provide for the provision of alternative accommodation for persons affected by the establishment of a PFA or the execution of a search warrant.
Part 16: The Criminal Investigation Regulations 2007

984. The CI Regulations contains regulations relating to:
(a) forms for the purposes of the CIA;
(b) the approval of courses for certain forensic procedures;
(c) the issue of certificates to persons qualified for certain forensic procedures; and
(d) the prescription of authorised persons and senior officers.

985. Only one issue was raised in relation to the operation and effectiveness of the CI Regulations. This issue is discussed below:

Prescription of senior officers

986. Under sections 44, 47, 97, 133 and 140 of the CIA, senior officers may perform certain acts. The term “senior officer” is defined in each of those sections and means, in relation to a public officer, “a public officer prescribed as a senior officer in relation to that officer”.895

987. Section 184(3)(c) of the CCM Act states that the Commissioner (of the CCC) is prescribed to be a senior officer in relation to the authorised officer, for the purposes of sections 44, 47, 97, 133 and 140 of the CIA. Section 184(3)(c) of the CCM Act was inserted under amendments made to that section by the Criminal Investigation (Consequential Provisions) Act 2006 (WA).

988. Regulation 9 of the CI Regulations prescribes the Commissioner appointed under the CCM Act as a senior officer for the purposes of section 140 of the CIA. This regulation was made in 2007.

989. The CCC raised this issue with the Review Group.896

990. The Review Group is of the view that regulation 9 of the CI Regulations is superfluous given that the Commissioner is already prescribed in the CCM Act as a senior officer for the purposes of section 140 of the CIA.

Recommendation 126
Regulation 9 of the CI Regulations should be repealed or, in the alternative, amended to refer to sections 44, 47, 97, 133 of the CCM Act.

895 Sections 44(1), 47(1), 97(1), 133(1) and 140(1) of the CIA.
Appendix 1: Copy of Project Plan

The Review will:

- Consult broadly, research opinions, case law and other jurisdictions’ legislation to establish an issues paper that will form the basis of the review.
- Distribute the issues paper broadly to Stakeholders and invite comment and/or submissions to the Review Group.
- Assess the operation and effectiveness of the Act based on the issues paper.
- Identify whether there is a need for amendments to the Act or additional powers to ensure that both the needs of police and the rights of citizens are adequately balanced.
- Make recommendations in respect to the issues identified.
Appendix 2: Notice on website

Statutory Review of the *Criminal Investigation Act 2006*

Section 157 of the *Criminal Investigation Act 2006* provides for the Act to be reviewed “as soon as is practicable after the expiry of 5 years from its commencement”. Once a review is completed, the Minister is to prepare a report based on the review and lay that report before both houses of Parliament as soon as is practicable after the report is prepared.

In May 2015, Ms Carol Conley, Senior Assistant State Counsel at the State Solicitor’s Office, was appointed to chair a Review Group and to submit a report and recommendations on the review of the operation and effectiveness of the Act and Regulations.

An Issues Paper has now been prepared following wide consultation within WA Police, an examination of case law in Western Australia and an examination of legislation in other Australian jurisdictions.

The Review Group welcomes submissions from stakeholders and members of the general public on the issues raised in the Issues Paper and on any other issues concerning the CIA. The closing date for submissions on the Issues Paper is **30 March 2017**.

All submissions are to be emailed to ciareview2017@police.wa.gov.au

*Link – Criminal Investigation Act 2006*
*Link – Criminal Investigation Regulations 2007*
*Link – CIA Review Issues Paper*

Carol Conley
Chair of the Review
Appendix 3: Recipients of letters seeking submissions

1) Chief Judge, District Court of Western Australia
2) Chief Justice, Supreme Court of Western Australia
3) Chief Magistrate, Magistrate's Court of Western Australia
4) Commissioner for Children and Young People
5) Chief Mental Health Advocate, Mental Health Advocacy Service
6) Commissioner, Corruption and Crime Commission
7) Commissioner for Victims of Crime
8) Coroner, Coroners' Court of Western Australia
9) Dean of Faculty of Law, University of Western Australia
10) Dean of Law, Notre Dame University
11) Dean of Law School, Murdoch University
12) Dean of School of Business and Law, School of Business and Law, Edith Cowan University
13) Director General, Department of Fisheries
14) Director General, Department of Health
15) Director General, Department of Parks and Wildlife
16) Director, Legal Aid Commission of WA
17) Director of Public Prosecutions (WA)
18) Director, Youth Legal Service
19) Executive Committee President, Aboriginal Legal Service of Western Australia Inc
20) Executive Director, Community Legal Centres Association (WA) Inc
21) Foundation Dean and Head of School, Curtin Law School, Curtin University
22) Manager, Sexual Assault Resource Centre
23) Mental Health Commissioner, Mental Health Commission
24) President, Children's Court of Western Australia
25) President, Criminal Layers' Association
26) President, Law Society of Western Australia
27) President, Western Australian Bar Association
28) President, Women Lawyers of WA Inc
29) Principal Scientist, PathWest
30) Public Advocate
31) Registrar, Fremantle Association of Justices (Inc)
32) Registrar, Royal Association of Justices of Western Australia (Inc)
33) State Solicitor, State Solicitor's Office
## Appendix 4: List of submissions received

<table>
<thead>
<tr>
<th>Person or entity making submission</th>
<th>Date of submission</th>
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<tbody>
<tr>
<td>Aboriginal Legal Service of Western Australia (Inc)</td>
<td>29 March 2017</td>
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<tr>
<td>Chief Magistrate Steven Heath</td>
<td>3 April 2017</td>
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<td>Commissioner for Children and Young People</td>
<td>29 March 2017</td>
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<td>Corruption and Crime Commission</td>
<td>30 March 2017</td>
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<td>Detective First Class Constable Jack Kennedy</td>
<td>1 February 2017</td>
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<td>Detective First Class Constable Matthew Robinson</td>
<td>30 November 2016</td>
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<tr>
<td>Detective First Class Constable Michael Truong</td>
<td>7 March 2017</td>
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<td>Detective Inspector Brad Jackson</td>
<td>1 and 6 February 2017</td>
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<td>Department of Health</td>
<td>17 March 2017</td>
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<td>Department of Parks and Wildlife</td>
<td>16 March 2017</td>
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<td>Director of Public Prosecutions</td>
<td>27 March 2017</td>
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<td>Emergency Preparedness Unit, WA Police</td>
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<tr>
<td>First Class Constable Liam O’Connor</td>
<td>18 November 2016</td>
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<td>Fremantle Association of Justices (Inc)</td>
<td>11 June 2017</td>
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<td>Inspector Jenny O’Connell APM</td>
<td>8 February 2017</td>
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<td>Mental Health Commission</td>
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<td>PathWest</td>
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<td>Peter Lochore</td>
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<td>Public Advocate</td>
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<td>Senior Constable Cliff Daurat</td>
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<td>Senior Sergeant Roy Newland</td>
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<td>Sergeant Brett Fletcher</td>
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<td>Sergeant David Bright</td>
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<td>Sergeant Gareth Reed</td>
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<td>Sexual Assault Resource Centre</td>
<td>24 March 2017</td>
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<td>Western Australia Police Union</td>
<td>6 March 2018</td>
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Appendix 5: Table: List of issues and corresponding recommendations

<table>
<thead>
<tr>
<th>Issue</th>
<th>Recommendation</th>
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Appendix 6: Table: Criminal Code offences that are not "serious offences" for the purposes of sections 40(1), 57, 128(1), and 133(1) of the CIA

<table>
<thead>
<tr>
<th>Offence</th>
<th>Penalty</th>
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<tbody>
<tr>
<td>Unlawful military activities (s.51(2))</td>
<td>Imprisonment for 2 years</td>
</tr>
<tr>
<td>Sedition (s.52)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td>Interfering with Government or Ministers (s.54)</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Interfering with legislature (s.55)</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Disturbing Parliament (s.56)</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Witness not attending or giving evidence before Parliament (s.59)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Taking part in an unlawful assembly (s.63)</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
</tr>
<tr>
<td>Forcibly entering land (s.69)</td>
<td>Imprisonment for 2 years SCP: $6,000</td>
</tr>
<tr>
<td>Forcibly keeping possession of land (s.70)</td>
<td>Imprisonment for 2 years SCP: $6,000</td>
</tr>
<tr>
<td>Trespass (s.70A(2))</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
</tr>
<tr>
<td>Trespasser refusing to provide name and address/providing false name or address (s.70B(2) and (3))</td>
<td>Fine of $500</td>
</tr>
<tr>
<td>Fighting in public causing fear (s.71)</td>
<td>Imprisonment for 2 years SCP: $6,000</td>
</tr>
<tr>
<td>Challenge to fight duel (s.72)</td>
<td>Imprisonment for 2 years SCP: $6,000</td>
</tr>
<tr>
<td>Prize fight (s.73)</td>
<td>Imprisonment for 2 years SCP: $6,000</td>
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<tr>
<td>Threat toward dwelling (s.74)</td>
<td>Imprisonment for 3 years Imprisonment for 12 months and a fine of $12,000</td>
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<td>Disorderly behaviour in public (s.74A(2) and (3))</td>
<td>Fines of $6,000 and $4,000 respectively</td>
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<tr>
<td>Organising out-of-control gathering (s.75B(2))</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<td>Interfering with political liberty (s.75)</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<tr>
<td>Possession of material for display that is likely to racially harass (s.80D)</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 12 months and...</td>
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<td>Offence</td>
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<tr>
<td>Disclosing official secrets (s.81(2))</td>
<td>a fine of $12,000</td>
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<td>Administering oath without authority (s.86)</td>
<td>Imprisonment for 2 years</td>
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<tr>
<td>Impersonating public officer (s.87)</td>
<td>Imprisonment for 2 years</td>
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<tr>
<td>Undue influence (s.97)</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<tr>
<td>False or defamatory statements or deceptive material, publication of</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<tr>
<td>(s.99(2) and (4))</td>
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<td>Postal voting, offences in connection with (s.100)</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<tr>
<td>Polling places, offences at or near (s.101(2) and (3))</td>
<td>Fine of $2,000 and imprisonment for 12 months and a fine of $12,000</td>
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<tr>
<td>Voting offences (s.102(1), (2), (3), (4) and (5))</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<td>Ballot paper and ballot box offences (s.103)(1) and (2))</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<td>Secrecy offences (s.104(1) and (2))</td>
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<td>Electoral officer, offences by (s.105)</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<td>False statements in connection with an offence (s.106(1))</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<tr>
<td>Threatening witness before Royal Commission (s.128)</td>
<td>Imprisonment for 2 years</td>
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<td>Deceiving witness (s.131)</td>
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<td>Preventing witness from attending (s.133)</td>
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<td>Justice acting when personally interested (s.139)</td>
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<td>Bringing fictitious action on penal statute (s.141)</td>
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<td>Inserting advertisement without authority of court (s.142)</td>
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<td>Permitting escape from lawful custody (s.147)</td>
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<tr>
<td>Aiding escape from lawful custody (s.148)</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<td>SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<tr>
<td>Rescuing, permitting escape of or concealing a person subject to any</td>
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<td>law relating to mental disorder (s.149)</td>
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<td>Removing etc. property under lawful seizure (s.150)</td>
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<td>Obstructing court officer (s.151)</td>
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<td>False information to official etc (s.170)</td>
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<td>Creating false belief (s.171(2))</td>
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<td>Obstructing public officer (s.172)</td>
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<td>Public officer refusing to perform duty (s.173)</td>
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<td>Disobeying request to help arrest person (s.176)</td>
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<td>Disobeying statute law (s.177)</td>
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<td>Disobeying lawful order issue by statutory authority (s.178)</td>
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<td>Occupier or owner allowing young person to be on premises for unlawful</td>
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<td>carnal knowledge (s.186(1)(a))</td>
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<td>Being involved with prostitution (s.190(1), (2) and (3))</td>
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<td>Procuring person to be prostitute etc (s.191(1))</td>
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<td>Procuring person to have unlawful carnal knowledge by threat, fraud</td>
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<td>or administering drug (s.192)</td>
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<td>Abortion (s.199(2))</td>
<td>Fine of $50,000</td>
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<td>Obscene act in public (s.202(1) and (2))</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<td>Indecent act in public (s.203(1) and (2))</td>
<td>Imprisonment for 2 years SCP: Imprisonment for 9 months and a fine of $9,000</td>
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<td>Indecent act with intent to offend (s.204)</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<td>Supplying intoxicants to a person likely to abuse them (s.206)</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<td>Misconduct with regard to corpse (s.214)</td>
<td>Imprisonment for 2 years SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<td>Concealing birth of dead child (s.291)</td>
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<td>Setting dangerous thing (s.305(3) and (4))</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<td>Intoxication by deception (s.305A)</td>
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<td>Common assault (s.313(1)(a) and (b))</td>
<td>Imprisonment for 3 years and a fine of $36,000 and imprisonment for 18 months and a fine of $18,000 respectively</td>
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<td>Procuring apprehension or detention of person not suffering from mental illness or impairment (s.336)</td>
<td>Imprisonment for 3 years</td>
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<td>Unlawful detention or custody of person who is mentally ill or impaired (s.337)</td>
<td>Imprisonment for 2 years SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<td>Threats other than to kill and other than in circumstances of racial aggravation (s.338B(b))</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 18 months and a fine of $18,000</td>
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<td>Threats (s.338C(3)(b))</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 18 months and a fine of $18,000</td>
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<td>Stalking (s.338E(1)(b))</td>
<td>Imprisonment for 3 years SCP: Imprisonment for 18 months and a fine of $18,000</td>
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<td>Publication of report of child-stealing (s.343A(1))</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
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<td>Deserting a child (s.344)</td>
<td>Imprisonment for 1 year</td>
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<td>Criminal defamation (s.345(1))</td>
<td>Imprisonment for 3 years</td>
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<td>SCP: Imprisonment for 12 months and a fine of $12,000</td>
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<td>Concealing certificate of title (s.381)</td>
<td>Imprisonment for 3 years</td>
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<td>Using registered brand with criminal intention (s.384)</td>
<td>Imprisonment for 3 years</td>
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<td>Fraudulently dealing with ore at mine (s.385)</td>
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<td>Concealing royalty (s.386)</td>
<td>Imprisonment for 2 years</td>
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<td>Removing guano without licence (s.387)</td>
<td>Imprisonment for 1 year</td>
</tr>
<tr>
<td>Fraudulent disposition of mortgaged goods (s.389)</td>
<td>Imprisonment for 2 years</td>
</tr>
<tr>
<td>Fraudulent appropriation of electricity (s.390)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td>Demanding property with threats with intent to steal (s.396)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td>Person found armed etc with intent to commit crime (s.407)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td></td>
<td>SCP: Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Signing false document relating to company (s.418)</td>
<td>Imprisonment for 1 year</td>
</tr>
<tr>
<td>False statement by company's official with intent to affect share price (s.421)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Unlawfully using another person's animal (s.429)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Unlawful fishing (s.436)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Unlawfully taking fish (.s.437)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Damaging property (s.445)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Unlawfully travelling with infected animal (s.460)</td>
<td>Imprisonment for 2 years</td>
</tr>
<tr>
<td>Removing boundary mark with intent to defraud (s.461)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td>Obstructing railway (s.462)</td>
<td>Imprisonment for 2 years</td>
</tr>
<tr>
<td>Preparation for forgery (s.474(1))</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td></td>
<td>SCP: Imprisonment for 18 months and a fine of $18,000</td>
</tr>
<tr>
<td>Offence</td>
<td>Penalty</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Procuring or claiming unauthorised status (s.488)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td></td>
<td>SCP: Imprisonment for 12 months and a fine of $12,000</td>
</tr>
<tr>
<td>Lending qualification etc to another with intent it be used for personation (s.514)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td></td>
<td>SCP: Imprisonment for 18 months and a fine of $18,000</td>
</tr>
<tr>
<td>Joint stock company officer concealing information etc. as to reduction of capital (s.547)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td>Company being wound up, officer of falsifying books (s.548)</td>
<td>Imprisonment for 2 years</td>
</tr>
<tr>
<td>Mixing uncertified with certified articles (s.549)</td>
<td>Imprisonment for 3 years</td>
</tr>
<tr>
<td></td>
<td>SCP: Imprisonment for 12 months and a fine of $12,000</td>
</tr>
<tr>
<td>Possessing stupefying or overpowering drug or thing (s.557D)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Possessing thing to assist unlawful entry to place (s.557E)</td>
<td>Imprisonment for 12 months and a fine of $12,000</td>
</tr>
<tr>
<td>Possessing thing to assist unlawful use of conveyance (s.557F)</td>
<td>A fine of $6,000</td>
</tr>
<tr>
<td>Possessing disguise (s.557H)</td>
<td>A fine of $6,000</td>
</tr>
<tr>
<td>Possessing bulletproof clothing (s.557I)</td>
<td>A fine of $6,000</td>
</tr>
<tr>
<td>Declared drug trafficker, consorting by (s.557J)</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
<tr>
<td>Child sex offender, offences by (s.557K(4) and (6))</td>
<td>Imprisonment for 2 years and a fine of $24,000</td>
</tr>
</tbody>
</table>