Statutory Review of the
Criminal Investigation Act 2006

ISSUES PAPER

JANUARY 2017
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Introduction

Background to the introduction of the CIA

The CIA was proclaimed on 1 July, 2007. The powers in the CIA stemmed from a need to contemnporise police powers in Western Australia. Prior to the proclamation of the CIA, police relied predominantly on the Police Act, the Criminal Code and the common law for their powers.

The modernisation of police powers commenced with the publication of the WALRC Report on Police Act Offences. This reform project resulted in the enactment of the following statutes: the Weapons Act 1999 (WA); the Protective Custody Act 2000 (WA); the Prostitution Act 2000 (WA) and the CIIPA.

In 2003, a raft of legislation known as the “Criminal Law Reform Package” was developed to implement outstanding matters from the WALRC reform project. The Criminal Law Amendment (Simple Offences) Act 2004 (WA) and the CP Act were enacted.

In 2004, the final report of the Police Royal Commission supported new criminal investigation legislation and the replacement of the Police Act. The CIA was drafted consistently with most of the recommendations of the Police Royal Commission.

The Criminal Investigation (Covert Powers) Act 2012 (WA) is the most recent legislation conferring powers on police officers.

In Wright v The State of Western Australia Blaxell J noted:

The Criminal Investigation Act 2006 (WA) is now the primary source of police powers in this state. It has amalgamated the statutory powers previously in the Police Act and The Criminal Code, codified some common law police powers, and also introduced additional police powers.

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1 Geoffrey A Kennedy AO QC, Royal Commission Into whether there has been corrupt or criminal conduct by any Western Australia Police Officer, Final Report, Volume 2, Part 2 at 12.3 and 12.6.
2 [2010] WASCA 199 at [118]-[119].
This Issues Paper raises many issues about the operation of the CIA. In examining these issues, it has been considered important 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.

Some of the issues raised in this Issues Paper have resulted from operational difficulties in giving effect to the provisions of the CIA, or the need for provisions in the CIA to be clarified or strengthened.

Other issues have been raised because of case law in Western Australia, or legislative developments in other Australian jurisdictions, following the enactment of the CIA.

Finally, although the CIA is only 10 years old, particular issues have been raised because the CIA has not kept pace with developments in modern technology. This is illustrated by the issues relating to accessing data held in cloud storage.

Key amendments to the CIA

There have been a number of amendments to the CIA since the Act came into operation. The key changes are set out below:

- The Criminal Investigation Amendment Act 2011 commenced operation on 3 May, 2011. This Act made minor amendments to the CIA to expand the scope of qualified persons who could undertake the forensic procedures that previously only doctors were allowed to perform.

- The Criminal Law Amendment (Out of Control Gatherings) Act 2012 commenced operation on 15 December, 2012. This Act introduced new powers into the CIA for police to respond to out-of-control gatherings.

- The Criminal Investigation Amendment Act 2014 commenced operation on 28 January, 2015. This Act amended the CIA to remove the requirement to keep an arrested suspect in the company of an officer at all times prior to charge, unless impracticable to do so.
Review of the CIA

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 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, 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 CIA.

The Issues Paper

This Issues Paper was 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.

The closing date for submissions on the Issues Paper is **30 March 2017**.

Acknowledgments

The Chair would like to thank everyone within WA Police who made a submission about the CIA. These submissions provided a framework for the drafting of the Issues Paper. The Chair would also like to thank the following people from WA Police and the State Solicitor’s Office who assisted her in the drafting of the Issues Paper: Mr Matthew Samson; Ms Tatijana Vukic, Ms Taryn Iredell; Ms Breony Allen; Mr James Bennett; Ms Caroline Chapman; Mr Andrew Mason and Ms Rebecca Davey.
## Summary of Issues

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<td>Should the definition of &quot;arrestable offender&quot; in section 132 of the CIA be amended to include a person who may be arrested under section 54(2)(a) of the Bail Act?</td>
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<td>Should the CIA 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?</td>
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<td>Should the requirement in section 31(2)(e) of the CIA to give the occupier an opportunity to give informed consent to a place being entered be repealed?</td>
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<td>If the requirement in section 31(2)(e) of the CIA is to be retained, should the CIA be amended to make it clear that if the officer is given the informed consent of the occupier to enter the place: (a) the informed consent permits entry only; and (b) if the officer wishes to do something else in or on the place then the officer must seek the informed consent of the occupier or rely on a search warrant or some other statutory authorisation?</td>
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<td>If senior police officers and senior public officers are to be authorised to issue search warrants, then: (a) what level of seniority should be required before they may do so? (b) should an officer be precluded from issuing a search warrant if he or she is involved in the investigation for which the warrant is required? and (c) what, if any, measures should be put in place to ensure the accountability of the process?</td>
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Chapter 1: Preliminary and General

1.1 Definition of serious offence

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 CIIPA.

Serious offence and protected forensic area

Under section 40 of the CIA, a police officer may enter a place and establish a PFA if the officer reasonably suspects that a serious offence has been or is being committed in the place, or that there is in a place a thing relevant to a serious offence, or where there is evidence of a serious offence. The purpose of the entry is to safeguard evidence prior to obtaining a search warrant.3 In section 40, a "serious offence" means "an offence, the statutory penalty for which is or includes imprisonment for 5 years or more, or life."4

Serious offence and data access order

Under Part 7 of the CIA, an officer may apply for a data access order where a serious offence has been committed and the information stored on the device is related to the serious offence.5

In Part 7, a serious offence means "an offence, the statutory penalty for which is or includes imprisonment for 5 years or more, or life."6

Serious offence and arrest

Under section 128(2) of the CIA, a police officer or public officer may arrest a person for a serious offence, if the officer reasonably suspects that the person has committed, is committing, or is just about to commit, the offence.

Under section 128(3) of the CIA, a police officer or public officer may arrest a person for an offence which is not a serious offence if the criteria in that subsection are satisfied.

In section 128, a "serious offence" means an offence:

3 See sections 40(2)-(4) of the CIA.
4 Section 40(1) of the CIA.
5 See sections 58-59 of the CIA.
6 Section 57 of the CIA.
(a) the statutory penalty for which is or includes imprisonment for 5 years or more or life; or

(b) under section 61(1) or (2a) of the RO Act; or

(c) that involves an act of family and domestic violence as referred to in the definition of act of family and domestic violence paragraphs (a) to (c) and (f) in section 6(1) of the RO Act; or

(d) under section 38C(2) of the CIA.7

Serious offence and search of places and vehicles of arrested suspects

Under section 133 of the CIA, if a person is under arrest for a serious offence, then a police officer or a public officer may enter and search certain places and stop, enter and search certain vehicles.

In section 133, a "serious offence" means "an offence, the statutory penalty for which is or includes imprisonment for 5 years or more, or life."8

Charging and releasing arrested suspects

Section 142 of the CIA sets out how an arrested suspect is to be dealt with once the decision is made to charge them. It separates suspects into four categories:

1. suspect not charged;
2. suspect charged with simple offence;
3. suspect charged with an indictable offence that is not a serious offence; and
4. suspect charged with a serious offence;

In section 142, a "serious offence" means "an indictable offence, the statutory penalty for which is or includes imprisonment for 5 years or more, or life."9

Definition of "serious offence" in the CIIPA

Under Part 5 of the CIIPA, a warrant may only be applied for in respect of an involved person, where the offence suspected to have been committed that is relevant to the procedure, is a serious offence.

7 Section 128(1) of the CIA.
8 Section 133(1) of the CIA.
9 Section 142(1) of the CIA.
Under Part 6 of the CIIPA, only uncharged suspects, who are suspected of committing a serious offence, may have their identifying particulars obtained.

Under Part 7 of the CIIPA, suspects charged with serious offences may also be required to provide a DNA profile, an impression of an identifying feature and a sample of hair, in addition to fingerprints photographs and measurements.

Under Part 8A of the CIIPA, only an offender convicted of a serious offence may have their identifying particulars taken after a conviction is recorded against them.

For the purposes of the CIIPA, a "serious offence" means "an offence, the statutory penalty for which is or includes life imprisonment, or imprisonment for 12 months or more."10

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

Issue - 1

Should the CIA be amended so that there is only one definition for the term "serious offence"? If so, how should that term be defined?

Issue - 2

Should the definition of "serious offence" in the CIA be consistent with the definition of "serious offence" in the CIIPA?

Issue - 3

Should the term "serious offence" in section 128 of the CIA be changed to "arrestable offence"?

1.2 Use of animals

1.2.1 Assaults and obstruction of animals

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

10 Section 3 of the CIIPA.
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.

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 August 2015, a person was charged with an offence contrary to section 19 of the AW Act, after it was alleged that he hit a police dog with a hammer.\(^\text{11}\) The offender was convicted of the offence on 15 October 2015 and was sentenced to 2 months imprisonment. Fortunately, the incident did not result in any substantial injuries to the police dog or the handler.

### 1.2.2 Assault and obstruction of animals assisting officers under the CIA

In Western Australia:

(1) a person who assaults a public officer who is performing a function of his office or employment, or on account of his being such an officer or his performance of such a function commits an offence, the maximum penalty for which is imprisonment for 10 years;\(^\text{12}\) and

(2) a person who obstructs ("to prevent, to hinder and to resist"\(^\text{13}\)) a public officer, or a person lawfully assisting a public officer, in the performance of the officer’s functions commits an offence, the maximum penalty for which is imprisonment for 3 years.\(^\text{14}\)

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.

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\(^\text{12}\) Section 317(d) of the Criminal Code.

\(^\text{13}\) Section 172(2) of the Criminal Code.

\(^\text{14}\) Section 172(1) of the Criminal Code.
In Western Australia, a prison officer may, in a manner authorised under the regulations, use a prison dog to assist the prison officer in carrying out a drugs search.\textsuperscript{15} Section 49A(3) of the Prisons Act relevantly provides:

\begin{itemize}
\item (3) A person who —
\item (a) assaults; or
\item (b) hinders or obstructs,
\end{itemize}

\hspace{1cm} a prison dog under the control of a prison officer carrying out a drugs search is to be deemed to have assaulted, or to have hindered or obstructed, the prison officer handling the dog.

To similar effect is regulation 97(1) of the Young Offender Regulations 1995 (WA) ("the YO Regs"), which provides:

\begin{itemize}
\item (1) A person who —
\item (a) assaults; or
\item (b) hinders or obstructs,
\end{itemize}

\hspace{1cm} a trained dog under the control of a dog handler carrying out a search under this Division is to be deemed to have assaulted, or to have hindered or obstructed, the dog handler.

In Queensland, under the PPR Act (Qld), it is an offence to assault or hinder a police officer in the performance of the officer's duties.\textsuperscript{16} A person who obstructs a police dog or police horse under the control of a police officer in the performance of the police officer's duties is taken to obstruct the police officer.\textsuperscript{17} It is noted that there is no similar deeming provision for a person who assaults a police dog or police horse.

In the Northern Territory, under the PA Act (NT), it is an offence for a person to hinder or obstruct a member in the execution of his duty, or aid or abet another person to hinder or

\textsuperscript{15} Section 49A(2) of the Prisons Act.
\textsuperscript{16} Section 790(1) of the PPR Act (Qld).
\textsuperscript{17} Section 790(2) of the PPR Act (Qld).
obstruct a member in the execution of his duty.\textsuperscript{18} A person who hinders or obstructs a police dog or police horse used by a member in the execution of the member’s duty, is taken to hinder or obstruct the member.\textsuperscript{19}

If the CIA were amended to provide that a person who assaults or obstructs a dog being used by an officer under section 17 of the CIA, is taken to or deemed to have assaulted or obstructed the public officer, then this would mean that the person could be charged with an assault contrary to section 317 of \textit{The Criminal Code}, or obstruction contrary to section 172 of \textit{The Criminal Code}.

\textbf{Issue - 4}

\textit{Should the CIA 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?}

\textbf{1.2.3 Killing, wounding, injuring or obstructing an animal being used under the CIA}

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.

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.

In Queensland, under section 124(g) of the \textit{Corrective Services Act 2006 (Qld)}, it is an offence to obstruct a corrective services dog working under the control of a corrective services officer who is performing duties under that Act. The maximum penalty for such an offence is imprisonment for 2 years.

In Queensland, under section 10.21B of the PSA Act (Qld), it is an offence for a person, without lawful excuse to kill, maim, wound or otherwise injure a police dog or police horse

\textsuperscript{18} Section 159(1) of the PA Act (NT).
\textsuperscript{19} Section 159(2) of the PA Act (NT).
or attempt to do the same. The maximum penalty for an offence contrary to section 10.21B of the PSA Act (Qld) is 40 penalty units ($4,876\textsuperscript{20}), or imprisonment for 2 years. In the Northern Territory, under section 159A of the PA Act (NT), it is an offence to intentionally kill or injure a police dog or police horse:

a) knowing that the dog or horse is being used by a member of the Police Force in the execution of the member’s duty; or

b) as a consequence of, or in retaliation for, the use of the dog or horse by a member of the Police Force while in the execution of the member’s duty.

The maximum penalty for an offence contrary to section 159A of the PA Act (NT) is 215 penalty points ($33,110\textsuperscript{21}), or imprisonment for 5 years.

In Tasmania, under section 82D of the PS Act (Tas), it is an offence for a person, without lawful excuse, to strike, injure, maim or kill a detector dog\textsuperscript{22} or do anything likely to impede or interfere with the effective use of a detector dog.\textsuperscript{23} The maximum penalty for an offence contrary to section 82D(1) or (2) of the PS Act (Tas) is a fine not exceeding 20 penalty units ($3,140\textsuperscript{24}), or imprisonment for a term not exceeding 12 months, or both.

In New South Wales, under section 531 of the Crimes Act (NSW), it is an offence to intentionally kill or seriously injure an animal:

a) knowing that the animal is being used by a law enforcement officer in the execution of the officer’s duty; or

b) as a consequence of, or in retaliation for, the use of the animal by a law enforcement officer while in the execution of the officer’s duty.

\textsuperscript{20} The current monetary value of a penalty unit in New South Wales is $121.90: see section 5A of the Penalties and Sentences Act 1992 (Qld).

\textsuperscript{21} The current monetary value of a penalty unit in the Northern Territory is $154: see section 6(1) of the Penalty Units Act (NT) and regulation 2 of the Penalty Units Regulations (NT).

\textsuperscript{22} Section 82D(1) of the PSA Act (Tas). A detector dog includes a police dog and any other dog trained or used by a law enforcement agency to detect any substance or item: see section 82A of the PSA Act (Tas).

\textsuperscript{23} Section 82D(2) of the PSA Act (Tas).

\textsuperscript{24} The current monetary value of a penalty unit in Tasmania is $157: see section 4A of the Penalty Units and Other Penalties Act 1987 (Tas).
The maximum penalty for an offence contrary to section 531 of the Crimes Act (NSW) is imprisonment for 5 years.

In South Australia, under section 83I(1) of the CLC Act (SA), a person who, by an intentional act, causes the death of, or serious harm to a working animal (including a police dog, police horse or correctional services dog\textsuperscript{25}), commits an offence, the maximum penalty for which is imprisonment for 5 years.

It is noted that it might be more appropriate for any new offences relating to animals used by public officers in the performance of their functions to be inserted in the Criminal Code.

Issue - 5

\textit{Should the CIA be amended to make it an offence for a person to kill, wound, injure or obstruct an animal being used to assist an officer under the CIA? If so, what should the penalty for such an offence be?}

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

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 and because of the resources invested into their training. If such an animal is killed, wounded or injured, then it may be appropriate for the person who killed, wounded or injured the animal to:

a) pay for the treatment, care, rehabilitation and retraining of the animal; and/or
b) to pay for buying or training the animal's replacement.

In both Queensland and the Northern Territory, a court that finds a person guilty of an offence contrary to section 10.21B of the PSA Act (Qld) or section 159A(1) of the PA Act (NT) respectively may, in addition to any penalty imposed, order the person to pay to the Commissioner a reasonable amount for:

\textsuperscript{25} See the definitions of "working animal", "police dog", "police horse" and correctional services dog" in section 83H of the CLC Act (SA).
a) the treatment, care, rehabilitation and retraining of the police dog or police horse concerned;\(^{26}\) or

b) if it is necessary to replace the police dog or police horse, buying and training its replacement.\(^{27}\)

In South Australia, under section 83J(1) of the CLC Act (SA), a court that finds a person guilty of an offence against section 83I of the CLC Act (SA), may make an order requiring that person to pay one or more of the following amounts:

a) an amount by way of compensation for veterinary and other expenses reasonably incurred in treating the working animal to which the offence relates;

b) an amount for reasonable rehabilitation or retraining of the working animal to which the offence relates, having regard to the primary function of the working animal;

c) if the working animal to which the offence relates is permanently unable to perform its primary function as a result of the offence—an amount equal to the actual or expected costs of replacing the working animal with one of similar abilities and training;

d) if the working animal to which the offence relates is permanently unable to perform its primary function as a result of the offence—an amount equal to the actual or expected costs of retiring the working animal (including, but not limited to, the costs of relocating and rehousing the animal, and retraining the animal to ensure it is adapted to life other than a working animal);

e) any other amount the court thinks appropriate in the circumstances.

It is noted that it might be more appropriate for such a provision to be included in the Criminal Code.\(^{28}\)

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\(^{26}\) Section 1021B(2)(a) of the PSA Act (Qld) and section 159A(2)(a) of the PA Act (NT).

\(^{27}\) Section 1021B(2)(b) of the PSA Act (Qld) and section 159A(2)(b) of the PA Act (NT).

\(^{28}\) 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).
Issue - 6

Should the CIA 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?

1.2.5 Protection from liability for use of animals under the CIA

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) and (3), 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. The provisions of the Dog Act do not apply to, or in relation to, a dog that is kept for the purposes of the Crown. Further, a police officer or other person acting under a statutory duty is not a person liable for the control of the dog under the Dog Act. However, there are no analogous provisions in other legislation for other animals used by public officers (e.g. horses).

Section 266 of the Criminal Code provides that a person who has in his charge anything (including a living thing) of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, is under a duty to use reasonable care and to take reasonable precautions to avoid such danger. Such a person is held to have caused any consequences which result to the life or health of any person by reasons of any omission to perform that duty.

Protection from liability

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.

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29 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.

30 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.

31 See the definition of "person liable for the control of the dog" in section 3 of the Dog Act.

32 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
In Western Australia, section 49A of the Prisons Act relevantly provides:

(5) Without limiting the generality of section 111, a prison officer is not personally liable for injury or damage caused by the use of a prison dog under the control of the prison officer in carrying out a drugs search, if that use was in accordance with this Act.

(6) Subsection (5) does not apply if injury or damage occurs as a result of anything commanded or permitted by the prison officer maliciously and without reasonable and probable cause.

To similar effect is regulation 97 of the YO Regulations which relevantly provides:

(2) A trained dog under the control of a dog handler may enter, and be in, any place that an officer may lawfully enter or be in while carrying out a search for illegal or unauthorised substances, and no liability arises by reason only that the dog entered or was in that place, notwithstanding any other law.

(3) Without limiting the generality of section 182 of the Act, an officer or a dog handler is not personally liable for injury or damage caused by the use of a trained dog under the control of a dog handler in carrying out a search for illegal or unauthorised substances, if that use was in accordance with this Part.

(4) Subregulation (3) does not apply if injury or damage occurs as a result of anything commanded or permitted by the dog handler without reasonable and probable cause.

In other jurisdictions, there are specific provisions which protect a public officer from liability in respect of injury or damage caused by use of an animal. The scope of the protections varies between jurisdictions.

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34 Section 111 of the Prisons Act 1981 (WA) is a general protection from civil liability provision.
35 These regulations are made under section 196(3)(e) of the Young Offenders Act 1994 (WA).
36 Section 182 of the Young Offenders Act 1994 (WA) is a general protection from civil liability provision.
Section 82C of the PS Act (Tas) provides that, “The Crown, a police officer and a detector-dog handler are not liable to any action, liability, claim or demand merely because a detector dog entered, or was in or on, premises as provided by this Part or because a detector dog initiated, or inadvertently made, contact with a person.”

In New South Wales, under the LEPR Act (NSW), neither the State nor a police officer is liable to any action, liability, claim or demand merely because a dog entered, or was in or on, premises as provided by section 146 (drug detection) and section 195 (firearm or explosive detection).

In Queensland, section 38 of the PPR Act (Qld) provides:

(1) This section applies if-

(a) the handler of a detection dog is using the detection dog to carry out detection; and

(b) the detection dog-

(i) physically intrudes onto a person or the clothing of a person, or otherwise comes into contact with a person, while the detection dog is carrying out the detection; or

(ii) causes damage to a thing that has in or on it an unlawful dangerous drug or explosives or firearms;

(2) The handler does not incur civil liability for an act done, or omission made, honestly and without negligence, in the circumstances to which this section applies.

(3) The State does not incur civil liability in the circumstances to which this section applies-

(a) for an act done by the detection dog; or

(b) for an act or omission of the handler.

(4) However, if-

(a) the act of the detection dog; or

(b) the act or omission of the handler;

37 Section 146(3) of the LEPR Act (NSW).
38 Section 195(3) of the LEPR Act (NSW).
causes bodily harm and subsection (2) prevents civil liability attaching to the
handler, the civil liability attaches instead to the State.

(5) The handler is not criminally responsible for an act done by the detection dog in the
circumstances to which this section applies other than for an attack by the
detection dog on a person intentionally caused by the handler or for which the
handler is criminally responsible under the Criminal Code, section 289.39

(6) This section does not prevent the State or the handler from relying on another
provision of an Act to limit civil liability or criminal responsibility.

(7) In this section-

bodily harm includes physical injury, grievous bodily harm, and death, but does not
include mental, psychological or emotional harm.

detection means drug detection under section 35(1) or explosives detection under
section 35(2).

handler, of a detection dog, includes a police officer helping the handler of the
detection dog.

Section 116G of the PA Act (NT) provides:

(1) A member of the Police Force is not civilly or criminally liable if a police dog or a
police horse, while being used by the member in good faith in the exercise of a
power or performance of a function as a member:

(a) comes into physical contact with a person or a person's clothing; or

(b) causes damage to a thing.

(2) Subsection (1) does not affect any liability the Territory would, apart from that
subsection have for the act of the dog or horse.

(3) A member of the Police Force or the Territory is not civilly or criminally liable
merely because a police dog or police horse entered or was at a place.

(4) In this section:

"exercise", of a power, includes the purported exercise of the power.

"performance", of a function, includes the purported performance of the function.

39 Section 289 of the Criminal Code (Qld) is the equivalent of section 266 of the Criminal Code (duty of person
in charge of dangerous things).
Section 27(2) of the Corrections Act 1986 (Vic) provides that, "Without affecting the liability of the Crown or any other body or person, a prison officer is not personally liable for injury or damage caused by the use of an approved dog in accordance with this section."

Section 12A of the Australian Federal Police Act 1979 (Cth) relevantly provides that:

(2) Where an AFP dog handler is entitled to enter, or to be on or in, particular premises or a particular place in the performance of the AFP dog handler's duties as a member or a protective services officer, the AFP dog handler is entitled, in entering, or being on or in, the premises or place, to be accompanied by an AFP dog under the control of the AFP dog handler.

(3) The Commonwealth, a member or a protective service officer is not subject to any penalty, liability or forfeiture by reason only of an AFP dog having entered, or having been on or in, particular premises or a particular place if:

(a) the AFP dog is under the control of an AFP dog handler;

(b) the AFP dog handler is performing the AFP dog handler's duties as a member or protective services officer; and

(c) the AFP dog handler is entitled to enter, or to be on or in, the premises or place.

Issue - 7

Should the CIA be amended to provide that public officers using animals pursuant to section 17 of the CIA are protected from civil liability in respect of injury or damage caused by the animal?

Issue - 8

Should the CIA be amended to provide that public officers using animals pursuant to section 17 of the CIA are protected from criminal liability in respect of injury or damage caused by the animal?

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

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.

For example, provisions relating to searches under the MDA enable the police to use necessary assistance\(^40\). It is also noted that, under Part 4A of the MDA, which was introduced by the *Misuse of Drugs Amendment (Search Powers) Act 2016* (WA), drug detection dogs may now be used to undertake preliminary drug detection testing.

**Issue - 9**

*Should section 17 of the CIA be extended to the use of animals by public officers in the exercise of powers other than under the CIA?*

1.3 **Delegation by officers**

Section 12(1) of the CIA provides that an officer may delegate the performance of a function under the CIA, other than the power of delegation, to another officer. If an officer delegates the performance of a duty imposed on the officer by the CIA to another officer, then he or she must ensure that the other officer performs the duty.\(^41\)

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 lack of a written instrument or a written record may cause difficulties.

In *Cotchilli v The State of Western Australia*\(^42\), the accused challenged the admissibility of a video record of interview. One of the grounds of challenge related to his arrest on the basis that the officer who delegated his power of arrest did not hold a reasonable suspicion and did not ensure that the officer to whom he delegated the power performed the duty. No records were made of the conversation by which the delegation took place. McKechnie J stated:

\(^{40}\) See for example, sections 13, 14, 23 and 24 of the MDA.

\(^{41}\) Section 12(2) of the CIA.

\(^{42}\) [2008] WASC 103.
A reasonable suspicion must be personally in the mind of the delegator—here, Doyle. The general words of s 12 allow an officer who has a reasonable suspicion to delegate the power of arrest to another officer who may not hold a suspicion.

From viewing the video record of interview it is clear that Doyle did have information available to him concerning the possible commission of an offence. In my opinion, taking all matters into consideration, he had reasonable grounds for suspecting that an offence may have been committed by the accused.

What Doyle delegated, was his power under s 128 to arrest on reasonable suspicion. It is obvious Ripp performed this delegated power because the accused was arrested and brought to Doyle’s presence for the purposes of interview. Upon arrest an accused person automatically attracts certain rights under the Criminal Investigation Act, including rights under s 137 and s 138 in the present case. Officers have certain duties and arguably Doyle, as the officer in charge of the investigation, had particular duties under s138(3).

In the circumstances, I have found that if those duties were delegated to Ripp, they were performed. However, the absence of their performance does not lead to the conclusion that an officer in Doyle’s position failed to ensure the officer performed the duty. The duties under s 137 and s 138 are different from the power under s 128(2). That delegated power to arrest was duly performed.43

In Martin v The State of Western Australia44, the accused challenged the admissibility of a video record of interview. An issue which arose was whether the officer in charge of the investigation had informed the accused of his rights under section 138(3) of the CIA. McKechnie J stated:

The first difficulty facing the respondent (‘prosecution’) is that there is no evidence as to who was the officer in charge. Each officer disclaimed this position. Doyle was the senior officer who conducted the substance of the interview, while Walsh prepared the brief. The duties of the officer in charge may be delegated (Criminal Investigation

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43 At [26]-[27] and [33]-[34].
Act s 12) but in the absence of an officer in charge or evidence that there was an officer in charge I am unable therefore to find any valid delegation. In particular, I am unable to find therefore that the officer in charge delegated any power to Rigior to inform the accused that he had a reasonable opportunity to communicate with a lawyer.45

Issue - 10

**Should section 12 of the CIA be amended to require a delegation to be in writing or a written record to be made of a delegation?**

1.4 Use of force

1.4.1 Use of force in effecting an arrest

In *Elwin v Robinson*46 the Court of Appeal was required to consider the force which may be used to effect an arrest under the CIA. Mazza JA (with whom Pullin and Newnes JJJA agreed) stated:

> Section 16 of the CIA provides that a person exercising a power under that Act may use any force that is reasonably necessary in the circumstances to exercise the power and overcome any resistance offered. Section 16 is subject to ch XXVI of the Criminal Code: s 16(3) CIA. The sections in ch XXVI of the Criminal Code which are relevant to this case are s 231 and s 260. Section 231 of the Criminal Code provides that it is lawful for a person engaged in making an arrest (or any person lawfully assisting in that process) 'to use such force as may be reasonably necessary to overcome any force used in resisting' that arrest.

...  

The effect of these provisions is that if a police officer uses more force than is reasonably required in the circumstances to effect an arrest that use of force is unlawful and the police officer will not be performing a function of his or her office.

45 At [29].
46 [2014] WASCA 46 at [58] and [60]. See also, *Crosswell v Ainsworth* [2014] WASC 186 at [10] per Allanson J.
In such circumstances, an offence against s 172 of the Criminal Code cannot be made out.

In Johnson v Staskos\footnote{[2015] WASCA 32; (2015) 48 WAR 349; See also Gartner v Brennan [2016] WASC 89 at [41] per Pritchard J.}, Mazza JA noted the effect of section 231(2)(b) of The Criminal Code in the context of an arrest. His Honour stated:\footnote{At [111]. See also [14] per McLure P.}

The effect of s 231(2)(b) in the context of an arrest is as follows. It is relevant to the question of whether an arrest might have been made in a less forcible manner to consider, so far as it was practicable to do so, whether notice was given of the cause of the arrest. The clear implication of this provision is that failure to give notice does not make the arrest unlawful.

Issue - 11

Are any changes required to section 16 of the CIA in the context of the use of force to effect an arrest?

1.4.2 Scope of use of force

In Swales v Cox\footnote{[1981] 1 All ER at 119 as extracted in Words and Phrases Legally Defined, LexisNexis (4th edition)}, Donaldson LJ gave examples of the use of force to enter a place for the purpose of making an arrest:

First of all, let me define what I think is meant by "force". In the context of outside premises of course there is no problem about force unless there is a gate or something of that sort. The constable simply enters the place and is authorised to do so by sub-s(6). But if he meets an obstacle, then he uses force if he applies any energy to the obstacle with a view to removing it. It would follow that, if my view is correct, where there is a door which is ajar but is insufficiently ajar for someone to go through it without moving the door and energy is applied to that door to make it open further, force is being used. A fortiori force is used when the door is latched and you turn the handle from the outside and then ease the door open. Similarly, if someone opens any window or increases the opening in any window, or indeed
dislodges the window by the application of any energy, he is using force to enter, and in all those cases a constable will have to justify the use of force.

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:

1) disable an alarm, camera or surveillance device; and
2) pacify any animal used to guard the place.

This issue arises because 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 rather is effected to prevent advance warning to the occupants of entry to the place or to prevent injury to those entering the place.

Section 70 of the LEPR Act (NSW) relevantly provides:

(1) A person authorised to enter premises pursuant to a warrant may use such force as is reasonably necessary for the purpose of entering the premises.

(1A) An executing officer authorised to enter premises pursuant to a warrant may, if it is reasonably necessary to do so for the purpose of entering those premises, do any of the following:

(a) disable any alarm, camera or surveillance device at the premises; and
(b) pacify any guard dog at the premises.

(2) A person authorised to search premises pursuant to a warrant may, if it is reasonably necessary to do so, break open any receptacle in or on the premises for the purposes of that search.

(3) An executing officer authorised to search premises pursuant to a warrant may do anything that it is reasonably necessary to do so for the purpose of preventing the loss or destruction of, or damage to, any thing connected with an offence that the executing officer believes on reasonable grounds to be at those premises, including by blocking any drains at or used in connection with the premises.
Issue - 12

**Should section 16 of the CIA 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)?**

**Rendering safe**

An issue has also arisen as to whether there is statutory power in the CIA to render safe a dangerous article located during a search or which is seized following a search.

There is no clear statutory power 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 which may be utilised. However, the doctrine of necessity in relation to civil law or extraordinary emergency under the criminal law\(^{50}\) would likely provide a defence to taking action to make an item safe.

Section 70(4) of the LEPR Act (NSW) relevantly provides:

> A person authorised to search premises pursuant to a warrant may do anything that is reasonably necessary to render safe any dangerous article found in or on the premises.

Section 51V(a) of the *Defence Act 1903* (Cth) provides that if a member of the Defence Force seizes a thing under Division 2, 2A, 3 or 3A of Part IIIAAA\(^{51}\), then the member may take such action as is reasonable and necessary to make the thing safe or prevent it being used.

Issue - 13

**Should a provision be inserted in the CIA which 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)?**

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\(^{50}\) See section 25 of the Criminal Code.

\(^{51}\) That is, when the Defence Force is being used to protect Commonwealth interests and State and self-governing territories (including protecting States from domestic violence).
Chapter 2: Entering and Searching Places without Warrant

The CIA contains a number of provisions which enable search without warrant. These provisions are contained in Part 5, Division 2 and Part 12, Division 3.

2.1 Ability to search persons in the exercise of search powers under Part 12, Division 3

General powers to search people are set out in Part 8, Division 2 of the CIA. Section 68 of the CIA confers a power on officers to search people for things relevant to offence. However, the prerequisite to the exercise of the power is that the officer reasonably suspects that a person has in his or her possession or under his control any thing relevant to an offence.

Under Part 12, Division 3 of the CIA, there are various search powers that are ancillary to the power of arrest:

- Section 132 provides a power to enter places and vehicles for the purposes of arresting a person who is being pursued by police.
- Section 133 provides a power to search the various premises and vehicles relating to a suspect who has been arrested for a serious offence.
- Section 134 provides a search power to assist police in recapturing an escapee and obtaining evidence of specified offences in relation to the escapee's escape or offences reasonably suspected of having been committed whilst the escapee is at large.

An officer who is authorised under Part 12, Division 3 to enter and search a place may also exercise any of the ancillary powers in section 44. The only power of search is contained in section 44(2)(g)(iv), and this is limited to the search of a person who is in the place for any weapon or other thing that could endanger a person.

An issue has been raised in relation to the lack of ability under the search powers in Part 12, Division 3 to search a person, other than the person who police wish to arrest, within the place or vehicle that is authorised to be searched. The problem is illustrated in the following example:
Example:

An offender is observed by police to flee a residential property with items of jewellery stolen therein. The offender takes flight when police try to effect an arrest and the offender is then pursued by police on foot.

The offender jumps the fence of an accomplice’s property and takes refuge inside. Police enter the property under section 133 and locate four people inside, one of whom is the person, X, they wish to arrest.

Police search X for the alleged stolen property under section 68 of the CIA, but are unable to locate the jewellery.

If X is arrested, then police may search the premises for any thing relevant to a serious offence pursuant to section 133 of the CIA.

If the offender has passed the stolen jewellery onto one of the other 3 occupants, they would be able to conceal it and police would have no power to search any of them, unless they could establish a reasonable suspicion under section 68 of the CIA.

Similarly, under section 134 of the CIA, a police officer may enter the escapee's family home looking for evidence of his whereabouts, but they would not be able to search the family members present for things relevant to the commission of an offence (for example an offence committed by the escapee while at large).

It would appear unnecessary and inappropriate to provide a power to search other persons in section 132 of the CIA, as that section is limited to searching for a person.

The power to search under section 68 of the CIA may not be applicable in every circumstance when the power to conduct searches under section 133 and 134 of the CIA is enlivened. However, there is some merit to the idea that police should have the power to search persons (other than the person who the officer wishes to arrest), in the case of section 133 and 134. This is because other persons present in the place may have concealed a thing relevant to an offence, on behalf of the person who police wish to arrest.

The power to search a person is currently limited under section 68 of the CIA. 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.

It is noted that under section 13(2)(c) of the TEP Act, if a police officer reasonably suspects that a person is in the company of a target person in suspicious circumstances, then the officer may do a basic search or a strip search of a person for the purpose of looking for a thing connected with a terrorist act. However, the issue of a Commissioner's warrant is a prerequisite to the exercise of the power in section 13.

Issue - 14

Should section 131 of the CIA be amended to provide a power to search persons (other than the arrested person or escapee), when exercising powers in section 133 and 134? If so, what limits should be imposed on the exercise of this power?

2.2 Expansion of power to search places under section 133 of the CIA

If a person is under arrest for a serious offence, then a police officer or 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, and search it for any thing relevant to the serious offence, or any person against whom the serious offence was committed. Further, a police officer or public officer may, with the approval of a senior officer, enter a place that the person under arrest occupies, controls or manages, in the circumstances set out in section 133(3) of the CIA.

In some cases, a person who police wish to arrest for a serious offence may have entered and fled from several successive properties prior to their arrest. The offender may have left evidence behind in any of the several properties he or she entered prior to arrest. The police will only be able to search the place in which the person was arrested, or the place from which the person fled immediately before being arrested. If they wish to search any of the other places, they will need to obtain the consent of the occupier or a search warrant.

52 Section 133(a), (d) and (e) of the CIA.
Statutory powers of search and search under warrant are generally confined to a specific place rather than multiple places. It would be a significant extension of power to allow an officer to search, without warrant, more than one place.

It is noted that under section 15(1) of the TEP Act, if a police officer reasonably suspects that a place is in a target area, the officer may enter and search the place for a thing connected with a terrorist act. However, the issue of a Commissioner's warrant is a prerequisite to the exercise of the power in section 15.

Issue - 15

**Should the power to search a place under section 133(2) of the CIA be extended to include any place the person is suspected of having fled prior to being arrested? If so, what limits should be imposed on the exercise of this power?**

2.3 Amendment to definition of "arrestable offender" to include a person who may be arrested under section 54(2)(a) of the Bail Act

The Bail Act imposes various obligations on Courts, Judicial Officers and charging/arresting officers (authorised officers), to consider a person’s case for bail whilst that person is in custody. Whilst it is not within the scope of this Review to consider any changes to the Bail Act, some issues have arisen in relation to the exercise of powers under the CIA in relation to persons who have been granted bail.

A judicial officer or authorised officer may impose conditions on a grant of bail only to the extent that he or she is authorised to do so by clause 2(3)(c) of Part C and Part D of Schedule 1 of the Bail Act.53

Under the Bail Act, a bail undertaking of an accused contains 4 key requirements:

1. that the accused will appear at a time and place specified, or deemed by section 31(3) to be specified, in the undertaking; and
2. that if the accused fails to appear at that time and place the accused will, as soon as is practicable, appear at the court at which the accused was required to appear, when that court is sitting; and

53 Section 17(1) of the CIA.
c) that the accused will comply with such conditions as may be imposed on him or her under clause 2 of Part D of Schedule 1; and

d) that he will comply with any home detention condition which may be imposed as a condition on a grant of bail to him pursuant to clause 3 of Part D of Schedule 1.

Clause 2 of Part D of Schedule 1 relevantly provides:

(1) A judicial officer or authorised officer, on a grant of bail, may impose conditions —

(a) to be complied with before the accused is released on bail or while the accused is on bail; or

(b) as to the accused’s conduct while on bail; or

(c) as to where the accused shall reside while on bail, if he considers that it is desirable for any purpose mentioned in subclause (2), (2b), (3) or (4).

(1a) Without limiting subclause (1), a judicial officer or authorised officer shall, on a grant of bail to a child accused, consider whether it is desirable for any purpose mentioned in subclause (2) to impose a condition as to —

(a) any period in each day during which the child is to remain at a particular place; or

(b) any person with whom the child is not to associate or communicate; or

(c) any place that the child is not to frequent; or

(d) the attendance by the child at a school or other educational institution; or

(e) any other matter,

and the judicial officer or authorised officer may impose any such condition.

(2) Any condition may be imposed under subclause (1) or (1a) to ensure that an accused —

(a) appears in court in accordance with his bail undertaking; or

(b) does not while on bail commit an offence; or

(c) does not endanger the safety, welfare or property of any person; or

(d) does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; or
(e) as regards the period when the accused is on trial, does not prejudice the proper conduct of the trial.\textsuperscript{54}

The conditions referred to in paragraphs (c) and (d) of clause 2(2) of Part D of Schedule 1, are described by WA Police as "protective conditions". Conditions which are not protective conditions are described by WA Police as "non-protective conditions".

An accused who, without reasonable cause, fails to comply with the requirement of his or her bail undertaking mentioned in section 28(2)(a)\textsuperscript{55} or section 28(2)(b),\textsuperscript{56} commits an offence contrary to section 51(1) and section 51(2) of the Bail Act respectively. The maximum penalty for the offences is a fine not exceeding $1,000, imprisonment for 3 years, or both.

An accused whose bail undertaking includes any condition imposed for a purpose mentioned in clause 2(2)(c) or (d) of Part D of Schedule 1 of the Bail Act, and who fails to comply with the condition, commits an offence contrary to section 51(2a) of the Bail Act.

An accused who commits an offence contrary to section 51(1), (2) or (2a) of the Bail Act may be arrested under section 128(3) of the CIA (for a non-serious offence). A person who may be arrested under section 128 falls within paragraph (e) of the definition of "arrestable person" in section 132(1) of the CIA, which means that an officer may exercise the powers of entry and search in section 132(2) and (3) of the CIA for the purposes of arresting the person, and the power of seizure in section 132(5) of the CIA.

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 of the Bail Act does not commit an offence.\textsuperscript{57} Consequently, such a person cannot be arrested under section 128 of the CIA, and officers cannot exercise the powers in section 132 of the CIA. A police officer may be able to arrest

\textsuperscript{54} See clause 2(2) of Part D of Schedule 1 to the Bail Act.

\textsuperscript{55} The requirement that the accused appear at a time and place specified, or deemed to be specified, in the undertaking: see section 28(2)(a) of the Bail Act.

\textsuperscript{56} The requirement that if the accused fails to appear at the time and place specified the accused will, as soon as is practicable, appear at the court at which the accused was required to appear, when that court is sitting: see section 28(2)(a) of the Bail Act.

\textsuperscript{57} It is noted that a failure to comply with the condition imposed under clause 2(2)(a) would also be a contravention of the requirement of the bail undertaking mentioned in section 28(2)(a) which is an offence contrary to section 51(1) of the Bail Act.
the accused under section 54(2)(a) of the Bail Act for the purpose of bringing them before a judicial officer to have their bail varied or revoked. However, a person who may be arrested under section 54(2)(a) of the Bail Act is not an arrestable person for the purposes of section 132 of the CIA. Further, there is no power in the Bail Act which gives a police officer the power to enter a place or vehicle for the purpose of arresting an accused under section 54(2)(a) of the Bail Act.

An issue has arisen as to whether a person who may be arrested under section 54(2)(a) of the Bail Act should be an "arrestable offender" for the purposes of section 132(1) of the CIA. The problem is illustrated in the following example:

Example:

A juvenile is arrested and charged with committing numerous burglaries on schools during the hours of darkness. Upon considering bail, the authorised officer has imposed a condition requiring the juvenile to keep to a strict curfew of having to stay at his home address between 7pm and 7am daily. This curfew condition is not considered protective for the purposes of section 51(2).

Police receive information from the public, friends or family of the juvenile that he is not keeping to the curfew imposed as a condition of the grant of bail. The juvenile has not committed an offence, but police may arrest the juvenile under section 54 of the Bail Act and bring him before an appropriate judicial officer to have his bail reconsidered.

However, as previously mentioned, police do not have the power to enter premises to effect an arrest so, if the juvenile refuses to answer the door, the police cannot arrest the juvenile.

If a person who may be arrested under section 54(2)(a) of the Bail Act was an "arrestable person" for the purposes of section 132 of the CIA, police would have the power to enter a place or vehicle for the purpose of arresting the juvenile. There seems little point in having a power to arrest a person, if the police cannot enter a place or vehicle to effect the arrest.
In Queensland, under section 29 of the *Bail Act 1980* (Qld), it is an offence for a defendant to break any condition of the undertaking on which he or she was granted bail requiring the defendant's appearance before a court. However, this offence does not apply to a child, or a condition that the defendant surrender into custody, or a condition of the defendant's undertaking imposed under section 11(9) or 11AB. Under section 367 of the *PPR Act* (Qld), a police officer may arrest, without warrant, a person granted bail, if the police officer suspects that person is likely to contravene, is contravening, or has contravened the condition for the person's appearance, or another condition of the undertaking on which the person was granted bail. A police officer may enter a place and stay for a reasonable time in the place to arrest a person without warrant. If the place contains a dwelling, a police officer may enter the dwelling without the consent of the occupier to arrest or detain a person, only if the police officer reasonably suspects the person to be arrested or detained is at the dwelling. If the place is a vehicle, a police officer may stop and detain the vehicle and enter it to arrest or detain the person. A police officer who enters a place under section 21 of the *PPR Act* (Qld) may also search the place for the person.

In New South Wales, a police officer may arrest a person, without warrant, if the police officer believes on reasonable grounds that a person has failed to comply with a bail condition, and take the person as soon as practicable before a court or authorised justice. The police officer may also apply for a warrant for the person's arrest. A police officer may enter and stay on premises to arrest a person, or detain a person under an Act, or arrest a person named in a warrant, but only if the police officer believes on reasonable grounds

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58 Section 29(1) of the *Bail Act 1980* (Qld).
59 Section 29(2) of the *Bail Act 1980* (Qld). A condition imposed under section 11(9) is a condition that the defendant participate in a rehabilitation, treatment or other intervention program or course. A condition imposed under section 11AB is a condition that the defendant complete a drug and alcohol referral course by a stated day.
60 Section 367(3)(a)(i) of the *PPR Act* (Qld).
61 Section 21(1)(a) of the *PPR Act* (Qld).
62 Section 21(2) of the *PPR Act* (Qld).
63 Section 21(3) of the *PPR Act* (Qld).
64 Section 21(4) of the *PPR Act* (Qld).
65 Section 77(1)(e) of the *Bail Act 2013* (NSW).
66 Section 77(1)(f) and (4) of the *Bail Act 2013* (NSW).
that the person to be arrested or detained is in the dwelling.  

A police officer who enters premises under section 10 of the LEPR Act (NSW), may also search the premises for the person.

In South Australia, a person who, without a reasonable excuse, contravenes or fails to comply with a term or condition of a bail agreement, commits an offence. If it appears to a court or justice that a person released on bail has contravened or failed to comply with a term or condition of a bail agreement, it may revoke the bail agreement and, if it appears necessary or desirable to do so, issue a warrant for the person's arrest. A police officer may, without warrant, arrest a person released on bail if he or she has reasonable grounds for believing that the person intends to abscond, has contravened or failed to comply with a bail agreement, or is contravening or failing to comply with a bail agreement.

In Victoria, under section 30A(1) of the Bail Act 1977 (Vic), an accused on bail who is subject to any conduct condition must not, without reasonable excuse, contravene any such condition. However, section 30A(1) does not apply to the contravention of a conduct condition requiring the accused to attend and participate in bail support services or a child. Any police officer on duty at a designated place may, without warrant, arrest any person who has been released on bail, if the police officer has reasonable grounds for believing that the person is likely to break the condition for his attendance, or any other condition on which he was admitted to bail, or has reasonable cause to suspect that the person is breaking or has broken any such other condition.

In the Northern Territory, a person who is granted bail commits an offence if, without reasonable excuse, the person engages in conduct that results in a breach of their bail undertaking, or a condition of the grant of bail. Where a police officer believes on

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67 Section 10(1) and (2) of the LEPR Act (NSW).
68 Section 10(3) of the LEPR Act (NSW).
69 Section 17(1) of the Bail Act 1985 (SA).
70 Section 18(1) of the Bail Act 1985 (SA).
71 Section 18(2) of the Bail Act 1985 (SA).
72 A condition imposed under section 5(2A) of the Bail Act 1977 (Vic).
73 Section 30A(2) of the Bail Act 1977 (Vic).
74 Section 30A(3) of the Bail Act 1977 (Vic).
75 Section 124(1)(a) of the Bail Act 1977 (Vic).
76 Section 37B(1) of the Bail Act (NT).
reasonable grounds that a person who has been released on bail has failed to comply with, or is about to fail to comply with the person’s bail undertaking, or an agreement entered into by the person pursuant to a bail condition, the police officer may arrest the person without warrant.\(^\text{77}\) Where a member of the Police Force may arrest a person without warrant, the member may enter, by force if necessary, and with such assistance as he or she thinks necessary, a place at any time of the day or night for the purpose of arresting the person, if the member believes on reasonable grounds, that the person has committed an offence punishable by a term of imprisonment not exceeding 6 months, and that the person is at the place.\(^\text{78}\)

In Tasmania, under section 9 of the \textit{Bail Act 1994 (Tas)}, a person who has been admitted to bail and who, without reasonable excuse, contravenes the requirements specified in section 7(2) or any condition of an order for bail, commits an offence. A police officer may arrest a person if he or she has reasonable grounds to believe that the person has contravened, or is about to contravene: a requirement of section 7(2), the condition specified in section 7(3), any condition of an order for bail that has effect after the release of the person from custody, or a requirement specified in written advice given to that person in accordance with section 7(3A).\(^\text{79}\) A police officer may enter premises, using reasonable force if necessary, remain on and search premises including a conveyance, for the purpose of making an arrest without warrant if it is lawful to do so.\(^\text{80}\)

In the Australian Capital Territory, a person who gives an undertaking to appear before a court and who, without a reasonable excuse, fails to carry out the undertaking, commits an offence and the court may issue a warrant to arrest the person.\(^\text{81}\) Further, a police officer may arrest, without warrant, a person who has been granted bail in the ACT, if the officer believes on reasonable grounds that the person has failed to comply with a bail condition, or will not comply with a bail condition.\(^\text{82}\)

\(^{77}\) Section 38(1)(a) of the \textit{Bail Act (NT)}.  
\(^{78}\) Section 126(2) of the \textit{Police Administration Act 1978 (NT)}.  
\(^{79}\) Section 10(1) of the \textit{Bail Act 1994 (Tas)}.  
\(^{80}\) Section 26A(1)(b) of the \textit{Criminal Code Act 1924 (Tas)}.  
\(^{81}\) Section 49(1) and (3) of the \textit{Bail Act 1992 (ACT)}.  
\(^{82}\) Section 56A(1) and (2) of the \textit{Bail Act 1992 (ACT)}. 
Section 3Y(1) of the Crimes Act (Cth) provides that a constable may, without warrant, arrest a person who has been released on bail if the constable believes on reasonable grounds that the person has contravened or is about to contravene a condition of a recognisance on which bail was granted to the person in respect of an offence, even though the condition was imposed in a State or Territory other than the one in which the person is. The power in section 3ZB to enter premises to arrest an offender does not apply to the exercise of the power to arrest under section 3Y(1).

Issue - 16

**Should the definition of "arrestable offender" in section 132 of the CIA be amended to include a person who may be arrested under section 54(2)(a) of the Bail Act?**

2.4 Power to enter place to check whether a bailed person is complying with bail conditions

Police officers may decide to attend at an accused’s place to see whether he or she is complying with curfew conditions imposed under the Bail Act. If the accused answers the door, then police will be able to satisfy themselves that the accused is complying with their curfew condition. However, if the accused refuses to answer the door, then police will not be able to satisfy themselves that the accused is complying with their curfew condition. This is because there is no power in the CIA or the Bail Act for a police officer to enter a place to ascertain whether an accused is complying with a curfew condition imposed under the Bail Act.

An issue has arisen as to whether the CIA should be amended to allow police officers to enter a place to check on a person's compliance with a curfew condition imposed under the Bail Act.

Section 11 of the *Bail Act 1985* (SA) provides:

(7a) If it is a condition of a bail agreement that the person released under the agreement will remain at a particular place of residence, a police officer or a community corrections officer authorised by the Minister for the purposes may enter the residence at any time for the purpose of ascertaining whether or not the person is complying with the condition.
(7b) A person must not hinder a person referred to in subsection (7a) in the exercise of powers under that subsection.

Maximum penalty: $2500.

Issue - 17

Should the CIA 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?
Chapter 3: Entering and Searching Places with Warrant

Part 5 of the CIA contains provisions relating to the entry and search of places and vehicles with or without warrant.

In *Coco v R*\(^{83}\) the High Court held that:

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private premises without the leave or license of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law. Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language.

There are various provisions in the CIA which authorise officers to enter and search places or vehicles:

- Section 20(3) of the CIA gives an officer a power to enter a place if it is necessary to enter another place where the officer may enter a place with or without a search warrant;
- Sections 34, 35, 36, 37, 38B of the CIA confer powers on officers or police officers to enter places for various purposes;
- Sections 38 and 39 of the CIA confer powers on officers or police officers to stop, enter and search a vehicle;
- Section 40 of the CIA confers powers on a police officer to enter a place to establish a protected forensic area;
- A police officer may enter and search a place under the authority of a search warrant issued under section 42 of the CIA and may exercise the powers referred to in sections 43 and 44 of the CIA;

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\(^{83}\) (1994) 72 A Crim R 32 at 34-35 per Mason CJ, Brennan, Gaudron and McHugh JJ.
- Section 132 of the CIA confers powers on a police officer to enter and search a place, and stop and enter a vehicle, for the purposes of arresting an arrestable person;
- Section 133 of the CIA confers powers on a police officer to enter and search a place, and stop, enter and search a vehicle, for evidence in relation to a person under arrest for a serious offence; and
- Section 134 of the CIA confers powers on police officer to enter and search any place in relation to an escapee.

In Norton v The Queen\(^84\) Roberts-Smith J (with whom Wallwork and Pidgeon JJ agreed) noted that:

*The warrant and the legislative provisions under which it has been issued must be carefully scrutinised when considering what is required or authorised to be done under it, and strict compliance with the statutory requirements and those of the warrant itself will be demanded: see Noordhof v Bartlett (1986) 31 A Crim R 417.*

### 3.1 Requirement to seek informed consent of occupiers to enter a place and the scope of the informed consent

Section 31 of the CIA requires officers who intend to enter a place under a power within the CIA (that is, under section 20(3), Part 5 or Part 12, Division 3\(^85\)) to provide the occupier of the place, if present, with certain information and opportunities. "Place" is defined in section 3(1) of the CIA as "any land, building, structure, tent or mobile home or a part of any land, building, structure, tent or mobile home."

Section 31(2) provides that, if the occupier is present when it is proposed to enter the place, an officer must, prior to entering, do the following things:

a) identify himself or herself to the occupier; and  
b) inform the occupier that it is intended to enter the place; and

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\(^{84}\) [2001] WASCA 207; (2001) 24 WAR 488 at [113].

\(^{85}\) See section 130 of the CIA.
c) if the place is to be entered under a search warrant, provide the occupier with a copy of the search warrant; and

d) if the place is to be entered under some other statutory authority, inform the occupier of the reason, and the statutory power, for the entry; and

e) give the occupier an opportunity to give informed consent to the place being entered.

The requirement to provide the occupier with an opportunity to give informed consent to the place being entered exists regardless of whether or not the entry is authorised by warrant. The only circumstances in which all of the above requirements need not be met are where the officer reasonably suspects that to do so will endanger any person, including the officer, or jeopardise the purpose of the entry, or the effectiveness of any search of the place.\(^{86}\)

Operational police officers have indicated that confusion often arises in relation to seeking consent from an occupier to the entry of a place in circumstances in which the officer has a warrant or statutory authority to enter. That is, the occupier may not understand that the officer is authorised to, and intends to, enter regardless of whether or not consent to entry is given.

The requirement to seek informed consent to entry from the occupier, even where a warrant or statutory power to enter exists, appears to have been included in the legislation to ensure that officers do not use their powers unnecessarily. However, this is somewhat counter-intuitive, given that the officer has already been granted the authority to enter by way of a warrant or statutory power. Further, section 31 does not require the officer to seek the informed consent of the occupier to a search of the place etc.

The inclusion of the requirement to seek the informed consent of the occupier provides the occupier with an opportunity to voluntarily cooperate with officers. Feedback from operational police officers indicates, however, that the requirement to request consent to

\(^{86}\) Section 31(2) of the CIA.
enter most often results in confusion. Moreover, this requirement imposes an additional onus on the officer to record the existence or otherwise of the occupier’s consent.

An issue has also has arisen on the part of officers as to whether any consent granted by an occupier to entry of the place also constitutes the occupier’s consent to search and the exercise of ancillary powers relating to the search, or whether the officer is required to seek further consent to exercise ancillary powers such as the power to search persons in the place, establish a protected forensic area, or operate equipment.

The consent sought in section 31 is merely consent to entry of the premises. If an occupier, having been given the opportunity to give informed consent to the place being entered, gives his or her informed consent, then the consent merely covers entry.

If an officer having entered premises with the informed consent of the occupier wishes to do anything else on the premises (such as search) then he or she has two options. First, the officer may rely on the authority of a search warrant to conduct the search or some other statutory provision authorising search without warrant. Second, the officer may seek the informed consent of the occupier to the exercise of any other powers that could be exercised under a search warrant.

It is noted that section 30(1) of the CIA expressly states that Part 5 does not prevent an officer, with the informed consent of the occupier of a place, from exercising without a search warrant, any of the powers that could be exercised under a search warrant in respect of the place (including, for example, the powers conferred by sections 43 and 44 of the CIA). An occupier gives informed consent to an officer if the occupier consents after being informed by the officer:

(a) of the powers that the officer wants to exercise in respect of the place; and

(b) of the reason why the officer wants to exercise those powers; and

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87 See e.g. section 43(8)(b)(ii) of the CIA.
88 Section 44(2)(f) of the CIA.
89 Section 44(2)(b) of the CIA.
90 For example, a warrant issued under section 42 of the CIA.
91 Section 30(1) of the CIA.
(c) that the occupier can refuse to consent to the officer doing so.\textsuperscript{92}

However, if the officer already has a search warrant, or a statutory authority to search, it seems unnecessary to seek consent to search.

In Tasmania, section 19(1) of the \textit{Search Warrants Act 1997} (Tas) requires that, prior to entering premises under a warrant, the executing officer is to do two things. First, announce that he or she and any person assisting is authorised to enter the premises. Second, give any person at the premises an opportunity to allow entry to the premises. Section 19(2) provides that the executing officer is not required to comply with section 19(1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure the safety of a person (including a police officer) or that the effective execution of the warrant is not frustrated.

In New South Wales, section 68(1) of the \textit{LEPR Act (NSW)} also requires that one of the persons executing a warrant must, before any of the persons executing the warrant enters the premises do two things. First, announce that the person is authorised by the warrant to enter the premises. Second, give any person then in or on the premises an opportunity to allow entry into or onto the premises. Section 68(2) provides that a person executing a warrant is not required to comply with the section if the warrant is a covert search warrant or if the person believes on reasonable grounds that immediate entry is required to ensure the safety of any person or to ensure that the effective execution of the warrant is not frustrated.

\textbf{Issue - 18}

\textit{Should 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 be repealed?}

\textsuperscript{92} Section 30(2) of the CIA.
Issue - 19

If the requirement in section 31(2)(e) of the CIA is to be retained, should an additional provision be inserted in the CIA which 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?

Issue - 20

If the requirement to seek consent is repealed, should it 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? If the requirement in section 31(2) of the CIA is to be retained, should the CIA be amended to make it clear that if the officer is given the informed consent of the occupier to enter the place: (a) the informed consent permits entry only; and if the officer wishes to do something else in or on the place then the office must seek the informed consent of the occupier or rely on a search warrant or some other statutory authorisation?

3.2 Requirement that JP issues search warrant

Section 41(2) of the CIA requires that an application for a search warrant be made to a JP in accordance with the procedure outlined in section 13. Section 13(4) states that the application must be made in person before the JP, unless the warrant is needed urgently, and the applicant reasonably suspects that a JP is not available within a reasonable distance of the applicant. In these cases, the application may be made to a JP by remote communication.

As outlined in section 42 of the CIA, a JP may issue a search warrant for a place, if satisfied that, in respect of each of the criteria in section 41(3) that the applicant suspects, there are reasonable grounds for that suspicion. According to section 43(3) of the CIA, a search warrant comes into force when it is issued by a JP. Section 43(6) also requires that search warrants 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.

The final report of the Police Royal Commission recommended that "legislation be enacted to provide that only magistrates and other designated persons, rather than all Justices of
the Peace, issue search warrants". However, this recommendation was not adopted in the CIA. The basis for rejecting this recommendation was grounded primarily in practicalities. Concerns were expressed that this recommendation would require magistrates or other authorized persons to be available seven days a week, 24 hours a day, State-wide. It was considered at the time that the existing arrangement for search warrants to be issued by a JP was sufficient.

Queries have now been raised as to whether an application for a search warrant should be able to be made to a senior police officer, either in all circumstances, or where there is an urgent need to enter a target premises at night or on a weekend, where no other powers of entry exist. It appears that the rationale for this suggestion is grounded in practicalities, namely that it is not always possible to contact a JP in order to make an application.

The office of the JP is a statutory position which involves a range of duties and responsibilities, including the issuing of search warrants. Pursuant to sections 9 and 10 of the Justices of the Peace Act 2004 (WA), JPs are appointed by the Governor upon the recommendation of the Minister for Justice. JPs undertake training and, before performing the functions of a JP, must take an oath or affirmation of offices. Search warrants issued by JPs are only rarely found to have been invalidly issued, or otherwise problematic.

In relation to their availability, the website of the Department of the Attorney General states:

> When contacting JPs, please keep in mind they are volunteers who provide their services to the community free of charge. While they make themselves available as much as possible, they have the same type of work and personal commitments as any other person.

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93 Geoffrey A Kennedy AO QC, *Royal Commission Into whether there has been corrupt or criminal conduct by any Western Australia Police Officer*, Final Report, Volume 2, Part 2 at 340.

94 See, for example, *Collett v Webb* [2011] WASC 13, in which it was held that, due to evidence that the JP who was called as a witness at trial had no recollection of issuing the search warrant in question, and was not in fact the JP who had issued it, the basis on which the trial had been conducted was undermined, as was the subsequent appeal.

95 'Find a Justice of the Peace', Department of the Attorney General, Court and Tribunal Services: www.courts.dotag.wa.gov.au/_apps/jps/Default.aspx
The website also notes that there are JPs available in most of Western Australia’s suburbs and towns, as well as in other states and some foreign countries, and provides a search facility to find JPs in particular areas.

Historically, the issue of search warrants has fallen within the remit of JPs only. However, section 7 of the TEP Act now empowers the Commissioner of Police to issue a warrant that authorises police officers to exercise certain powers, including the power to enter and search specified places and people, where the Commissioner is satisfied that there are reasonable grounds to suspect that a terrorist act has been, is being, or is about to be, committed, and that the exercise of powers will substantially assist to prevent it or minimise the risk to the safety or health of the public arising from the terrorist act. The Commissioner must not issue such a warrant without the prior approval of a Supreme Court judge but, if there is an urgent need to issue it, and a judge cannot be contacted to request approval, the Commissioner may issue it without such approval and subsequently obtain approval within 24 hours of its issue.  

The issuing of authorities and approvals by senior police officers is not without precedent. The CIA itself currently empowers senior officers to give certain authorisations and approvals:

(a) the authorisation of the exercise of powers in relation to an out of control gathering;  
(b) to enter a place near the target place;  
(c) the authorisation of the exercise of powers that could be exercised under a search warrant in relation to a protected forensic area;  
(d) the giving of approval for a non-intimate procedure to be carried out on an adult suspect;  
(e) the authorisation to exercise the powers in section 133(3) of the CIA; and

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96 Section 7(3) and (4) of the TEP Act.  
97 Section 38A of the CIA.  
98 Section 44(3)-(5) of the CIA. See also the definition of “senior officer” in section 44(1) of the CIA.  
99 Section 47(3)-6) of the CIA. See also the definition of “senior officer” in section 47(1) of the CIA.  
100 Section 98 of the CIA. See also the definition of “senior officer” in section 97(1) of the CIA.  
101 Section 133(4), (5) and (8) of the CIA. See also the definition of “senior officer” in section 133(1) of the CIA.
(f) the authorisation of a further period of detention of up to 6 hours for an arrested suspect.\textsuperscript{102}

An advantage of the present requirement that applications for search warrants be made to a JP is the separation of the JP from the investigation for the purposes of which the warrant is sought. This separation permits the JP to turn his or her mind objectively to the matters outlined in the application. By contrast, if police officers were empowered to issue search warrants, it may be difficult to find an officer, particularly in rural areas, who has sufficient distance from the investigation in question to consider the application entirely objectively.

If senior police officers are to issue search warrants, then it may be necessary to impose certain conditions on the issuing of search warrants by police officers to ensure the accountability and propriety of the process. Some potential prerequisites to the issue by a police officer of a warrant might include the urgent need to issue a warrant and the requirement that the officer issuing the warrant have no involvement with the investigation. As noted, however, this latter condition may not always be practical, such as in rural locations.

It is also noted that applications for search warrants may be made by public officers in addition to police officers.\textsuperscript{103} This raises a query as to whether senior public officers would also want to issue search warrants.

In New South Wales, section 48(1) of the LEPR Act (NSW) provides that an "eligible issuing officer" to whom an application for a search warrant is made may, if satisfied that there are reasonable grounds for doing so, issue the search warrant. An "eligible issuing officer" for a warrant other than a covert search warrant or a criminal organisation search warrant means an authorised officer (a Magistrate or a Children’s Magistrate, a registrar of the Local Court, or an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of the Act\textsuperscript{104}).

\textsuperscript{102} Section 140(4) of the CIA. See also the definition of “senior officer” in section 140(1) of the CIA.
\textsuperscript{103} Section 41(1) of the CIA.
\textsuperscript{104} Section 3 of the LEPR Act (NSW).
In South Australia, section 67 of the SO Act (SA) states that, despite any law or custom to the contrary, the Commissioner of Police may issue general search warrants to such police officers as the Commissioner thinks fit. Further, under section 32 of the SO Act (SA), the Commissioner of Police, or a senior police officer, or any other police officer authorised in writing by the Commissioner or a senior police officer, may at any time enter and search premises which he or she suspects on reasonable grounds to be a brothel. A senior police officer means a police officer of or above the rank of superintendent.\textsuperscript{105}

In Tasmania, section 60(1) of the Police Offences Act 1935 (Tas) provides that it shall be lawful for the Commissioner of Police to issue to any police officer a general warrant authorizing such officer to search for stolen property. Each such warrant must be signed by the Commissioner personally, and the Commissioner may, at any time, revoke the warrant.\textsuperscript{106}

Section 3E(1) of the Crimes Act (Cth) provides for the issuing of a warrant to search premises by an issuing officer. An "issuing officer" means a magistrate or a JP or other person employed in a court of a State or Territory who is authorized to issue search warrants.\textsuperscript{107}

Issue - 21

\textit{Should senior police officers and senior public officers be given the power to issue search warrants as well as JPs? If so, in what circumstances?}

Issue - 22

\textit{If senior police officers and senior public officers are to be authorised to issue search warrants, then: (a) what level of seniority should be required before they may do so? (b) should an officer be precluded from issuing a search warrant if he or she is involved in the investigation for which the warrant is required? (c) what, if any, measures should be put in place to ensure the accountability of the process?}

3.3 Detention of persons present at place the subject of a search

Part 5, Division 3 of the CIA outlines the powers that may be exercised upon the execution of a search warrant in relation to a place.

\textsuperscript{105} Section 66 of the SO Act.
\textsuperscript{106} Section 60(2) and (3)) of the Police Offences Act 1935 (Tas).
\textsuperscript{107} Section 3 of the Crimes Act (Cth).
Section 31(4) of the CIA states that if the occupier is present in the place when it is being searched, an officer doing the search must not prevent the occupier, or a person nominated by the occupier, from observing the search unless:

(a) the officer reasonably suspects that the occupier or person might be endangered if he or she were to observe the search; or

(b) the occupier or person obstructs the search; or

(c) it is impracticable for the occupier or person to observe the search.

However, at present, police officers have limited power to detain any person occupying the place that is being searched. Section 44(2)(g)(iii) of the CIA authorises detention of a person in the place for a period of time no longer than is reasonably necessary while a search warrant is being executed, only if the officer reasonably suspects it is necessary to do so to protect the safety of any person in the place being searched. Section 44(7) of the CIA notes that a person who is detained under subsection (2)(g)(iii) when he or she is not under arrest is to be taken in lawful custody.

Section 44(2)(f) of the CIA also provides that an officer may establish a PFA in the target place under section 46 of the CIA if the officer reasonably suspects it is necessary to do so in order to prevent a target thing from being concealed or disturbed, or a victim of an offence being endangered. Section 44(2)(a) of the CIA also authorizes an officer executing a search warrant to enter, but not to search, a place near the target place if the officer reasonably suspects it is necessary to do so in order to, inter alia, prevent a person from fleeing the target place.

Operational police officers have suggested that it would be helpful to have a general power, which is not contingent upon a need to protect the safety of any person, to detain any person occupying the place the subject of a search warrant as long as reasonably necessary while the warrant is being executed. The rationales for the existence of this additional power are manifold.

First, operational police officers have indicated that it is generally helpful to have an occupier of the premises present during the execution of the warrant to assist in the facilitation of the search by, for example, answering questions about the layout of the house.
and assisting entry to locked doors or cabinets. Second, if suspicious property is located during the execution of the warrant, it may be necessary to question the occupier in order to identify its owner and whether there is a legitimate excuse for its possession. Third, it may also be desirable to have an occupier present during the search in order to have a witness to the execution of the warrant, both in order to ensure the relevant officers’ accountability, and to address any concerns of the occupier regarding the search. Finally, it may become necessary for the officer executing the warrant to arrest an occupier of the target place, which would be greatly facilitated if the occupier were detained in the place during the search.

It is noted that under a Commissioner’s warrant issued under the TEP Act a police officer may order a person to remain in a target area.\textsuperscript{108}

In the Northern Territory, section 119A(4)(b) of the PA Act (NT) provides that, for the purposes of exercising the power to enter premises pursuant to a search warrant, a member of the Police Force may detain any persons found in or on the place, or who enter it while the search is in progress, for as long as reasonably required for the exercise of the power. Section 119A(5) provides that a person detained under this provision is in the lawful custody of the police officer while so detained.

In Queensland, section 157(1) of the PPR Act (Qld) provides that, under a search warrant, a police officer may lawfully exercise a power to detain anyone at the relevant place, for the time reasonably necessary to find out if the person has anything sought under the search warrant.\textsuperscript{109} Section 157(1)(f) also provides that, if the warrant relates to an offence, and the police officer reasonably suspects that a person at the relevant place has been involved in the commission of the offence, the police officer may detain the person for the time taken to search the place.

\textsuperscript{108} Section 11(3)(b) of the TEP Act.
\textsuperscript{109} Section 157(1)(e) of the PPR Act (Qld).
Issue - 23

**Should the CIA be amended to allow a police officer to detain any person present at a place that is the subject of a search?**

If the power to detain an occupier and/or persons present at the place at the time of the search were granted, consideration must also be given to the conditions on which this detention ought to be permitted, both in order to ensure the protection of those detained and the accountability of the officers concerned. This is because a search of a place may take several days.

Issue - 24

**What conditions should be imposed on any power to detain persons present at the place the subject of the search?**

If a person is to be detained at the place the subject of the search, then it may be necessary for certain rights to be conferred upon those persons.

Issue - 25

**What rights should be conferred on a person who is detained at the place the subject of the search?**

Issue - 26

**Should any person who is detained be taken to be in lawful custody?**

In order to facilitate the objectives to which the proposed power to detain is directed, it may also be beneficial for a power to be inserted in the CIA which permits an officer to request that the person detained give the officer any or all of the person's personal details. Section 16 of the CIIPA permits an officer to exercise a power to request personal details only where the officer reasonably suspects that a person whose personal details are unknown to the officer has committed or is committing or is about to commit an offence, or may be able to assist in the investigation of an offence or a suspected offence.

The power to request a person's personal details has been incorporated into the TEP Act. By virtue of section 12 of the TEP Act, if a police officer reasonably suspects that a person whose personal details are unknown to the office is about the enter, is in, or has recently
left, a target area, is a target person, is in the company of a target person in suspicious circumstances, or is in a target vehicle, the officer may exercise the powers in section 16 of the CIIPA as if the person were reasonably suspected by the officer to be able to assist in the investigation of a suspected offence.

**Issue - 27**

*Should the CIA 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 CIIPA?*

**Issue - 28**

*Should any further ancillary powers be conferred on officers who detain persons at a place during a search?*

### 3.4 Covert search warrants

A police officer who executes a search warrant under the CIA is required to give the occupier notice of the search either before the search is carried out, or as soon as practicable after the place is entered.\(^{110}\) The occupier is also entitled to receive a copy of the search warrant.\(^{111}\) If the place that is entered is unoccupied, then the officer in charge must leave a notice about the search and copies of the warrant or other statutory authority.\(^{112}\)

A covert search warrant is, as the name suggests, a warrant authorising a place or vehicle to be entered and searched without the knowledge of the occupier of the place, or the person in charge of the vehicle.

Covert search warrants are sometimes called "delayed notification search warrants".\(^{113}\)

#### 3.4.1 Covert search warrants beyond the TEP Act

Covert search warrants are an important investigative tool for police officers in that they enable an investigation to be progressed without the knowledge of the person(s) under

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\(^{110}\) Section 32(2)(b) and (3) of the CIA.

\(^{111}\) Section 32(2)(c) and 32(3)(b) and 32(6) of the CIA.

\(^{112}\) Section 132(5) and (6) of the CIA.

\(^{113}\) Part IAAA of the Crimes Act (Cth).
investigation, so as to enable more evidence to be gathered before a person is charged with an offence or, in other cases, to exculpate a person from involvement in the commission of an offence.

Whilst some warrants permit entry to premises for a particular purpose (e.g. to install a surveillance device) for which entry is carried out covertly to avoid detection, these warrants do not authorise a covert search of the premises. However, if a person executing such a warrant observes something relevant to the commission of an offence, then what they have observed may ground the issue of a search warrant.

Currently, 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. Similar provisions for covert search warrants in relation to terrorist acts or terrorism offences exist in other Australian jurisdictions.114

However, in Queensland and New South Wales, the use of covert search warrants is not confined to terrorist acts or terrorism offences.115

Issue - 29

Should the CIA be amended to enable the covert search of a place or a vehicle under a covert search warrant by police officers or other public officers in circumstances other than those currently permitted by the TEP Act?

3.4.2 Applicants for covert search warrants

In Western Australia, under the TEP Act, a police officer must be authorised by the COP to apply for a covert search warrant, and only an authorised applicant may apply for a covert search warrant.116

In Queensland, under the PPR Act (Qld), a police officer of the rank of Inspector or above may apply to a Supreme Court Judge for a covert search warrant.117

114 Terrorism (Community Protection) Act 2003 (Vic); Police Powers and Responsibilities Act 2001 (Qld); Terrorism (Police Powers) Act 2002 (NSW); Terrorism (Emergency Powers) Act (NT); and Part IAAA of the Crimes Act (Cth).
115 PPR Act (Qld); CC Act (Qld); LEPR Act (NSW).
116 Sections 23(1) and 24(1) of the TEP Act.
In Queensland, under the CC Act (Qld), an authorised commission officer may apply for a covert search warrant with the chairperson’s approval. If the authorised commission officer is a police officer, then he or she must be of at least the rank of inspector.

In New South Wales, under the LEPR Act (NSW), a police officer must be authorised to make an application for a covert search warrant by a police officer holding the rank of Superintendent or above.

Issue - 30

Who should be able to apply for a covert search warrant?

3.4.3 Application of covert search warrants to places and vehicles

When the TEP Act was first enacted, a covert search warrant only applied in relation to a target place. However, as a result of amendments made by the Terrorism (Extraordinary Powers) Amendment Act 2015, covert search warrants now apply in relation to both target places and target vehicles.

A covert search warrant issued under the PPR Act (Qld) or the CC Act (Qld) applies in relation to a “place” (which includes premises, vacant land and a vehicle).

A covert search warrant issued under the LEPR Act (NSW) applies to “premises” (which includes any building, structure, vehicle, vessel or aircraft and any place, whether built on or not).

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117 Section 212 of the PPR Act (Qld).
118 Section 148(1) and (2) of the CC Act (Qld).
119 Section 148(2) of the CC Act (Qld).
120 Section 46C(1)(a) of the LEPR Act (NSW).
121 Section 212(1) of the PPR Act (Qld) and section 148 of the CC Act (Qld).
122 See the definition of “place” in the Dictionary in Schedule 6 of the PPR Act (Qld) and the definition of “place” in the Dictionary in Schedule 2 of the CC Act (Qld).
123 Section 47(3) of the LEPR Act (NSW).
124 See the definition of “place” in section 3 of the LEPR Act (NSW).
Should a covert search warrant apply to both places and vehicles?

3.4.4 Offences (other than terrorism) in relation to which a covert search warrant should be issued

A search warrant issued under section 41 of the CIA may be obtained in relation to an offence under a written law. However, given the nature of a covert search warrant, there is good reason to argue that such warrants should only apply to the most serious offences under Western Australian law.

In Queensland, an application for a covert search warrant under the PPR Act (Qld) may only be made to enter and search a place for evidence of a designated offence, organised crime or terrorism.

A "designated offence" means:

(a) an offence against any of the following provisions of the Criminal Code-
   (i) section 300,
   (ii) section 306,
   (iii) section 309, or
(b) another offence for which a person is liable, on conviction, to be sentenced to imprisonment for life if the circumstances of the offence involve-
   (i) a serious risk to, or actual loss of, a person’s life; or
   (ii) a serious risk of, or actual, serious injury to a person.

125 See the definition of "offence" in section 3(1) of the CIA.
126 Section 212(1) of the PPR Act (Qld).
127 Unlawful homicide.
128 Attempt to murder.
129 Conspiracy to murder.
130 See the definition of "designated offence" in the Dictionary in Schedule 6 of the PPR Act (Qld)
"Organised crime" means:

an ongoing criminal enterprise to commit serious indictable offences in a systematic way involving a number of people and substantial planning and organisation.  

In Queensland, under the CC Act (Qld), an application for a covert search warrant, may only be made in relation to the commission of "major crime". "Major crime" means:

(a) criminal activity that involves an indictable offence punishable on conviction by a term of imprisonment not less than 14 years; or
(b) criminal paedophilia; or
(c) organised crime; or
(d) terrorism; or
(e) something that is—

(i) preparatory to the commission of criminal paedophilia, organised crime or terrorism; or
(ii) undertaken to avoid detection of, or prosecution for, criminal paedophilia, organised crime or terrorism.

In New South Wales, an application for a covert search warrant under the LEPR Act (NSW) may only be made in relation to a "searchable offence". Section 46A of the LEPR (NSW) relevantly provides that a "searchable offence" in relation to a covert search warrant means a "serious offence." A "serious offence" means:

(i) any indictable offence punishable by imprisonment for a period of 7 or more years and that involves the following:

(ii) the supply, manufacture or cultivation of drugs or prohibited plants,

(iii) the possession, manufacture or sale of firearms within the meaning of the Firearms Act 1996,

(iv) money laundering,

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131 See the definition of "organised crime" in the Dictionary in Schedule 6 of the PPR Act (Qld).
132 See the definition of "criminal paedophilia" in the Dictionary in Schedule 2 of the CC Act (Qld).
133 See the definition of "organised crime" in the Dictionary in Schedule 2 of the CC Act (Qld).
134 See the definition of "major crime" in the Dictionary in Schedule 2 of the CC Act (Qld).
135 Section 47(3) of the LEPR Act (NSW).
(iv) car and boat rebirthing activities,
(v) the unauthorised access to, or modification or impairment of, computer data or electronic communications,
(vi) an activity involving theft carried out on an organised basis,
(vii) violence causing grievous bodily harm or wounding,
(viii) the possession, manufacture or supply of false instruments,
(ix) corruption,
(x) destruction of property,
(xi) homicide,
(xii) kidnapping,

(ii) any offence under Division 10 (Offences in the nature of rape, offences relating to other acts of sexual assault etc) of Part 3 of the Crimes Act 1900 punishable by imprisonment for a period of 7 or more years,
(iii) an offence under section 80D (Causing sexual servitude) or 80E (Conduct of business involving sexual servitude) of the Crimes Act 1900,
(iv) an offence under section 93FA (Possession, supply or making of explosives) of the Crimes Act 1900,
(v) an offence under Division 15 (Child Prostitution) or 15A (Child pornography) of Part 3 of the Crimes Act 1900,
(vi) an offence under section 308F (Possession of data with intent to commit serious computer offence) or 308G (Producing, supplying or obtaining data with intent to commit serious computer offence) of the Crimes Act 1900,
(vii) an offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting, an offence referred to in paragraphs (a)-(f).  

136 See the definition of "serious offence" in section 46A of the LEPR (NSW)
To which offences should the covert search warrant apply?

3.4.5 Persons who may issue a covert search warrant

Under the CIA, a JP may issue a search warrant. However, warrants that are highly intrusive in nature (such as surveillance device warrants) are generally issued by Judges of the Supreme Court rather than a JP.

There needs to be an appropriate level of judicial supervision relating to the issue of a covert search warrant because the occupier of the place or person in charge of the vehicle the subject of the covert search is not given prior notification of the covert search and may never be notified that a covert search took place. Accordingly, if police officers are to be given the power to apply for covert search warrants, consideration needs to be given to who should issue such warrants.

In Western Australia, under the TEP Act, covert search warrants are issued by a Supreme Court Judge. In Queensland and New South Wales, covert search warrants are also issued by a Supreme Court Judge. In addition, in New South Wales, a Supreme Court Judge must give their consent before being nominated for the purpose of issuing covert search warrants.

Who should issue the covert search warrant?

3.4.6 Hearings of applications for covert search warrants

Applications for covert search warrants under the TEP Act are heard in private.

In Queensland, under the PPR Act (Qld) and the CC Act (Qld), an application for a covert search warrant must be heard in the absence of anyone other than the following persons:

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137 Section 41(2) of the CIA.
138 Section 24(2) of the TEP Act.
139 Section 212(1) of the PPR Act (Qld); section 148(1) of the CC Act (Qld);
140 Section 46A of the LEPR Act (NSW).
the applicant, a monitor, someone the judge permits to be present and a lawyer representing any of these persons.141

In New South Wales, under the LEPR Act (NSW), an application for a covert search warrant must be dealt with by the Judge in the absence of the public.142

Issue - 34

Should applications for covert search warrants be heard in the same manner as applications for covert search warrants under the TEP Act?

3.4.7 Pre-requisites for issue of covert search warrant

Under the PPR Act (Qld), a Supreme Court Judge may issue a covert search warrant if satisfied that there are reasonable grounds for believing that evidence of a designated offence, organised crime or terrorism is at the place, or is likely to be taken to the place, within the next 72 hours.143

Under the CC Act (Qld), a Supreme Court Judge may issue a covert search warrant if satisfied that are reasonable grounds for believing that evidence of a major crime is at the place, or is likely to be taken to the place, within the next 72 hours.144

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 eligible applicant suspects on reasonable grounds 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.145 A Supreme Court Judge may issue a covert search warrant if satisfied that there are reasonable grounds for doing so.146

141 Section 213(1) of the PPR Act (Qld) and section 149 of the CC Act (Qld).
142 Section 76A of the LEPR Act (NSW).
143 Section 215(1) of the PPR Act (Qld).
144 Section 151(1) of the CC Act (Qld).
145 Section 47(2) of the LEPR Act (NSW).
146 Section 48(1) of the LEPR Act (NSW).
What should the prerequisites be for the issue of a covert search warrant?

3.4.8 Special considerations

Where a warrant is highly intrusive, the person issuing the warrant may be required to take into account special considerations in deciding whether or not to issue the warrant.

In Western Australia, under the TEP Act, in deciding whether the issue of a covert search warrant is justified, a judge must consider (but is not limited to considering) the following matters:147

(a) the nature and seriousness of the terrorist act or Commonwealth terrorist offences described in the application;

(b) whether there are alternative means of finding the thing or class of thing.

In Queensland, before deciding the application, the Judge must, in particular and being mindful of the highly intrusive nature of a covert search warrant, consider the following:148

a) the nature and seriousness of the suspected offence or terrorism/major crime;

b) the extent to which issuing the warrant would help prevent, detect or provide evidence of, the offence or terrorism/major crime;

c) the benefits derived from any previous covert search warrants, search warrants or surveillance warrants in relation to the relevant person or place;

d) the extent to which police officers investigating the matter have used or can use conventional ways of investigation;

e) how much the use of conventional ways of investigation would be likely to help in the investigation of the matter;

f) how much the use of conventional ways of investigation would prejudice the investigation of the matter;

g) any submission made by a monitor.149

147 Section 26(3) of the TEP Act.
148 Section 214 of the PPR Act (Qld) and section 150 of the CC Act (Qld).
149 Public Interest Monitor.
What special considerations (if any) should the person issuing the covert search warrant be required to take into account when deciding whether or not to issue such a warrant?

3.4.9 Conduct which is authorised by a covert search warrant

A covert search warrant issued under the TEP Act authorises the exercise of the following primary powers:

(i) to enter the target place or target vehicle;
(ii) to do so without the knowledge of, and without at the time advising, the occupier of the target place or person in charge of the target vehicle;
(iii) to impersonate another person for the purposes of executing the warrant;
(iv) to search the target place or target vehicle for, and to seize, the thing or class of thing described in the warrant;
(v) to seize any thing found that is not connected with a terrorist act or Commonwealth terrorist offence but which the officer reasonably suspects may be evidence relevant to a serious indictable offence;
(vi) to do a basic search or a strip search of any person who is in the target place or target vehicle when the warrant is being executed for any thing or class of thing described in the warrant;
(vii) if the warrant expressly so authorises —
   (i) to enter, but not to search, a place that adjoins or is near the target place or target vehicle and that is specified in the warrant;
   (ii) to remove a thing described in the warrant from the target place or target vehicle and replace it with a substitute;
   (iii) subject to subsection (11), to re-enter the target place or target vehicle to return any thing removed from, or to retrieve any thing substituted in, the place or vehicle when it was first entered under the warrant.\(^{150}\)

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\(^{150}\) Section 27(7) of the TEP Act.
A covert search warrant issued under the TEP Act also authorises the exercise of all or any of the following ancillary powers:

(a) to take into and use in the target place or target vehicle any equipment or facilities that are reasonably necessary in order to exercise any power under the warrant;

(b) to photograph or otherwise make a record of any thing in the target place or target vehicle;

(c) to conduct a forensic test in the target place or target vehicle or on any thing in it;

(d) to make reasonable use of any equipment, facilities or services in the target place or target vehicle in order to exercise any power under the warrant and for that purpose —
   (i) to order any occupier of the place, or person in charge of the vehicle, to do anything reasonable to facilitate that use; and
   (ii) to operate the equipment or facilities;

(e) in order to search for any record or other data —
   (i) to operate any device or equipment in the target place or target vehicle that is needed to gain access to, recover, or make a reproduction of, the record or data; and
   (ii) to access and operate any device or equipment that holds, records or processes data and to exercise the powers to copy and seize the records or data set out in the Criminal Investigation Act 2006 section 148;

(f) if the officer reasonably suspects it is necessary to do so to protect the safety of any person, including the officer, who is in or near the target place or target vehicle when the warrant is being executed —
   (i) to detain a person who is in the place or vehicle;
   (ii) to do a basic search or a strip search of a person who is in the place or vehicle;
   (iii) to order a person to leave the place or vehicle or its vicinity;
   (iv) to order a person not to enter the place or vehicle or its vicinity;
(v) to seize and retain any weapon or other thing in the place or vehicle that could endanger a person, while the warrant is being executed. 151

Under the PPR Act (Qld) and the CC Act (Qld), a covert search warrant authorises the police officer/commission officer (as the case may be) to whom it is issued to, to exercise the following covert search warrant powers:

a) power to enter the place stated in the warrant ("the relevant place"), covertly or through subterfuge, as often as is reasonably necessary for the purposes of the warrant and stay at the place for the time reasonably necessary;

b) power to pass over, through, along or under another place to enter the relevant place;

c) power to search the relevant place for anything sought under the warrant;

d) power to open anything at the relevant place that is locked;

e) power to seize a thing or part of a thing found at the relevant place that the commission officer reasonably believes is evidence of the commission of a designated offence or an offence relating to organised crime or terrorism/major crime stated in the warrant;

f) power to photograph anything the police officer/commission officer reasonably believes may provide evidence of the commission of a designated offence or an offence relating to organised crime or terrorism/major crime stated in the warrant; and

g) power to inspect or test anything found at the place. 152

Under the PPR Act (Qld), a covert search warrant also authorises the exercise of the powers contained in section 219(2) if authorised under the warrant, namely:

(a) power to take a thing, or part of a thing, seized under the warrant, as a sample, to a place with appropriate facilities for testing the thing for evidence of the commission of the designated offence or organised crime or of terrorism to which the warrant relates;

151 Section 27(8) of the TEP Act.
152 Section 219(1) of the PPR Act (Qld) and section 212 of the CC Act (Qld)
(b) power to do any of the following in relation to a vehicle a police officer enters under the warrant if the police officer reasonably suspects the vehicle has evidence of the commission of the designated offence or organised crime or of terrorism to which the warrant relates in or on it—

(i) seize the vehicle;
(ii) take the vehicle to a place with appropriate facilities for searching the vehicle;
(iii) remove walls, ceiling linings, panels or fittings of the vehicle for the purpose of searching the vehicle;
(iv) search the vehicle for evidence of the designated offence or organised crime or of terrorism to which the warrant relates.

Under the LEPR Act (NSW), a covert search warrant authorises any executing officer to:

a) enter the subject premises;
b) search the premises for things connected with a particular searchable offence in relation to the warrant;
c) conduct the entry and search of the premises without the knowledge of any occupier of the subject premises;
d) if necessary to do so to enter and search the subject premises, enter premises adjoining or providing access to the subject premises ("adjacent premises") without the knowledge of the occupier of the adjacent premises;
e) impersonate another person for the purposes of executing the warrant; and
f) do anything else that is reasonable for the purpose of concealing anything done in the execution of the warrant from the occupier of the premises.\textsuperscript{153}

A person executing a covert search warrant under the LEPR Act (NSW) may seize and detain a thing (or a thing of a kind) mentioned in the warrant and other things found in the course of executing the warrant, which are believed to be connected with any offence.\textsuperscript{154} If a covert search warrant authorises the placing of a kind of thing in substitution for a seized

\textsuperscript{153} Section 47A of the LEPR Act (NSW).
\textsuperscript{154} Section 49(1) of the LEPR Act (NSW).
thing, then the power to seize and detain includes a power to place a thing of that kind on
the subject premises in substitution for the thing seized. Further, if a covert search warrant
authorises the return of a thing seized, or retrieval of a thing placed under section 49, then
the subject premises may be re-entered for the purpose of returning or retrieving the
thing.\textsuperscript{155}

Issue - 37

\textbf{What should a covert search warrant authorise?}

\textbf{3.4.10 Time for execution of covert search warrant}

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{156}

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

Under the TEP Act, a covert search warrant may be exercised at any time of the day or night
unless it is expressly provided otherwise.\textsuperscript{157}

In Queensland and New South Wales, a covert search warrant may be executed at any time
of the day or night.\textsuperscript{158}

Issue - 38

\textbf{When should a covert search warrant be able to be executed?}

\textbf{3.4.11 Duration of covert search warrant}

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: to ensure

\textsuperscript{155} Section 49A of the LEPR Act (NSW).
\textsuperscript{156} Section 43(6) of the CIA.
\textsuperscript{157} Section 27(3) and clause 1 of Schedule 1 of the TEP Act.
\textsuperscript{158} 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).
that no one is in the place or vehicle which is the subject of the proposed covert search; and to minimise other people observing their covert entry and search so as to prevent those people from informing the occupier of the place or the person in charge of the vehicle.

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.\(^{159}\) A covert search warrant ceases to be in force on the expiry date specified in the warrant, or when it is executed.\(^{160}\) 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.

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.\(^ {161}\) The warrant may be extended.\(^ {162}\) The warrant remains in force until the earlier of the following: the day stated in the warrant, or when the initial search is complete.\(^ {163}\) 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.\(^ {164}\)

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.\(^ {165}\)

**Issue - 39**

**For how long should a covert search warrant last?**

**3.4.12: Audiovisual recordings of the execution of covert search warrant**

An audiovisual recording must be made of the execution of a search warrant issued under the CIA, if reasonably practicable.\(^ {166}\)

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\(^{159}\) Section 26(5)(h) of the PPR Act (Qld).
\(^{160}\) Section 27(10) of the PPR Act (Qld).
\(^{161}\) Sections 215(1) of the PPR Act (Qld) and section 152(f) and 153(1) of the CC Act (Qld).
\(^{162}\) Section 217(2) of the PPR Act (Qld) and sections 153(2) of the CC Act (Qld).
\(^{163}\) Section 217(1) of the PPR Act (Qld) and section 153(1) of the CC Act (Qld).
\(^{164}\) Section 217(4) of the PPR Act (Qld).
\(^{165}\) Section 152 of the LEPR Act (NSW).
\(^{166}\) Section 45(2) of the CIA.
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.

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

Issue - 40

**Should there be a requirement to make an audiovisual recording of the execution of a covert search warrant?**

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

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.  

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.

In New South Wales, under the LEPR Act (NSW), an application for a covert search warrant is to be dealt with in the absence of the public. Further, it is an offence to intentionally or recklessly publish an application for a covert search warrant, a report prepared under

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167 Section 216(e) of the PPR Act (Qld) and section 152(e) of the CC Act (Qld).
168 Section 29(2) of the TEP Act.
169 Section 218(1) of the PPR Act (Qld) and section 154(1) of the CC Act (Qld).
170 Section 218(2) of the PPR Act (Qld) and section 154(2) of the CC Act (Qld).
171 Section 218(3) of the PPR Act (Qld) and section 154(3) of the CC Act (Qld).
172 Section 76A of the LEPR Act (NSW).
section 74 or 74A, an occupier's notice or any information derived therefrom except as permitted in section 76B(1).\textsuperscript{173}

Issue - 41

\textbf{What restrictions should apply to access to, and the publication of records relating to covert search warrants?}

\subsection*{3.4.14 Notification of occupiers or other persons}

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. This means the occupier of the place or the person in charge of a vehicle may never know of the covert search unless, for example, they are charged with an offence and evidence as to what was found during a covert search is relevant to the charge.

In Queensland, there is no requirement under either the PPR Act (Qld) or the CC Act (Qld), which requires an occupier to be given notice of the covert search warrant.

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.\textsuperscript{174} 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.\textsuperscript{175}

\begin{flushright}
\textsuperscript{173} Section 76B(1) of the LEPR Act (NSW).
\textsuperscript{174} Section 67A of the LEPR Act (NSW).
\textsuperscript{175} Section 67B(4) of the LEPR Act (NSW).
\end{flushright}
Should the occupier of a place or the person in charge of a vehicle be notified that the place or vehicle has been the subject of a covert search warrant? If so, when?

3.4.15 Reporting requirements

In Western Australia, under the TEP Act, a police officer, or a replacement police officer, must provide a written report about the execution of a 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 TEP Act, the COP must provide an annual report to the Minister of Police about covert search warrants.

In Queensland, under the PPR Act (Qld), a police officer to whom a covert search warrant is issued, or who is primarily responsible for executing the warrant, must make a report to the Supreme Court Judge who issued the warrant, or to the public interest monitor as stated in the warrant. The report must be made within 7 days after the warrant is executed.

In Queensland, under the CC Act (Qld), a commission officer to whom a covert search warrant is issued must make a report to the Supreme Court Judge who issued the warrant and a monitor, containing information required under a regulation. The report must be

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176 Section 28 of the TEP Act.
177 Section 28(3A) and (3B) of the TEP Act.
178 Section 28(2) of the TEP Act.
179 Section 30 of the TEP Act.
180 Sections 216(g) and 220(1) and (2) of the PPR Act (Qld).
181 Section 220(3) of the PPR Act (Qld).
182 Section 156(1) of the CC Act (Qld).
made within 7 days after the warrant is executed or, if that is impracticable because of the unavailability of the Judge, as soon as practicable after the warrant is executed.  

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. The report must contain the matters set out in section 74A(1) of the LEPR Act and be provided within 10 days after the execution or the warrant, or the expiry of the warrant (whichever occurs first). 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 contain the matters set out in section 74A(3) and be provided within 10 days after entry to the premises.

Issue - 43

**Should there be a requirement to lodge a report relating to the execution of a covert search warrant? If so, with whom?**

### 3.4.16 Taking seized things and photographs before the person who issues the covert search warrant

Part 13 of the CIA applies to, and in respect of, the seizing of a thing that is relevant to an offence. Clauses 6-8 of Schedule 1 to the TEP Act apply to the seizure of things under the TEP Act.

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. The Judge may then make orders relating to the seized items and photographs (e.g. 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).

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183 Section 156(2) of the CC Act (Qld).
184 Section 74A(2) of the LEPR Act (NSW).
185 Section 74A(4) of the LEPR Act (NSW).
186 Section 220(5) of the PPR Act (Qld) and section 156(3) of the CC Act (Qld).
187 Section 220(6) of the PPR Act (Qld) and section 156(4) of the CC Act (Qld).
Issue - 44

Should there 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?
Chapter 4: Audiovisual Recordings by Police Officers

4.1 Recordings and photographs under the CIA

As a general rule a person can photograph or make a recording of what they can see without it being actionable. Some of the exceptions to that general rule might include where the taking of photographs or the making of a recording constituted a criminal offence, a breach of copyright, a breach of confidence, trespass, defamation or nuisance.

In Western Australia, the Criminal Code create various offences relating to persons who indecently record children or incapable persons and the SD Act creates various offences relating to the use of surveillance devices to record private activities and private conversations.

There is no general power in the CIA for police officers to use a camera to make recordings of images and/or sounds while the officer is performing the functions of his or her office, whether under the CIA or under another law.

The CIA sets out a number of circumstances in which persons exercising powers under that Act are permitted or required to photograph, or make an audiovisual recording. These are set out below.

Matters which must be recorded

An audiovisual recording must be made of the execution of a search warrant under the CIA, but only if reasonably practicable. However, there are no similar requirements in relation to the carrying out of a search of a place or a vehicle without a warrant under Division 3 of Part 12 of the CIA.

There are a number of provisions in the CIA, which require police officers to make audiovisual recordings of the making of a request and the giving of information.

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188 **Raciti v. Hughes** (Unreported, Supreme Court of NSW, 3667 of 1995 at 6 per Young J.
189 Sections 320(6), 321(6), 322(6), 330(6) and 329(6) of the Criminal Code. See also the definition of "indecently record" in section 319 of the Criminal Code.
190 Sections 5(1) and 6(1) of the SD Act.
191 The definition of "photograph" in section 3 of the CIA includes a digital image and a moving visual record.
192 Section 45(2) of the CIA.
193 See, for example, sections 85 and 93 of the CIA.
It is not mandatory to make an audiovisual recording of an admission made by a suspect charged with an indictable offence. However, the operation of section 118 of the CIA effectively makes the requirement for an audiovisual recording mandatory if it is desired to submit the admission into evidence against the person.

**Matters which may be recorded**

One of the ancillary powers available in relation to the execution of a search warrant is the power to photograph, or otherwise make a record of, a target thing that is in the target place.\(^{194}\) This ancillary power may also be exercised in relation to the search without warrant of a public open area\(^ {195}\) and in a protected forensic area established at a place that is not a public open area, with the prior approval or a senior officer.\(^ {196}\)

Further, if under the CIA a person may do a forensic examination on a thing relevant to an offence or a sample of such a thing, then the person may, *inter alia*, photograph, measure or otherwise make a record of it.\(^ {197}\) A forensic examination may be carried out in the exercise of powers relating to the search of person for: things relevant to offences\(^ {198}\) ; things relevant to prohibited behaviour orders\(^ {199}\); and things relevant to interim control orders or control orders.\(^ {200}\)

If a person ("the searcher") is authorised to do a basic search on a person, the search may also photograph part or all of the search while it is being done.\(^ {201}\) If the searcher is authorised to do a strip search on a person, then the searcher may also photograph any thing that may be lawfully seized in the position it is found on the person's body.\(^ {202}\)

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194 Section 44(2)(c) of the CIA.
195 Section 33(1) of the CIA.
196 Section 47(3) of the CIA.
197 Section 21(1)(b) of the CIA.
198 Section 68(2)(c) of the CIA.
199 Section 69A of the CIA.
200 Section 69B of the CIA.
201 Section 65(3) of the CIA.
202 Section 65(4)(b) of the CIA.
A person who is authorised under the CIA to do a non-intimate forensic procedure on a person may 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.\textsuperscript{203}

A person who is authorised under the CIA to do an intimate forensic procedure on a person may photograph any relevant thing in the position it is found on the person’s external private parts.\textsuperscript{204}

A person who is authorised under the CIA to do an internal forensic procedure may photograph any relevant thing in the position it is found in the person’s internal parts, or orifices.\textsuperscript{205}

\subsection*{4.2 Impact of the SD Act}

The SD Act regulates, \textit{inter alia}, the use of listening devices in respect of private conversations and optical surveillance devices in respect of private activities.\textsuperscript{206} The SD Act binds the Crown.\textsuperscript{207}

Section 5(1) of the SD Act prohibits the installation, use and maintenance of listening devices to record, monitor or listen to private conversations in certain circumstances. Section 6(1) of the SD Act prohibits the installation, use and maintenance of optical surveillance devices to record visually or observe a private activity in certain circumstances. Section 9 of the SDA prohibits a person from publishing or communicating a private conversation, or a report or record of a private conversation, or a record of a private activity that has come to the person’s knowledge as a direct or indirect result of the use of a listening device or an optical surveillance device. There are exceptions to each of the prohibitions.

A body worn camera records both sound and vision, which means that it is both an optical surveillance device and a listening device\textsuperscript{208}. Therefore, police officers using body worn cameras must ensure that their use does not contravene the provisions of the SD Act.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{203} Section 74(2)(e) of the CIA.
\item \textsuperscript{204} Section 75(2)(e) of the CIA.
\item \textsuperscript{205} Section 76(2)(d) of the CIA.
\item \textsuperscript{206} See sections 5 and 6 of the SD Act.
\item \textsuperscript{207} Section 4(1) of the SD Act.
\end{itemize}
\end{footnotesize}
4.3 Trespass

A police officer who takes photographs or video on private premises may commit a trespass, unless the occupier of the premises expressly or impliedly consents to that conduct, or the police officer is authorised by law to perform that conduct.

Police officers, like any other person, have an implied licence to enter private premises. The implied licence may be revoked (e.g. by signs etc.). However, there is a question as to whether the scope of an implied licence to enter private premises extends to the filming of activities on those premises.

In some cases, premises have signs which make it clear that filming is not permitted on the premises. Any implied licence to enter such premises would clearly not extend to the filming on the premises.

In *Slaveski v State of Victoria*, officers of the Victorian Police executed a search warrant at the plaintiff’s shop following the plaintiff’s arrest. The police officers took video footage and photographs of the search. The primary purpose of the filming was to create a record of the arrest and execution of the search warrant, in order to avoid or minimise complaints about the conduct of the police on that date. The footage of the shop was also to be used as a means of gathering intelligence for possible use in future police operations. It was also accepted that the footage might be used as evidence in any prosecution of the plaintiff, or in the defence of civil proceedings that might be instigated by the plaintiff. The plaintiff commenced civil action against the State for various torts, including trespass to land and trespass to goods. Kyrou J held that footage taken for the proper purpose of creating a

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208 See the definitions of "listening device" and "optical surveillance device" in section 3(1) of the SD Act. See also section 3(2) of the SD Act.
211 See *TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82; *TV3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720; *Lincoln Hunt Australia Pty Ltd v Willessee* (1986) 4 NSWLR 457.
record of the lawful execution of the warrant (i.e. the footage which depicted activities, objects of parts of the plaintiff’s shop that were incidental to the exercise of the express powers in the warrant), was lawful.\(^\text{213}\)

4.4 Trial of body worn cameras

In 2016, the Evidence Based Policing Team of WA Police commenced a trial of the use of body worn cameras by police officers in Bunbury and Perth. The trial is due to run for six months and will be assessed to see whether there is enough evidence to support the roll-out of the cameras to other parts of the State.\(^\text{214}\)

The use of the body worn cameras is subject to specific guidelines. In particular, officers must ensure that they do not act in contravention of the SD Act, or commit an act of trespass.

4.5 Legislation in other jurisdictions

In New South Wales and Queensland, legislation has been enacted to facilitate the use of body worn cameras by police officers.

Section 7(1) of the SD Act (NSW) prohibits the installation, use and maintenance of listening devices to overhear, record, monitor or listen to private conversations in certain circumstances. Section 8(1) of the SD Act (NSW) prohibits the installation, use and maintenance of optical surveillance devices to record visually or observe the carrying out of an activity in certain circumstances. However, these prohibitions do not apply to “the use, in accordance with section 50A, of body-worn video by a police officer.”\(^\text{215}\)

Section 50A of the SD Act (NSW) provides:

\[
(1) \text{The use of body-worn video by a police officer is in accordance with this section if:}
\]

\[
(a) \text{the police officer is acting in the execution of his or her duty, and}
\]

\[
(b) \text{the use of the body-worn video is overt, and}
\]

\(^{213}\) At [1375].
\(^{214}\) See the entry on body worn video trial on the WA Police website at www.police.wa.gov.au
\(^{215}\) See sections 7(2)(g) and 8(2)(f) of the SD Act (NSW)
(c) if the police officer is recording a private conversation, the police officer is in uniform or has provided evidence that he or she is a police officer to each party to the private conversation.

(2) Without limiting the ways in which the use of a body-worn video may be overt for the purposes of subsection (1), the use of body-worn video is overt once the police officer informs the person who is to be recorded of the use of body-worn video by the police officer.

(3) The use of body-worn video by a police officer is also in accordance with this section if:
   (a) it is inadvertent or unexpected; or
   (b) it is incidental to the use of body-worn video by the police officer in the circumstances set out in subsection (1).

Section 43(1) of the IOP Act (Qld) prohibits the use of a listening device to overhear, record, monitor or listen to a private conversation in certain circumstances. Section 43(1) of the IOP Act (Qld) does not apply to, or in relation to, the use of a listening device by a police officer or another person under a provision of an Act authorising the use of a listening device. Surveillance device warrants are dealt with in Chapter 13 of the PPR Act (Qld).

A new provision has now been inserted into the PPR Act (Qld) relating to body worn cameras. Section 609A of the PPR Act (Qld) provides:

(1) It is lawful for a police officer to use a body-worn camera to record images or sounds while the officer is acting in the performance of the officer's duties.

(2) Use of a body-worn camera by a police officer under subsection (1) includes use that is:
   (a) inadvertent or unexpected; or
   (b) incidental to use while acting in the performance of the officer's duties.

(3) Subsection (1) does not affect an ability the police officer has at common law or under this Act or another Act to record images or sounds.

(4) To remove any doubt, it is declared that subsection (1) is a provision authorising the use by a police officer of a listening device, for the purposes of the Invasion of Privacy Act 1971, section 43(2)(d).
(5) In this section:

body-worn camera means a device:

(a) worn on clothing or otherwise secured on a person; and
(b) designed to be used to:

(i) record images; or
(ii) record images and sounds.

A suggested draft provision for inclusion in the CIA is set out below:

(1) In this section:

body-worn camera means a device:

(a) worn on clothing or otherwise secured on an officer; and
(b) designed to be used to:

(i) record images;
(ii) record sounds; or
(iii) record both images and sounds.

(2) Subject to subsections (4) and (5), an officer may use a body-worn camera to record images or sounds or to record both images and sounds while the officer is performing the functions of his or her office whether under this Act or any other law.

(3) Use of a body-worn camera by an officer under subsection (2) includes use that is:

(a) inadvertent or unexpected; or
(b) incidental to use while the officer is performing the functions of his or her office.

(4) If reasonably practicable, an officer must inform any person being recorded that the officer is wearing a body-worn camera and that the person is being recorded.

(5) If another provision of this Act permits or requires an officer to take a photograph or make a recording, then the officer may use a body-worn camera to take the photograph or make the recording.

(6) Subsection (2) does not affect an ability an officer has under another law to record images or sounds or both images and sounds.

(7) The power contained in subsection (2) applies:
(a) notwithstanding anything to the contrary in the Surveillance Devices Act 1998 or any other law;

(b) where the officer is in or on:

   (i) a vehicle;

   (ii) a public place; or

   (iii) a place which is not a public place; and

(c) whether or not:

   (i) any person being recorded; or

   (ii) the occupier of the place or vehicle in relation to which the body worn camera is being used.

   has given their consent to the recording.

(8) Sections 9 and 10 of the Surveillance Devices Act 1998 do not apply to an officer who uses a body-worn camera in accordance with subsection (2).

Issue - 45

Should a provision be inserted into the CIA to facilitate the use of body worn cameras by police officers?
Chapter 5: Protected Forensic Areas

Part 5 Division 4 of the CIA deals with the establishment of a PFA.

Sections 39(1)(f), 40(2) and 44(2)(f) of the CIA authorise officers to establish a PFA under section 46 of the CIA around or in a vehicle, or in relation to a place (whether or not the place is a public open area). Section 46 sets out how a PFA is established and section 47 confers powers on officers in relation to a PFA. Sections 48 and 49 deal with the continuance of a PFA and the review of a PFA by the Magistrates Court respectively.

The purpose of a PFA is to protect the integrity of a vehicle or place, which is linked to a criminal offence. The establishment of a PFA is designed to serve two key ends. First, to prevent evidence of a thing relevant to an offence from being concealed or disturbed until the vehicle or area has been properly inspected or examined and, second, to protect the safety of a person.

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

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. The role of such an officer is not specified in the CIA, however, it is assumed that this officer is required to guard the PFA or liaise with any person who may be affected by the establishment of a PFA.

An issue has been raised as to whether the officer who is required to remain in the area is able to take reasonable measures under section 47(2) of the CIA. Section 47(2) provides that while a PFA is established, an officer at the area may take reasonable measures, including giving orders, for the purposes specified in paragraphs (a) to (g) inclusive of that subsection.

The officer who is subject to the obligation in section 46(5) is clearly an officer at the area. Accordingly, that officer may exercise the powers in section 47(2), since those powers may only be exercised by an officer at the area.
5.2 Whether other persons should be able to undertake the obligation to remain at a PFA.

Apart from the general principle that the PFA should be competently guarded by a person or persons for the duration of the PFA, there would appear to be little or no need for the person guarding a PFA to be an officer involved in the investigation. In most cases, the officers involved in the investigation are generally carrying out other investigative tasks that run parallel to the duration of the PFA, and it is highly inefficient to have one of the officers involved in the investigation remain at the area while the PFA is established.

It has been suggested that once an officer establishes a PFA, a person other than an officer involved in the investigation should be able to guard the PFA (that is, exercise the powers in section 47(2) of the CIA). It is not suggested that such persons be able to exercise the powers in section 47(3). It has been suggested that an employee of the Police Department (rather than a member of the Police Force) or a private contractor are persons who could guard a PFA.

Section 12 of the CIA permits an officer to delegate a function to "another officer" (namely, a police officer or a public officer appointed under a written law to an office that is prescribed under section 9(1)\(^\text{216}\)). However, it would seem that the power to delegate cannot be used to override the requirement in section 46(5) of the CIA that the officer who established the investigation, or another officer involved in the investigation, must remain at the PFA.

Further, there is no power in the CIA to enable the COP or another CEO of a Government Department to engage private contractors to exercise any of the powers in the CIA.

There is some merit in allowing persons other than officers involved in an investigation to guard a PFA. The key reason is to enable officers who are involved in the investigation to be more appropriately and efficiently utilised to carry out investigative tasks rather than guarding a PFA.

\(\text{216} \) See the definitions of "officer" and "public officer" in section 3 of the CIA.
If a person, other than an officer involved in the investigation, is able to fulfil the obligation that a person remain at the scene, then it would be necessary for them to exercise the powers under section 47(2). Otherwise, it would be necessary for an officer at the area to exercise the powers.

It is noted that some tasks historically performed by police officers are now performed by employees of the Department or contractors. For example, the CEO of Corrective Services may enter into a contract with a person in the private sector for the provision of court security. Further, employees of the Police Service are able to deal with firearms and ammunition in the course of their duties in the same way as members of the Police Force (and in such capacity are exempt from the requirement to have a firearms licence).

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217 Section 18 of the Court Security and Custodial Services Act 1999 (WA).
218 Section 8(1)(d)(ii) of the Firearms Act 1973 (WA).
Issue - 46

Should section 46 of the CIA be amended to allow an officer not otherwise involved in the investigation (for example, an employee of the Police Service or another Department or a contractor) to be the person who is required to remain at the area established as a PFA?

Issue - 47

Should section 47 of the CIA be amended to allow an officer not otherwise involved in the investigation (for example, an employee of the Police Service or another Department or a contractor) to exercise the powers in section 47(2)?

Issue - 48

Should the COP, or the CEO of another Government Department whose officers may establish a PFA, be given the power to engage private contractors to perform the functions in section 46(5) and 47(2) of the CIA?

5.3 Remotely piloted aircraft and PFAs

Another issue which has been raised is 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.

There are two key concerns:

1) the remotely piloted aircraft may crash into the PFA and contaminate or disturb the PFA, or injure persons within the PFA;

2) 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.

219 The term “remotely piloted aircraft” replaced the term “unmanned aerial vehicle” by virtue of the Civil Aviation Legislation Amendment (Part 101) Regulations 2016 (Cth).

220 The privacy of a victim should be protected: see the requirement in schedule 1 clause 5 to the Victims of Crime Act 1994 (WA).

221 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.
In a news article published in 2016 it was reported that the operator of a drone was fined $850 after flying the drone over a police operation in Melbourne, which drone hit a power line and almost landed on a police officer.222

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). Amendments recently made to Part 101, which took effect on 29 September 2016, relax the requirements for the operation of remotely piloted aircraft.223 This has resulted in a rapid uptake in the operation of such aircraft.

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 inconsistent with the Commonwealth legislation224 (for example, a direction prohibiting all aircraft from flying in the airspace above a PFA).

Section 47(7) of the CIA makes it an offence for an unauthorised person to enter a PFA, without a reasonable excuse. Further, 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 or the investigation at the PFA.225 The maximum penalty for the each of the offences in section 47 is a fine of $12 000 and imprisonment for 12 months.

It has been suggested that section 47 of the CIA should be amended to make it an offence for an unauthorised person to use remotely piloted aircraft to take a photograph (which term is defined to include "a digital image and a moving visual record")226 of a PFA, or any person or thing in the PFA.

222 "Australia drone laws to be relaxed this year but experts warn of safety threat" reported on 9 April 2016 at www.news.com.au.
224 By virtue of the operation of section 109 of the Commonwealth Constitution.
225 See the definition of "authorised" in section 47(1) of the CIA.
226 See the definition of "photograph" in section 3(1) of the CIA.
Issue - 49

*Should a new offence be inserted into section 47 of the CIA which makes 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?*

Issue - 50

*Should the penalty for such an offence be the same as for an offence contrary to section 47(7) or (8) of the CIA?*
Chapter 6: Disclosure of Information

6.1 Disclosure of confidential information to Western Australia Police

Duties of confidentiality
The disclosure of information held by a person is generally governed by whether or not the information is held subject to any duties of confidentiality, which may prohibit, or impose restrictions on, the use, recording or disclosure of that information. A duty of confidentiality may arise by statute, under contract, or in equity.

Statutory duty of confidentiality
A duty of confidence may arise in consequence of a statutory provision, which prohibits disclosure of information, except in the limited circumstances specified in the statute.

Statutory confidentiality provisions often have a number of features in common. In general, each provision stipulates:

1) the person(s) to whom the provision applies;
2) the information to which the provision applies;
3) a prohibition on certain activities or actions in relation to that information (usually relating to "use", "recording" and "disclosure");
4) particular exceptions to the prohibition on the use or disclosure of the information such as:
   a) recording, use or disclosure with the consent of the person to whom the information relates
   b) recording, use or disclosure under the statute in question or another law
   c) recording, use or disclosure with the authority of a particular person such as the Chief Executive Officer or Minister
   d) recording, use or disclosure in prescribed circumstances
   e) the divulging of statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates.

Disclosure of information subject to a statutory duty of confidence otherwise than in accordance with the statutory provision, may constitute a criminal offence.
Contractual duty of confidence

Some contracts contain confidentiality clauses, which bind the parties to the contract. In other cases, a duty of confidentiality may be an implied term of a contract. A party who or which breaches a confidentiality clause in a contract will be in breach of contract.

Duty of confidence in equity

A duty of confidence can also arise in equity. An equitable duty of confidence will arise where the information has the "necessary quality of confidence about it" and, the circumstances in which the confidential information was communicated or obtained give rise to an obligation of confidence. For example, the relationship between a health professional and his or her patient is a relationship which gives rise to a duty of confidence.

Information subject to an equitable duty of confidence cannot be used for a purpose which is inconsistent with the purpose for which the information was provided or obtained.

There are a number of defences to actions for a breach of confidentiality. These include: consent; disclosure permitted or required by law; and disclosure in the public interest.

6.1.1 Provision permitting disclosure of confidential information to a police officer

In Western Australia it is not an offence to fail to report the commission of an offence to the WA Police. By way of contrast, in Victoria misprision of felony is an offence and, in Tasmania, it is an offence to fail to report the killing, or a planned killing, of a person to a proper authority.

The ability of officers of the WA Police Force to perform their functions of preventing and investigating criminal offences, depends to a great extent on the provision of information to police officers.

The provision of confidential information may assist the WA Police in determining: whether action is required to prevent a criminal offence; whether an investigation into a criminal offence is required; and what level of resources should be allocated to a particular

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227 Moorgate Tobacco Co Ltd v Philip Morris Ltd (1984) 156 CLR 414 at 438 per Deane J.
228 Section 162A of the Criminal Code 1924 Schedule (Tas).
investigation. For example, information from hospital staff about the nature and extent of injuries sustained by the victim(s) of a motor vehicle accident, (in circumstances where the victim(s) cannot consent to the disclosure of the information because of their injuries), will assist police officers in determining whether the Major Crash Unit needs to conduct an investigation into the incident.

The provision of confidential information would also enable police officers to provide appropriate care to persons in police custody. It is noted that the State Coroner has recently 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.*

Police officers are able to obtain access to confidential documents (e.g. medical records) by means of a warrant or a notice to produce. However, in some cases, confidential information may not be in a form in which it may be seized or produced (i.e. because it has not been reduced to a written or electronic form). In other cases, police may not be aware of the existence of the confidential information so as to be able to obtain a search warrant to seize that information.

There are a number of statutory provisions permitting or requiring the disclosure of confidential information to a police officer, the COP or the WA Police Force. However, the provisions are ad hoc. For example:

**Children**

- The CEO of the Department of Child Protection and Family Services (“DCPFS”) must give copies of mandatory reports of sexual abuse to the Commissioner of Police.

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229 Recommendation 5 of the Findings in relation to the Inquest into the Death of Ms Dhu. The findings were delivered on 16 December 2016.

230 Section 124D of the *Children and Community Services Act 2004* (WA).
• The CEO of DCPFS or an authorised officer may disclose relevant information to WA Police.231 "Relevant information" includes information that, in the opinion of the CEO, is, or is likely to be, relevant to the wellbeing of a child or a class or group of children or the safety of a person who has been subjected to, or exposed to, one or more acts of family and domestic violence.232

• The CEO of a prescribed authority may disclose relevant information to the Police Force of Western Australia233 "Relevant information" includes information that is, or is likely to be, relevant to the wellbeing of a child or a class or group of children or the safety of a person who has been subjected to, or exposed to, one or more acts of family and domestic violence.234

Health information

• The disclosure of information subject to the duty of confidentiality in section 219 of the Health Services Act 2016 (WA) and section 576 of the Mental Health Act 2014 (WA), is authorised if the information is disclosed in good faith for the purposes of the investigation of a suspected offence or disciplinary matter, or the conduct of proceedings against a person for an offence or disciplinary matter.235

• The CEO of the Mental Health Commission may disclose relevant information to a State authority.236 "Relevant information" includes information that, in the CEO’s opinion, is or is likely to be relevant to: the health, safety or wellbeing of a person who has or may have a mental illness; or the safety of another person with respect to which there is a serious risk because of a person who has or may have a mental illness.237

231 Section 23(2) of the Children and Community Services Act 2004 (WA).
232 See the definition of "relevant information" in section 23(1) of the Children and Community Services Act 2004 (WA).
233 Section 28B(1) of the Children and Community Services Act 2004 (WA). See also the definition of "prescribed authority" in section 28A of the Children and Community Services Act 2004 (WA) and regulation 20(la) of the Children and Community Services Regulations 2006.
234 See the definition of "relevant information" in section 28A of the Children and Community Services Act 2004 (WA).
235 Section 220(1)(g) of the Health Services Act 2016 and section 577(1)(f) of the Mental Health Act 2014.
236 Section 572(2) of the Mental Health Act 2014.
237 See the definition of "relevant information" in section 572(1) of the Mental Health Act 2014.
• The CEO of a prescribed State authority (the disclosing CEO) may disclose relevant information to the CEO of another prescribed State authority. The Police Force of Western Australia is a prescribed State authority. "Relevant information" includes information that, in the opinion of the disclosing CEO is, or is likely to be, relevant to: the health, safety or wellbeing of a person who has or may have a mental illness; or the safety of another person with respect to which there is a serious risk because of a person who has or may have a mental illness.

Information about a death

• A person must report a death that is or may be a reportable death to a coroner or a member of the Police Force immediately after he or she becomes aware of the death, unless the person has reasonable grounds to believe that the death has already been reported. A “reportable death” means, inter alia, a Western Australian death "that appears to have been unexpected, unnatural or violent or to have resulted, directly or indirectly, from injury.

Incidents involving vehicles

• If a vehicle is involved in an incident occasioning bodily harm, or an incident in which any property is damaged, then the driver must report the incident to the office in charge of a police station.

Firearms and weapons

• A health professional may, in good faith, inform the COP if he or she is the opinion that:
  a) because of the patient’s physical, mental, or emotional condition, it is not in the person’s interest or not in the public interest that the person possess any firearm or ammunition to which the patient is believed to have access; or

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238 Section 573(2) of the Mental Health Act 2014.
239 See section 573(1) of the Mental Health Act 2014 and regulation 19 of the Mental Health Regulations 2015.
240 See the definition of "relevant information" in section 573(2) of the Mental Health Act.
241 Section 17(1) of the Coroners Act 1996 (WA).
242 See paragraph (a) of the definition of "Western Australian death" in section 3 of the Coroners Act 1996 (WA).
243 Section 56(1) and (4) of the Road Traffic Act 1974 (WA).
b) in the case of a medical practitioner or registered nurse, a person is seeking or has sought medical assistance for an injury in the infliction of which a firearm or ammunition is believed to have been involved.\textsuperscript{245}

- It is noted that there is no analogous provision in the \textit{Weapons Act 1999} (WA) in respect of prohibited or controlled weapons.

\textbf{Criminal property confiscation information}

A financial institution that has information about a transaction with the institution may give the information to a police officer if there are reasonable grounds for suspecting that the information may, \textit{inter alia}, be relevant to the investigation of a confiscation offence, or assist a court in deciding whether to make a declaration under the CPC Act.\textsuperscript{246}

\textbf{Public interest information}

Under the \textit{Public Interest Disclosure Act 2003} (WA), any person may make an appropriate disclosure\textsuperscript{247} of public interest information to a proper authority.

"Public interest information" means information that tends to show that, in relation to its performance of a public function (either before or after the commencement of this Act), a public authority, a public officer, or a public sector contractor is, has been, or proposes to be, involved in, \textit{inter alia}, an act or omission that constitutes an offence under a written law.\textsuperscript{248}

A disclosure of public interest information is made to a proper authority if, where the information relates to an act or omission that constitutes an offence under a written law, it is made to a police officer or to the Corruption and Crime Commission.\textsuperscript{249}

\begin{itemize}
  \item \textsuperscript{244} Section 23B(1)(a) of the \textit{Firearms Act 1973} (WA).
  \item \textsuperscript{245} Section 23B(1)(b) of the \textit{Firearms Act 1973} (WA).
  \item \textsuperscript{246} Section 53 of the CPC Act.
  \item \textsuperscript{247} See section 5(2) of the \textit{Public Interest Disclosure Act 2003} (WA).
  \item \textsuperscript{248} See the definition of "public interest information" in section 3 of the \textit{Public Interest Disclosure Act 2003} (WA).
  \item \textsuperscript{249} Section 5(3)(a) of the \textit{Public Interest Disclosure Act 2003} (WA).
\end{itemize}
A proper authority must investigate or cause to be investigated the information disclosed to it under this Act if the disclosure relates to, inter alia, a matter or person that the authority has a function or power to investigate.\textsuperscript{250}

**Disclosures in the public interest**

As mentioned above, the duty of confidentiality in equity is also subject to an exception which enables the disclosure of information in the public interest.

However, there is uncertainty in Australia about the extent to which the public interest may justify disclosure. In Australia, the authorities suggest that information subject to a duty of confidentiality may be disclosed if the information relates to a serious wrongdoing or crime, which it is in the public interest to disclose, or if the disclosure will avoid threatened serious harm to the public generally, or to particular individuals. See, for example,\textit{A v Hayden};\textsuperscript{251} \textit{R v Lowe};\textsuperscript{252} \textit{Richards v Kadian};\textsuperscript{253} \textit{Brown v Brooks};\textsuperscript{254} and \textit{AFL and Anor v The Age Company Limited and Ors}.\textsuperscript{255}

The situation is different in the United Kingdom where confidential information may be disclosed if the public policy considerations favouring the maintenance of confidentiality are outweighed by the public interest. See, for example: \textit{X v Y};\textsuperscript{256} \textit{R v Chief Constable of the North Wales Police and ors};\textsuperscript{257} \textit{W v Edgell};\textsuperscript{258} and \textit{Woolgar v Chief Constable of the Sussex Police}.\textsuperscript{259} Where a person proposes to make a disclosure in the public interest, then the disclosure must be made to a person or entity, which has a proper or legitimate interest in the disclosure. Where information relates to the commission of a criminal offence, then the appropriate authorities to whom the information should be disclosed are the police or the Director of Public Prosecutions.\textsuperscript{260}

\textsuperscript{250} Section 8(1)(c) of the \textit{Public Interest Disclosure Act 2003 (WA)}.  
\textsuperscript{251} (1984) 156 CLR 532 at 595-596 per Deane J and 574-575 per Wilson and Dawson JJ.  
\textsuperscript{252} [1997] 2 VR 465.  
\textsuperscript{253} [2005] NSWCA 328; (2005) 64 NSWLR 204.  
\textsuperscript{254} (unreported, Supreme Court of NSW, 18 August 1988).  
\textsuperscript{255} [2006] VSC 308; (2006) 15 VR 419;  
\textsuperscript{256} [1988]2 All ER 648.  
\textsuperscript{257} [1998] 3 WLR 57.  
\textsuperscript{258} [1990] 1 All ER 835.  
\textsuperscript{259} [2000] 1 WLR 25.  
\textsuperscript{260} \textit{AFL and Anor v The Age Company Limited and Ors} [2006] VSC 308; (2006) 15 VR 416 at [67] per Kellan J.
Should there be a provision in the CIA which permits a person to disclose confidential information to a police officer?

6.1.2 Types of confidential information which may be disclosed

If a provision is to be inserted in the CIA which permits a person to disclose confidential information to a police officer, then it will be necessary to stipulate what types of confidential information may be disclosed.

As has been outlined above, there are already some statutory provisions which permit the disclosure of confidential information to a police officer, the COP or the WA Police.

The types of confidential information which may be disclosed should relate to the functions of a police officer. For example:

- a) information relating to an act or omission that constitutes an offence under a written law (or a serious offence\(^{261}\)), which the person making the disclosure reasonably suspects has been, is being, or is about to be committed;

- b) information relating 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;

- c) information relating to national security;

- d) information about the medical condition of, and injuries sustained by, a person injured in an incident involving a vehicle\(^{262}\);

- e) information a person 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 prohibited weapon\(^{263}\); or as a result of the commission of an offence;

\(^{261}\) See, for example, the definition of "serious offence" in section 128 of the CIA.

\(^{262}\) See the definition of "vehicle" in section 3(1) of the CIA.

\(^{263}\) See the definitions of "controlled weapon" and "prohibited weapon" in section 3 of the Weapons Act 1998 (WA).
f) information which is relevant to the health, safety or well-being of a person in the custody of the WA Police to enable appropriate care to be provided to that person; and

g) information which falls within a prescribed class of information.

In some cases it may be appropriate to make it mandatory for a person to provide information to a police officer upon request. For example, information which a police officer requests from a health professional to enable appropriate care to be provided to person in police custody.

There may be some categories of confidential information that should not be able to be disclosed to a police officer. For example, information subject to legal professional privilege.\(^\text{264}\)

**Issue - 52**

**What types of confidential information should or should not be able to be disclosed?**

**6.1.3 Form of information**

Information has been defined as "knowledge communicated or received concerning some fact or circumstance; news."\(^\text{265}\)

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 (e.g. a blood sample), which requires scientific examination to extract information from it (e.g a DNA profile).

If a provision is to be inserted in the CIA 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.

\(^{264}\)Section 5(6) of the *Public Interest Disclosure Act 2003* (WA).

\(^{265}\) *Macquarie Dictionary On-line edition.*
What forms of information should be able to be disclosed to a police officer?

6.1.4 Restrictions on the use, recording and disclosure of confidential information disclosed to a police officer

Currently, police officers are subject to regulation 607 of the Police Force Regulations 1979 (WA) which relevantly provides:

(1) A member shall not —
   (a) give any person any information relating to the Force or other information that has been furnished to, or obtained by, the member in the course of his or her duty as a member; or
   (b) disclose the contents of any official papers or documents that have been supplied to the member in the course of his or her duties as a member or otherwise, except in the course of his or her duty as a member.

(2) A member shall not, except with the express permission of his or her officer in charge or the Commissioner —
   (a) publicly comment, either orally or in writing, on any administrative action, or upon the administration of the Force; or
   (b) use for any purpose, other than for the discharge of his or her official duties as a member, information gained by the member through his or her employment in the Force; or
   (c) communicate to the public, or to any unauthorised person any matter connected with the Force.

If a provision is to be inserted in the CIA which 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 further use, recording and disclosure of that information by the police officer. For example:

   a) use, recording and disclosure in the course of duty;
b) use, recording and disclosure for the purposes of an investigation into a criminal offence;

c) use, recording and disclosure for the purposes of a prosecution into a criminal offence;

d) use, recording and disclosure for the purposes of providing the information to:
   i. another law enforcement agency;
   ii. a Coroner;
   iii. the Corruption and Crime Commission; and

e) use, recording and disclosure for one or more prescribed purposes.

Issue - 54

Once a police officer is in possession of confidential information, what restrictions (if any) should there be on the use, recording and disclosure of the information by police officers?

6.1.5 Protection of person making the 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, or a breach of professional ethics, 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 which 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. For example:

- no civil or criminal liability is incurred in respect of the recording, disclosure or use;
- the recording, disclosure or use is not to be regarded as —
  - a breach of any duty of confidentiality or secrecy imposed by law; or
  - a breach of professional ethics or standards or any principles of conduct applicable to a person’s employment; or
unprofessional conduct\textsuperscript{266}.

- a person who makes the disclosure is not liable to the following: disciplinary action under a written law; to be dismissed; or to have his or her services dispensed with or otherwise terminated.\textsuperscript{267}

### Issue - 55

**What protections should be available to a person who discloses confidential information to the WA Police?**

#### 6.2 Orders to produce

Part 6 of the CIA contains provisions for obtain business records by means of an order to produce. The legislative scheme for obtaining business records is as follows:

- a) A police officer or a public officer may apply to a JP for an order to produce a business record.\textsuperscript{268} A "business record" means "a record prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business".\textsuperscript{269} "Business" means "any business, including a business of a governmental body or instrumentality or of a local government, or any occupation, trade or calling".\textsuperscript{270}

- b) The application for an order to produce must be made in accordance with section 13.\textsuperscript{271} The application must contain the information set out in section 52(3);

- c) A JP may issue an order to produce a business record to a business upon satisfaction of the matters contained in section 53(1);

- d) The order to produce must contain the information required by section 53(2) and be in the prescribed form.\textsuperscript{272}

\textsuperscript{266} See, for example, sections 23(5), 28B(6) and 129 of the *Children and Community Services Act 2004* (WA); section 577(3) of the *Mental Health Act 2014*; section 220(3) of the *Health Services Act 2016* (WA).
\textsuperscript{267} Section 13 of the *Public Interest Disclosure Act 2003* (WA).
\textsuperscript{268} Section 52(1) of the CIA.
\textsuperscript{269} See the definition of "business record" in section 50 of the CIA.
\textsuperscript{270} See the definition of "business" in section 50 of the CIA.
\textsuperscript{271} Section 52(2) of the CIA.
\textsuperscript{272} Section 53(3) of the CIA.
e) An order to produce must not 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;

f) An order to produce must be served on the person to whom it applies as soon as practicable after it is issued;

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g) An order to produce has effect according to its contents and section 55. It is an offence for a person who is served with an order to produce not to obey the order unless he or she has a reasonable excuse;

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h) An officer to whom a business record is produced may retain it for a reasonable time in order to decide whether it is a thing relevant to an offence and, if so, may seize it (subject to section 146) and do a forensic examination on it (whether or not the business record is seized);

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i) If the business record is seized then sections 148 and 150-152 apply.

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6.2.1 Definition of business

An issue has arisen as to whether or not section 53 of the CIA enables a notice to produce to be issued to a government department or agency absent a commercial enterprise being carried out by that department (that is, an undertaking being carried on for gain).

In the CIA, the term "business record" means "a record prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business." The term "business" means "any business, including a business of a governmental body or instrumentality or of a local government, or any occupation, trade or calling" (emphasis added). Accordingly, the definition of "business" is central to the definition of "business record" in the CIA.

278 See the definition of "business record" in section 50 of the CIA.

279 See the definition of "business" in section 50 of the CIA.
The Evidence Act contains provisions relating to the admissibility of statements in business records. In section 79B of the Evidence Act, the terms "business record" and "business" for the purposes of section 79B-79G inclusive are defined slightly differently than in the CIA. In the Evidence Act, the term "business record" means "a book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business." The term "business" means "any business, occupation, trade or calling and includes the business of any governmental body or instrumentality and any local government" (emphasis added).

There is no case law on the definitions contained in section 150 of the CIA. However, there is case law on the definitions in section 79B of the Evidence Act. See, for example, Beamish v The Queen, McKay v Commissioner of Main Roads [No.2], Donohoe v The Director of Public Prosecutions.

The meaning of "business" and "business record" has been considered by other courts in Australia and the United Kingdom in relation to the Evidence Act of each jurisdiction. See, for example, O'Donnell v Dakin, Bates v. Nelson, R v Perry [No 3], Albrighton v Royal Prince Alfred Hospital, R v Crayden, R v Perry (No.4) and Sands v Channel Seven Adelaide Pty Ltd.

It is arguable that the term "business" in the CIA is narrower than the term "business" in the Evidence Act having regard to the differences in the definition of the term "business" in each statute (in particular, the reference to "a business" in the CIA and the reference to "the business" in the Evidence Act). Accordingly, a court might find that a record of a particular government department, agency or instrumentality is not a business record for the

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280 See the definition of "business record" in section 79C of the Evidence Act.
281 See the definition of "business" in section 79B of the Evidence Act.
285 [1966] Tas SR 87
286 (1973) 6 SASR 149.
287 [1981] 28 SASR 112. Note, this decision was overturned on appeal on another issue.
purposes of section 150 of the CIA on the basis that the government department, agency or instrumentality was not engaged in a commercial undertaking. However, a court might find that the same record is a business record for the purposes of section 79B of the Evidence Act.

Issue - 56

Should the definition of "business" in section 50 of the CIA be amended to make it clear that the term includes any government department, agency or instrumentality irrespective of whether or not the government department, agency or instrumentality carries on a commercial undertaking?

Issue - 57

Should the definition of "business" in section 50 of the CIA 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)?

6.2.2 Authorisation to issue orders to produce a business record

As set out above, a JP is the only person who may issue an order to produce a business record.

The bulk of orders to produce business records that are issued in Western Australia are issued in respect of stealing and fraud-related matters and they are generally directed towards ADIs. An ADI is a body corporate which has been granted an authority by the Australian Prudential Regulation Authority under section 9(3) of the Banking Act 1959 (Cth) to carry on banking business in Australia.292

In some cases, particularly fraud matters, numerous orders to produce are issued in respect of the same investigation. ADIs are generally very willing to assist police in investigating criminal offences by the provision of business records. However, ADIs are unable to provide documents to police without some kind of compulsion. Given the relatively benign circumstances in which orders to produce are executed in relation to ADIs, it has been

292 See the definition of "authorised deposit-taking institution" in section 5 of the Banking Act 1959 (Cth) and section 9 of that Act.
suggested that the process may be streamlined by enabling a senior police officer to issue orders to produce in some circumstances.

One of the advantages of the present requirement that applications for orders to produce be made to a JP is the separation of the JP from the investigation for the purposes of which the business records are sought. However, as set out above in relation to search warrants, the CIA already empowers senior police officers to give certain authorisations and approvals.

It is noted that under section 54 of the CPC Act, a police officer may by written notice require a financial institution to provide information about accounts and account holders. A financial institution which fails to comply with the notice commits an offence.

In New South Wales, under the LEPR Act (NSW) a police officer who believes on reasonable grounds that an ADI holds documents that may be connected with an offence committed by someone else may apply to an eligible issuing officer for a notice to produce the documents.293 An "eligible issuing officer" relevantly means an authorised officer", 294 namely: a Magistrate or a Children's Magistrate; a registrar of the Local Court or an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of the Act.295

In Queensland, under the PPR Act (Qld) a senior police officer (an officer of at least the rank of inspector296) may in the circumstances specified in section 197B(1):

(a) give written notice to a financial institution stating a name and requiring the institution to advise the police officer whether a person of the stated name is authorised, or was authorised at any time, to operate an account held with the financial institution and, if so, the name in which the account is or was held and the account number;297 and

(b) give written notice to a financial institution stating a number and requiring the institution to advise the police officer whether an account with the stated number

293 Section 53(1) of the LEPR Act (NSW).
294 Section 46(1) of the LEPR Act (NSW).
295 Section 3(1) of the LEPR Act (NSW).
296 See the definition of "senior police officer" in section 197A of the PPR Act (Qld).
297 Section 197B(2) of the PPR Act (Qld).
is held, or was held at any time, with the financial institution and, if so, the name in which the account is or was held and the name of any person who is or was authorised to operate the account.\textsuperscript{298}

A financial institution which does not comply with a notice issued under section 197B commits an offence.\textsuperscript{299}

Issue - 58

\textit{Should police officers be able to issue an order to produce under section 53 of the CIA?}

Issue - 59

\textit{Should the power of a police officer to issue an order to produce be limited to ADIs?}

Issue - 60

\textit{If police officers are to be authorised to issue orders to produce, then: (a) which police officers may issue them? and (b) should an officer be precluded from issuing a notice to produce if he or she is involved in the investigation to which the notice to produce relates?}

Issue - 61

\textit{Should the offence contained in section 55(2) of the CIA apply when the notice to produce is issued by a police officer?}

6.3 Data Access Orders

\textbf{6.3.1 Gaining access to data stored in "cloud storage"}

The provisions of the CIA relating to the seizure of computers and access to data have not kept pace with technological developments. In particular, new challenges have arisen in relation to accessing cloud storage data.

To explain this further, in addition to storing data on the hard drive of a computer or a local storage device such as thumb drive, data may now be stored on an off-site or remote database maintained by another party. This is commonly referred to as a "cloud storage" system. A user uploads copies of their document to a cloud storage system via the internet.

\textsuperscript{298} Section 197B(3) of the PPR Act (Qld).

\textsuperscript{299} Section 197D of the PPR Act (Qld).
A user may then access their remotely stored data from any location, provided that they have internet access. In other words, access to the stored data is not dependent on the user using the same device (e.g. computer, smartphone or tablet) to access the data, as they did to send the data into the cloud storage system.

Data which is stored remotely on a cloud storage system is often encrypted for security purposes. This means that a person wishing to access data stored remotely must have the key to accessing the data, whether this is in the form of a password, or some other security measure. This creates challenges for officers seeking to access such information.

**Current legal framework**

The current provisions for search warrants are inadequate to deal with the changes in technology. This is principally because search warrant provisions in the CIA are limited to locations and things.\(^{300}\) The internet is not a "thing" that can be seized. Nor is the relevant data necessarily stored at the physical location that can be accessed using a search warrant in Western Australia. Further, in many cases, the owner or operator of the off-site or remote database is unable to access the data stored on their cloud storage system because of the security measures available to users.

Part 7 of the CIA provides police and public officers with a power to compel a suspect to provide necessary information and assistance to gain access to, transfer, copy or reproduce "data" that the "data storage device" may contain. This Part operates as follows. A police officer may apply for a "data access order" under section 58 of the CIA when investigating a serious offence.\(^{301}\) A Magistrate may issue such an order if satisfied of the following:

\[
\begin{align*}
&\text{a) that the applicant has lawful possession of or lawful access to the target device;}^{302} \\
&\text{b) that there are reasonable grounds for the applicant to suspect that:} \\
&\hspace{1em} \text{i. the offence has been committed;} \\
&\hspace{1em} \text{ii. any data the target device may contain is or may be a thing relevant to the serious offence; and}
\end{align*}
\]

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\(^{300}\) See sections 43(8)(a) and (b),43(9)and 43(10) of the CIA.

\(^{301}\) Defined as an offence carrying a punishment of 5 years imprisonment or more: section 57 CIA.

\(^{302}\) Section 59(1)(a) of the CIA.
iii. the target person has committed the serious offence;\textsuperscript{303} and
c) the target person has knowledge relevant to gaining access to any data the target
device may contain.\textsuperscript{304}

A data access order requires the person named in the order to provide information or assistance that is reasonable and necessary to allow the applicant to:

\begin{itemize}
  \item [(i)] gain access to any data the device may contain;
  \item [(ii)] copy any such data to another data storage device;
  \item [(iii)] reproduce any such data on order.\textsuperscript{305}
\end{itemize}

A person who is served with a data access order and who does not obey it without a reasonable excuse, commits a crime contrary to section 61(2) of the CIA. It is not a defence to a charge that information required to be given under the data access order would, or may have, incriminated the accused.\textsuperscript{306}

An issue has arisen as to whether under a data access order, police have the power to access data stored on the person’s "cloud" account. It is arguable that a data access order can require a target person to assist in gaining access to a device that is synchronised with cloud storage. However, it is unlikely that a data access order, in its current form, would allow an officer to require the target person to enter a user name and password that is specific to their cloud storage, on an electronic device that is not synchronised with cloud storage, as it cannot be said that the target device actually contains the data to which the data access order allows access.

This is troubling in an environment where the current trend in computers, smart phones and tablets is towards greater usage of cloud storage. Applications such as “iCloud”, “Dropbox” and “Google Drive”, can be used by an offender to store illegal images such as child exploitation material. Therefore, it is necessary to make changes to legislation to keep up with these technological advances that have occurred since the CIA was originally drafted.

\textsuperscript{303} Sections 59(1)(b) and 58(3) of the CIA.
\textsuperscript{304} Section 59(1)(c) of the CIA.
\textsuperscript{305} Section 59(2)(d) of the CIA.
\textsuperscript{306} Section 61(3) of the CIA.
To address the issues around gaining access to cloud storage, it has been suggested that legislation similar to section 3LA of the Crimes Act (Cth) be enacted.\textsuperscript{307} Section 3LA of the Crimes Act provides:

1. A constable may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to do one or more of the following:
   - (a) access data held in, or accessible from, a computer or data storage device that:
      - (i) is on warrant premises; or
      - (ii) has been moved under subsection 3K(2) and is at a place for examination or processing; or
      - (iii) has been seized under this Division;
   - (b) copy data held in, or accessible from, a computer, or data storage device, described in paragraph (a) to another data storage device;
   - (c) convert into documentary form or another form intelligible to a constable:
      - (i) data held in, or accessible from, a computer, or data storage device, described in paragraph (a); or
      - (ii) data held in a data storage device to which the data was copied as described in paragraph (b); or
      - (iii) data held in a data storage device removed from warrant premises under subsection 3L(1A).

2. The magistrate may grant the order if the magistrate is satisfied that:
   - (a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer or data storage device; and
   - (b) the specified person is:
      - (i) reasonably suspected of having committed the offence stated in the relevant warrant; or

\textsuperscript{307} It is noted that section 99AAB of Summary Procedure Act 1921 (SA) is in similar terms to section 3LA of the Crimes Act. However, it only provides this power where there may have been a contravention of a restraining order.
(ii) the owner or lessee of the computer or device; or

(iii) an employee of the owner or lessee of the computer or device; or

(iv) a person engaged under a contract for services by the owner or lessee of the computer or device; or

(v) a person who uses or has used the computer or device; or

(vi) a person who is or was a system administrator for the system including the computer or device; and

(c) the specified person has relevant knowledge of:

(i) the computer or device or a computer network of which the computer or device forms or formed a part; or

(ii) measures applied to protect data held in, or accessible from, the computer or device.

(3) If:

(a) the computer or data storage device that is the subject of the order is seized under this Division; and

(b) the order was granted on the basis of an application made before the seizure;

the order does not have effect on or after the seizure.

Note: An application for another order under this section relating to the computer or data storage device may be made after the seizure.

(4) If the computer or data storage device is not on warrant premises, the order must:

(a) specify the period within which the person must provide the information or assistance; and

(b) specify the place at which the person must provide the information or assistance; and

(c) specify the conditions (if any) determined by the magistrate as the conditions to which the requirement on the person to provide the information or assistance is subject.

(5) A person commits an offence if the person fails to comply with the order.

Penalty for contravention of this subsection: Imprisonment for 2 years.
Section 3LA of the Crimes Act (Cth) provides a similar power to that which is contained in Part 7 of the CIA. However, it broadens the scope of orders that may be given to a person, in that the order can compel a specified person to provide information or assistance to a constable, to allow a constable to access data that is "accessible from a computer or storage device". This change would ensure that officers can apply for a data access order, which compels a target person to provide user names and passwords for data storage facilities, such as iCloud and Dropbox, which are accessible via a device that police have seized from the target person.

Furthermore, where a police officer has a suspicion that a "thing relevant to an offence" is stored at a location that a target person has access to, it is desirable for police officers to also have the ability to require the target person to provide the information required to access cloud accounts, even if a target device has not been seized from the person, or the target device is inoperable or there is no target device. Such a change would require some considerable remodelling of the current provisions to allow for situations where an officer reasonably suspects that:

- there is a "thing relevant to an offence" stored in cloud storage;
- the target person is suspected of committing a serious offence that is connected to the thing (information stored in the cloud); and
- the target person has knowledge, or is in possession of the information, that is required to access the thing.

Where an application for the above is appropriately grounded before a Magistrate, the Magistrate should be empowered to issue a data access order that requires the target person to provide such information and assistance that is reasonable and necessary, to allow police to access the relevant cloud account.

The test as to whether legislation with extraterritorial effect is within the legislative power of a State, is whether the law "is connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstance which really appertains to the
Further, "legislation should be held valid if there is any real connexion - even a remote or general connexion - between the subject matter of the legislation and the State." The relevant territorial nexus for the purposes of the proposed amendment would be established by the following:

a. a person is suspected of committing an offence in Western Australia;

b. the person to whom the data access order is issued is present in Western Australia;

c. the person to whom the data access order is issued has the ability to access information stored in the cloud using a device that is located within Western Australia.

Issue - 62

_Should Part 7 of the CIA 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 cloud storage accounts?_

Issue - 63

_Should the power to obtain a data access order be available even when a target device is not seized, or the target device is inoperable?_

_6.3.2 Increased penalty for failing to comply with a data access order_

The seizure of mobile telephones and other electronic devices is increasing in investigations conducted by WA Police. Much of the contents of these devices are unable to be accessed by the Computer Crime Squad without the passwords or PIN numbers.

Currently, under section 61 of the CIA, the penalty for not obeying a data access order is imprisonment for five years, with a summary conviction penalty of a fine of $24 000 and imprisonment for two years.

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In cases where a suspect risks a significant imprisonment penalty for an offence, such as selling or supplying drugs or serious sexual assault, and is in possession of relevant and incriminating material on an encrypted device, there is arguably limited motivation for them to comply with a data access order. Put simply, the penalty for failing to comply with the data access order is significantly less than what the suspect may risk if the incriminating material is made available to police officers.

It has been suggested that section 61 of the CIA be amended to:

a) increase the penalty; or

b) apply a sliding scale penalty that increases with the penalty for the offence that is reasonably suspected to have been committed by the suspect.

Issue - 64

Should section 61 of the CIA be amended to increase the penalty?

Issue - 65

Should section 61 of the CIA be amended to apply a sliding scale punishment connected to the penalty for the offence that police are investigating?

6.3.3 Expanding data access orders for domestic violence matters

As outlined above, under Part 7 of the CIA, police and public officers may only apply for a data access order for a "serious offence". This is defined in section 57 as "an offence, the statutory penalty for which is, or includes, imprisonment for 5 years or more, or life."

However, the definition of "serious offence" excludes some of the most common domestic violence related offences. These are as follows:

- aggravated assault pursuant to section 313 of the Criminal Code;\(^{310}\)
- a breach of a violence restraining or police order pursuant to section 61 of the RO Act;\(^{311}\)

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\(^{310}\) Penalty of a fine of $36,000 or imprisonment for 3 years.

\(^{311}\) Penalty of $6,000 or imprisonment for 2 years.
• stalking pursuant to section 338E of the Criminal Code, where not in circumstances of aggravation.\(^\text{312}\)

Domestic violence offences such as those mentioned above, often involve prior and post offence threats and intimidation. These are increasingly carried out via electronic means of communication such as social media, email and text messages. Accordingly, in many cases it is desirable to interrogate data possessed by a person suspected to have committed one of the above offences in a domestic violence context. However, the current data access order provisions do not allow officers to seek a data access order to do so. This is an unsatisfactory situation.

To resolve this issue, it has been suggested that the definition of "serious offence" in section 57 of the CIA should be amended to include "a prescribed offence". In this way, offences such as those mentioned above can be prescribed for the purposes of the definition of "serious offence" in section 57 of the CIA. In this respect, it is noted that the definition of "serious offence" in section 128 of the CIA was recently amended to include offences under section 61(1) of the RO Act, and any offences that involve an act of family and domestic violence as referred to in sections 6(1)(a), (c) and (f) of the RO Act.

Issue - 66

Should the definition of "serious offence" in section 57 of the CIA be amended to accommodate domestic violence related offences through including "prescribed offences"?

6.3.4 Approval Authority for Data Access Orders

Section 58(2) of the CIA requires an application for a data access order to be made to a Magistrate. Whilst arrangements have been put in place to have Magistrates available for this purpose, it may be difficult to get timely approval of orders in urgent circumstances given the heavy workload of Magistrates. The urgency for obtaining access to the data is particularly necessary in the case of cloud storage or networked devices. Advances in technology allow the suspect, or even another person on the suspect’s behalf, to access the information stored in the cloud and potentially change or delete the relevant information.

\(^{312}\) Penalty of imprisonment for 3 years.
It is often necessary, or at least desirable, to get an order urgently, so as to serve a data access order on a suspect whilst the suspect is in police custody. This is because suspects can access online cloud storage or social media websites, such as Facebook or Twitter, with relative ease from multiple devices returned to them after leaving police custody. This ability means that there is the potential for valuable evidence to be erased, prior to police being granted a data access order and serving it on the suspect.

Accordingly, the streamlining of processes during which applications to grant data access orders are assessed should be explored, so that these orders can be obtained without delay.

It should be noted that the separate issue of whether a suspect should be detained for the purposes of complying with a data access order has been dealt with in Chapter 10.

**Issue - 67**

*Should data access orders be able to be issued by senior police officers in urgent situations?*

**Issue - 68**

*Are there other ways of speeding up the process to obtain a data access order?*

### 6.3.5 Possible offence of destroying, damaging, erasing or altering data the subject of a data access order

As outlined above, there is currently an offence under the CIA of failing to obey a data access order. Conceivably, this provision could capture situations where a person served with a data access order simply refuses to comply with the terms of the order, or where the person deletes or modifies the data in clear contradiction of the order. The latter action clearly has more serious implications for an ongoing investigation and a higher level of criminality than the former.

This raises an additional issue for review: should a further offence be inserted into the CIA of actively destroying, damaging, erasing or altering data, which is the subject of a data access order? The rationale behind such a provision would be that it captures the higher level of criminality involved when a person actively destroys, damages, erases or alters data in breach of a data access order.
Such a provision could be modelled somewhat on provisions from other jurisdictions. In particular, section 257C of the *Criminal Code 1924* (Tas) provides that it is an offence to, intentionally and without lawful excuse:

- destroy, damage, erase or alter data stored in a computer; or
- interfere with, interrupt or obstruct the use of a computer, a system of computers or any part of a system of computers or the data stored in that computer or system of computers.

A similar provision exists in sections 276C and 276D of the *Criminal Code Act 1983* (NT). It is suggested that a similar provision could be inserted into the CIA to apply specifically to a person who has been served with a data access order. New South Wales and the Australian Capital Territory have similar offences around access, modification and impairment of data, where such an access is unauthorised. However, the terms of the Tasmanian and Northern Territory provisions may be simpler and more applicable for Western Australian purposes.

**Issue - 69**

*Should an offence of destroying, damaging, erasing or altering data the subject of a data access order be inserted into the CIA?*

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313 See sections 308C and 308H of the *Crimes Act 1900* (NSW) and sections 415, 416, 417 and 420 of the *Criminal Code 2002* (ACT).
Chapter 7: Powers in Relation to Searching People

The legislative scheme for basic and strip searches

The CIA authorises the basic search of:

a) a person who is in the target place when a search warrant is being executed for the target thing,\footnote{314 Section 43(8)(b)(ii) of the CIA.}

b) a person who is in the target place when the warrant is being executed, for any weapon or other thing that could endanger a person;\footnote{315 Section 44(2)(g)(iv) of the CIA.}

c) a person if an officer reasonably suspects that the person has in his or her possession or under his or her control any thing relevant to an offence;\footnote{316 Section 68(1)(a) of the CIA.}

d) a person if an officer reasonably suspects that the person in a public place is prohibited by a prohibited behaviour order from having something in his or her possession in that place;\footnote{317 Section 69A(1)(a) of the CIA.}

e) a person if an officer reasonably suspects that the person in a public place is prohibited by a control order from having something in his or her possession in that place;\footnote{318 Section 69B(a) of the CIA.}

f) a person if the person is about to enter or is in a public place and consents to undergoing a basic search for the purpose of searching for any thing that the officer reasonably suspects does or may endanger the place or people who are in or may enter it;\footnote{319 Section 69(6)(a) of the CIA.} and

g) a person who is in custody for a security risk item.\footnote{320 Section 135(5)(a) of the CIA.}

The CIA also authorises the strip search of a person in the circumstances referred to in paragraphs (a), (b), (c) and (g) above.
A person who is authorised by the CIA to do a basic search of a person may:

(a) scan the person with an electronic or mechanical device, whether hand held or not, to detect any thing;
(b) remove the person’s headwear, gloves, footwear or outer clothing (such as a coat or jacket), but not his or her inner clothing or underwear, in order to facilitate a frisk search;
(c) frisk search the person;
(d) search any article removed under paragraph (b).\(^{321}\)

An officer who is authorised by the CIA to do a strip search of a person may do any or all of the following:

(a) remove any article that the person is wearing including any article covering his or her private parts;
(b) search any article removed under paragraph (a);
(c) search the person’s external parts, including his or her private parts;
(d) search the person’s mouth but not any other orifice.\(^{322}\)

A person or officer who is authorised by the CIA to do a basic search or strip search of a person is not, unless authorised to do so under Part 9, authorised to also do a forensic procedure on the person being searched.\(^{323}\)

The ancillary powers for the conduct of a strip search are set out in section 65 of the CIA. A basic search or a strip search must be done in accordance with Division 3 of Part 8.\(^{324}\)

7.1 Removal of requirements to seek consent and to inform person who refuses consent, that it is an offence to obstruct the searcher

If a person is authorised by the CIA to do a basic search or a strip search of a person, then section 70 applies.\(^{325}\)

\(^{321}\) Section 63(1) and (2) of the CIA.
\(^{322}\) Section 64(1) and (2) of the CIA.
\(^{323}\) Section 63(2) of the CIA.
\(^{324}\) Section 66 of the CIA.
\(^{325}\) Section 70(1) of the CIA.
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 or her consent, the searcher must inform the person that it is an offence to obstruct the searcher doing the search. There is no need for the searcher to mention that it is an offence to obstruct unless and until such time as the person indicates that they do not consent to the search. It has been suggested that the requirement to ask for consent should be removed.

People being searched often do not understand what is being explained to them, which can cause confusion and conflict. This often manifests as aggression and hostility towards the searcher.

If a person consents, the search generally goes smoothly. If a person does not consent, the searcher and their partner are on notice that force is likely to be required in order to effect the search. The requirement to ask for consent may have originally been included in the CIA as a way to ensure that the searcher obtains some verbal feedback from the detainee as to the level of resistance likely to be experienced during the search. Nevertheless, it seems futile to ask for consent when the CIA confers authority to carry out the search and, in practice, it can lead to hostility from the detained person who does not understand the search process (that the search will be carried out whether or not the person gives consent).

In New South Wales and Queensland, the searcher must, where reasonably practicable, ask for the person’s cooperation.326

In the Australian Capital Territory and under the Crimes Act (Cth), a strip search may be carried out in specified circumstances, and may also be carried out if the person consents in writing.327

In New South Wales, the searcher must, where reasonably practicable, inform the person to be searched whether the person will be required to remove clothing during the search, and why it is necessary to remove the clothing.328 Similar provisions exist in Queensland, except

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326 Section 32(3) of the LEPR Act (NSW) and section 630(1)(a)(iii) of the PPR Act (Qld).
327 Section 227(3) of the Crimes Act 1900 (ACT); and section 3ZH of the Crimes Act (Cth).
328 Section 32(2) of the LEPR Act (NSW);
that the searcher must tell the person he or she will be required to remove clothing during the search.\textsuperscript{329}

In Queensland, if a person obstructs a police officer conducting a lawful search of the person, the police officer must, if reasonably practicable:

a) warn the obstructing person it is an offence to obstruct a police officer in the performance of the police officer’s duties; and

b) give the person a reasonable opportunity to stop obstructing the search.\textsuperscript{330}

Issue - 70

\textit{Should section 70(2)(c) of the CIA be amended to remove the requirement to:}

\textit{a) request the person to consent to the search; and}

\textit{b) inform the person that it is an offence to obstruct the searcher doing the search?}

Issue - 71

\textit{Should section 70(2) of the CIA be amended to require the searcher to inform the person of what the search will entail (removal of clothing etc.) and request the person’s cooperation?}

7.2 Power to search person for evidence of injuries and take photographs of those injuries

Under section 68 of the CIA, an officer who reasonably suspects that a person has in his or her possession or under his control any thing relevant to an offence may:

a) do a basic search or a strip search of the person; and

b) subject to section 146, seize any thing relevant to an offence that the officer finds, whether or not it is a thing that the officer suspected was in the possession or under the control of the person; and

c) do a forensic examination on it (whether or not the officer seizes the thing).\textsuperscript{331}

\textsuperscript{329} Section 630(1)(a)(i) and (ii) of the PPR Act (Qld).
\textsuperscript{330} Section 628 of the PPR Act (Qld).
\textsuperscript{331} Section 68(1) of the CIA.
If under the CIA a person may do a "forensic examination" on a thing relevant to an offence, then person may, *inter alia*, "photograph, measure or otherwise made a record of it."\(^{332}\)

The ancillary powers for a basic search or a strip search include:

- in the case of a basic search, the power to photograph all or part of the search;\(^{333}\)
- in the case of a strip search, the power to photograph any thing that may be lawfully seized in the position it is found in the body.\(^{334}\)

A question which has arisen is whether a person may be searched for evidence of injury (sustained or inflicted by a victim\(^{335}\) or suspect during the commission of an offence), and photographs taken of such injuries under section 65 and 68 of the CIA.

For the purposes of the CIA, a thing is a thing relevant to an offence if it is reasonably suspected that, *inter alia*, the thing is or may afford evidence relevant to proving the commission of an offence or who committed an offence.\(^{336}\)

Whilst an injury is likely to be considered "a thing relevant to an offence", it is difficult to see how a person can be in possession or control of an injury for the purposes of section 68(1) of the CIA. This view is supported by the fact that it is contemplated that the thing relevant to the offence may be seized under section 68(1)(b). An injury cannot be seized.

Further, during a basic search, the injury would need to be visible whilst the victim or suspect is clothed in order for it to be photographed, in the exercise of the power to photograph all or part of the search under section 65(3) of the CIA. This is because during a basic search, the inner clothing cannot be removed.\(^{337}\)

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\(^{332}\) Section 21(1)(b) of the CIA.

\(^{333}\) Section 65(3) of the CIA.

\(^{334}\) Section 65(4)(b) of the CIA.

\(^{335}\) It is noted that it would be rare for a victim to refuse consent to their injuries being photographed.

\(^{336}\) Section 5(1)(d)(i) of the CIA.

\(^{337}\) Section 63(1)(b) of the CIA.
Finally, in the event that an injury is discovered during a strip search of a person, the injury cannot be photographed under section 65(4)(b) of the CIA because it is not "any thing that may be lawfully seized in the position it is found on the person's body".

Accordingly, it would seem that sections 68 and 65 of the CIA cannot be relied on to search for injuries and take photographs of those injuries.

**Issue - 72**

*Should section 68 of the CIA be amended to enable an officer to:*

*a) search for an injury on a person, which or she reasonably suspects was sustained by, or inflicted upon, the person during the commission of an offence; and*

*b) take photographs of those injuries during the search?*

7.3 **Ancillary powers for search of a person**

Pursuant to the ancillary powers to conduct a basic search or a strip search, the searcher may "order the person to do anything reasonable to facilitate the exercise by the searcher of any power in this section, or in section 63 or 64, as the case requires."

A question has been raised as to whether or not the ancillary power contained in section 65(2)(d) of the CIA, would permit the searcher to require a person to accompany them to another place for the search to be conducted (for example, to a location with less light to facilitate the use of a UV scanner).

The ancillary power contained in section 65(2)(d) would seem to be broad enough to enable the searcher to order a person to accompany them to another place for the search to be conducted. However, it is noted that there is an express power (in relation to a strip search) in section 65(4)(a), for the searcher to order the person to accompany the searcher to a place where the search can be done in accordance with section 72(3). 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.

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338 Section 65(2)(d) of the CIA.
Issue - 73

Should section 65(2) of the CIA be amended to make it clear that the searcher may order the person to accompany the searcher to a place where the search can be done?
Chapter 8: Forensic Procedures on People

Part 9 of the CIA makes provision for forensic procedures to be carried out on people.

As a general rule,\(^{339}\) a forensic procedure cannot be done on a person under Part 9 of the CIA, except for the purpose of searching for a thing or evidence of a thing:

- a) that is relevant to an offence that is reasonably suspected to have been committed;\(^ {340}\) and
- b) the existence or absence of which on or in the body of the person is relevant to the investigation of the offence.\(^ {341}\)

A forensic procedure cannot be done under Part 9 for the purpose of obtaining an identifying particular of a person.\(^ {342}\) The authority to use samples taken during a forensic procedure under Part 9 of the CIA to obtain an identifying particular of a person, must exist or be obtained under the CIIPA.\(^ {343}\)

Part 9 outlines the three types of forensic procedures which may be carried out on a person under the CIA.\(^ {344}\)

1) a non-intimate forensic procedure, which is a procedure that complies with section 74(1);\(^ {345}\)
2) an intimate forensic procedure, which is a procedure that complies with section 75(1);\(^ {346}\) and
3) an internal forensic procedure, which is a procedure that complies with section 76(1).\(^ {347}\)

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339 The exception to this general rule appears in section 82 of the CIA, which provides that the State Coroner may authorise the doing of forensic procedures on deceased persons.
340 Section 77(1)(a) of the CIA.
341 Section 77(1)(b) of the CIA.
342 Section 77(2) of the CIA.
343 Section 77(3) of the CIA.
344 See the definition of "forensic procedure" in section 73 of the CIA.
345 See the definition of "non-intimate forensic procedure" in section 73 of the CIA.
346 See the definition of "intimate forensic procedure" in section 73 of the CIA.
347 See the definition of "internal forensic procedure" in section 73 of the CIA.
Forensic procedures may be carried out on the following categories of person:

1) volunteers;  
2) deceased people;  
3) involved persons (victim or witness); and  
4) suspects.

A forensic procedure that may be done on a person under Part 9 must be done in accordance with Division 6. In particular, section 103 makes it clear who may carry out a forensic procedure on a person, such as a doctor, nurse or qualified person.

8.1 Taking photographs of injuries

Section 74 of the CIA relevantly provides:

(1) A person who is authorised under this Act to do a non-intimate forensic procedure on a person may do any or all of the following —

   (a) take a swab, or use other means, to detect a relevant thing on the external parts of the person’s body, other than his or her private parts;

   ...  

(2) A person who is authorised under this Act to do a non-intimate forensic procedure on a person may in addition do any or all of the following —

   (a) remove any article that the person is wearing, other than any article covering his or her private parts;

   (b) search any article removed under paragraph (a);

   (c) search the person’s external parts, other than his or her external private parts;

   (d) search the person’s mouth but not any other orifice;

   (e) 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.

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348 See Part 9, Division 2, of the CIA (sections 79-81).  
349 See Part 9, Division 3 of the CIA (section 82).  
350 See Part 9, Division 4 of the CIA (sections 83-90).  
351 See Part 9, Division 5 of the CIA (sections 83-90).  
352 Section 78 of the CIA.  
353 See regulation 7 of the CI Regulations in relation to qualified persons.
The Table in section 103(1) sets out who may do a non-intimate forensic procedure.

Section 75 of the CIA relevantly provides:

(1) A person who is authorised under this Act to do an intimate forensic procedure on a person may do any or all of the following —

(a) take a swab, or use other means, to detect a relevant thing on the person’s external private parts;

...

(2) A person who is authorised under this Act to do an intimate forensic procedure on a person may in addition do any or all of the following —

(a) remove any article that the person is wearing, including any article covering his or her private parts;

(b) search any article removed under paragraph (a);

(c) search the person’s external parts, including his or her external private parts;

(d) photograph any relevant thing in the position it is found on the person’s external private parts;

(e) do a non-intimate forensic procedure on the person.

The Table in section 103(2) of the CIA sets out who may do an intimate forensic procedure.

An authorised person may, under section 74(1)(a) of the CIA, take a swab, or use other means, to detect a relevant thing on the external parts of the person’s body, other than his or her private parts. Further, an authorised person may, under section 75(1)(a), take a swab, or use other means, to detect a relevant thing on the person's external private parts. A person who is authorised to do a non-intimate forensic procedure or an intimate forensic procedure may, in addition, take a photograph under sections 74(2)(e) and 75(2)(d), respectively.

The taking of a photograph is not a non-intimate forensic procedure or an intimate forensic procedure. This is because the taking of a photograph is not a procedure that complies with sections 74(1) or 75(1), respectively. In particular, the taking of a photograph allows a person to make a record of something, rather than being a means to detect a relevant thing on a person's body. Further, the powers in sections 74 and 75 may only be exercised by an
authorised person, which in the case of the powers in sections 74(1)(a) and 75(1)(a) is a doctor, nurse or qualified person.

An issue which has arisen is whether a police officer, rather than a doctor, nurse or qualified person, should be able to take photographs of a person's injuries, on the basis that the police officer does not need any particular training to be able to locate an injury on a person's body (because such an injury is either visible or will be revealed during a search under section 68), or to photograph the injury.

In the Australian Capital Territory, a police officer may undertake a non-intimate forensic procedure, which is the taking of a photograph or video recording of, or an impression or cast of a wound from, a part of the body (other than the genital or anal area, the buttocks, or, for a female or transgender or intersex person who identifies as a female, the breasts).  

In New South Wales, an appropriately qualified police officer or person may take a photograph of a person's body, other than the person's private parts (non-intimate forensic procedure), or take a photograph of a person's private parts (intimate forensic procedure).  

In the Northern Territory, a member of the police force may take a photograph of a part of the body other than the genital or anal area or the buttocks or, in the case of a female, the breasts (non-intimate forensic procedure). However, a member of the Police Force holding the rank of Senior Sergeant or above, must approve the carrying out of the non-intimate procedure on a person.

Under the Crimes Act (Cth), a constable may take a photograph or video recording of a part of the body other than the genital or anal area, the buttocks or, in the case of a female or a
transgender person who identifies as a female, the breasts (non-intimate forensic procedure).\(^{357}\)

**Issue - 74**

*Should a provision be inserted into the CIA which permits a police officer to take a photograph of an injury on the body of a person?*

**8.2 Definition of "responsible person"**

Under Part 9 of the CIA, a responsible person, in relation to an incapable person, may be asked to consent to a protected person undergoing a forensic procedure.\(^ {358}\)

A "protected person" includes an "incapable person".\(^ {359}\) An "incapable person" means a person of any age:

\[
\text{(a) who is unable by reason of a mental disability (which term includes intellectual disability, a psychiatric condition, an acquired brain injury and dementia) to understand the general nature and effect of, and the reason for and the consequences of undergoing, a forensic procedure; or}
\]

\[
\text{(b) who is unconscious or otherwise unable to understand a request made or information given under this Act or to communicate whether or not he or she consents to undergoing a forensic procedure.}\(^ {360}\)
\]

For the purposes of Part 9 of the CIA a "responsible person", in relation to an incapable person, relevantly means, "if the incapable person has reached 18 years of age – a guardian of the incapable person appointed under the Guardianship and Administration Act 1990, or the Public Advocate."\(^ {361}\) The responsible person must be informed of various matters.\(^ {362}\)

Guardians appointed under the *Guardianship and Administration Act 1990* (WA) ("the GA Act") are of two types: plenary guardians or limited guardians.

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\(^{357}\) See section 23WA (the definition of "non-intimate forensic procedure") and section 23XM of the *Crimes Act* (Cth) and regulation 6B and Schedule 3B of the *Crimes Regulations 1990* (Cth).

\(^{358}\) See sections 81(1)(c) and 84(2) of the CIA.

\(^{359}\) See the definition of "protected person" in section 73 of the CIA.

\(^{360}\) See the definition of "incapable person" in section 73 of the CIA.

\(^{361}\) See paragraph (d) of the definition of "responsible person" in section 73 of the CIA.

\(^{362}\) See sections 80(2) and 84(3) of the CIA.
A plenary guardian has:

all of the functions in respect of the person of the represented person that are, under the Family Court Act 1997, vested in a person in whose favour has been made —
(a) a parenting order which allocates parental responsibility for a child; and
(b) a parenting order which provides that a person is to share parental responsibility for a child,
as if the represented person were a child lacking in mature understanding, but a plenary guardian does not have the right to chastise or punish a represented person.363

By way of contrast, a limited guardian has in, respect of the person of the represented person, such of the functions mentioned in section 45 as the State Administrative Tribunal vests in him or them in the guardianship order.364 So, for example, a limited guardian may only have powers in relation to a represented person’s employment.

A concern has been raised as to whether it is appropriate for a limited guardian to have the power to consent to a forensic procedure being carried out on a represented 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).

By way of analogy, it is noted that under the CIIPA, an officer may, in certain circumstances, request a responsible person to consent to a non-intimate identifying procedure being done on an involved person who is protected person, to obtain an identifying particular.365 A "responsible person" under the CIIPA relevantly means, “if the incapable person has reached 18 years of age — the Public Advocate or a guardian of the incapable person appointed under the GA Act.”366

It is of course important to note that the Public Advocate is also a "responsible person". The Public Advocate may be appointed as a person’s guardian under the GA Act.

363 Section 45(1) of the Guardianship and Administration Act 1990 (WA).
364 Section 46 of the GA Act.
365 Section 26(2) of the CIIPA.
366 See paragraph (d) of the definition of "responsible person" in section 3(1) of CIIPA.
Issue - 75

Should paragraph (d) of the definition of "responsible person" in section 73 of the CIA be amended so that it refers to a plenary guardian of the incapable person, rather than a guardian?
Chapter 9: Rights of Persons Voluntarily Assisting Police and Arrested Persons and Corresponding Duties on Officers

Under the CIA, there is a clear distinction between:

- the conferral of a right upon a person;
- the duty imposed on an officer to inform a person of their right(s);
- the exercise of a right by a person; and
- the duty imposed on an officer to facilitate the exercise of a particular right.

Sections 28, 137 and 138 of the CIA confer certain rights on persons, and impose certain duties on police officers.

The purpose of conferring rights on arrested suspects is to try to ensure, amongst other things, that any interview conducted with the suspect is conducted in circumstances, which will not render any confessional evidence inadmissible. However, it is important to note that the rights under sections 137 and 138 are not exhaustive in respect of the requirements of the common law relating to voluntariness, unfairness etc.\(^{367}\)

The problem with the interaction between sections 28, 137 and 138 of the CIA is illustrated by the decision in *The State of Western Australia v Gibson*.\(^{368}\) In that case, WA Police were investigating the murder of a young man in Broome in 2010. The accused was not identified by police as a person of interest in the investigation until two years later, and a decision was made to interview him. At the time he was interviewed, the accused was a 21 year old Aboriginal man who had lived most of his life in an isolated Aboriginal community. The circumstances relating to the interview of the accused are set out in the judgment as follows:

*The accused normally resides in the Kiwirrkurra Community in the Gibson Desert. On 16 August 2012 police from the Major Crime Squad travelled to Kiwirrkurra to interview him. It had been decided prior to arrival that he would be treated as a witness only. As a consequence he was not initially arrested or cautioned and the*

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\(^{367}\) See Chapter 12 in relation to the admissibility of confessional evidence.

An unrecorded interview was conducted at the Kiwirrkurra Community Office. Towards the end of the unrecorded interview it is alleged that the accused made an admission to the effect that he had struck the deceased with a vehicle. He was then formally arrested on suspicion of murder and an audio visual recorded interview was commenced.

Mr Simon Butler, a senior member of the Kiwirrkurra Community, attended as an interview friend. During the recorded interview, Mr Butler and the accused spoke to each other in the local Aboriginal language, Pintupi. The police were not aware of what Mr Butler said to the accused.

At an early stage in the recorded interview the accused was advised that he had a right to make contact with a lawyer. He exercised that right and spoke by telephone to a lawyer from the Aboriginal Legal Service in Kalgoorlie. The lawyer then spoke to police and advised them that the accused did not wish to answer questions. Despite this police continued with the interview. Over a period of approximately six hours, including breaks, the accused made further admissions regarding his involvement in the death of the deceased.

At the conclusion of the interview at Kiwirrkurra the accused remained in the custody of the police and was taken in the back of a police wagon to the Kintore Police Station, approximately 200 kms to the east, where he was locked in a cell overnight. On the following morning the accused was flown by police aircraft to Broome. Later that day the accused was again interviewed at length. This included taking the accused to relevant locations in Broome. Further admissions were made. Neither an interpreter nor an interview friend were utilised during the interview in Broome.\(^{369}\)

During his trial, the accused successfully objected to the admissions allegedly made during the Kiwirrkurra interview and the Broome interview being admitted into evidence.

\(^{369}\) At [7]-[11].
Hall J held that there were 3 questions. First, whether the interviews were voluntary. Second, whether there had been breaches of the CIA and, if so, whether the discretion to admit the evidence under section 155 of the CIA should be exercised. Third, whether the discretion to exclude evidence on the ground on unfairness should be exercised.

Hall J held that there were 3 issues. First, whether the accused should have been treated as a suspect from the outset. Second, whether an interpreter was required. Third, whether the accused was subjected to coercion or pressure to participate in the interviews.

His Honour found that:

At the time the police were considering interviewing the accused they had been told by Mr Mandijarra and Mr Nagomarra that they were in a stolen car with the accused on the relevant night but that there had been no contact with the deceased. Mr Cotchilli said that he had been in the car and that there was a bang which he was told by the accused was caused by running down a ‘white bloke’, though others said that Mr Cotchilli was not present in the car. However, there was also evidence from Ms Nowee and Ms Nungoray that the accused had separately admitted to both of them that he had run down a white man in Broome.

Hall J was of the view that the accused should have been treated as a suspect and that he should have been arrested, afforded his rights under sections 137 and 138 and any interview recorded from the outset.

His Honour also found that an interpreter was required and that it was unlikely that the accused understood the caution. The failure to convey the caution was compounded because of the directives of the interview friend to the accused to talk to the police.

Hall J was not satisfied that the accused’s participation in the police interview was voluntary because: the accused was not cautioned at the outset of the unrecorded interview; the

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370 At [13].
371 At [15].
372 At [28].
373 At [43].
374 At [82]-[84].
375 At [150].
accused did not understand the caution when it was given or his right to silence; the accused’s will was overborne because he was pressured by his interview friend to answer the police questions; and the interview that occurred in Broome was a continuation of the interviewed which commenced in Kiwirrkurra.\(^{376}\)

Hall J also found that there were breaches of the CIA which rendered the interview inadmissible, namely: the failure to record the initial interview as required by section 118; and the failure to ensure that the accused, once he was arrested, was assisted by a qualified interpreter as required by sections 137(3)(d) and 138(2)(d).\(^{377}\) In his Honour’s view, there was no sufficient reason to exercise the discretion to admit the evidence under section 155 of the CIA.\(^{378}\)

Finally, Hall J held that even if he was wrong in regards to the questions of voluntariness and the breaches of the CIA, he would exclude the interview on fairness grounds.\(^{379}\)

9.1 Rights of persons voluntarily assisting police and duties of requesting officer

It is important to note that section 28 of the CIA does not confer power on a police officer to request a person who is not in lawful custody to accompany the officer for the purposes of assisting in the investigation of an offence.\(^{380}\) Instead, section 28 recognises that police may request a person to accompany them to assist in an investigation, and then imposes a duty on the police officer who makes such a request.

The duty cast upon the officer who requests a person who is not in lawful custody to accompany the officer or another officer for the purposes of assisting in the investigation of an offence, is the duty to inform the person of their rights, and to be satisfied that the person understands their rights.

A person who is voluntarily assisting an officer is entitled to be told:

\[ \text{(a) that he or she is not under arrest;} \]

\(^{376}\) At [175].
\(^{377}\) At [176]-[178].
\(^{378}\) At [179].
\(^{379}\) At [180].
\(^{380}\) See also Ian Weldon, *Criminal Law Western Australia* Looseleaf edition (LexisNexis, Butterworths) at [98,275.1] who holds the same view.
(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.\textsuperscript{381}

As was pointed out by Hall J in \textit{The State of Western Australia v. Gibson},\textsuperscript{382} "the rights of a
person who is merely accompanying the police and is not treated as a suspect are limited."

\section*{Issue - 76}
\textbf{Are there any other rights that should be conferred on a person who is voluntarily
assisting an officer?}

\section*{Issue - 77}
\textbf{Should section 28 be clarified to make it clear:}
\begin{enumerate}[a)]
\item that the section only applies to a suspect who is voluntarily assisting police; or
\item what additional rights apply when a suspect is voluntarily assisting police (for example,
the rights in sections 137 and 138)?
\end{enumerate}

\section*{9.2 Rights of arrested persons and rights of arrested suspects and duties of officer
in charge of the investigation}

A person who has been arrested by an officer is entitled:

\begin{enumerate}[a)]
\item to any necessary medical treatment;
\item to a reasonable degree of privacy from the mass media;
\item to a reasonable opportunity to communicate or to attempt to communicate with a
relative or friend to inform that person of his or her whereabouts; and
\item to be assisted by an interpreter or other qualified person, if he or she is for any
reason unable to understand or communicate in spoken English sufficiently.\textsuperscript{383}
\end{enumerate}

An arrested suspect is entitled to the rights set out above and the following additional
rights:

\textsuperscript{381} Section 28(1) of the CIA.
\textsuperscript{382} [2014] WASC 240; (2014) 243 A Crim R 68 at [36].
\textsuperscript{383} Section 137(3) of the CIA.
The rights conferred by section 137 and 138 are continuing rights. In *Kernaghan v The State of Western Australia*, Corboy J noted that a person who has been charged with an offence, will continue to be regarded as a person who is under arrest for the purpose of Part 12 of the CIA and will continue to have the rights conferred by section 137(3), until such time as he or she is delivered into the custody of a court. Further, his Honour noted that the effect of section 125(2) of the CIA is that, “a suspect who has been detained in custody pursuant to s 142(6) of the CIA will retain the rights conferred by s 138(2) after being charged and before being delivered into the custody of the court (in addition to the rights conferred by s 137(3)).”

In *Johnson v Staskos*, the Court of Appeal was required to consider whether the common law requirement to give a person notice of the reason for arrest, had been abrogated by section 128 of the CIA. The Court held that the common law requirement did not apply

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384 Section 138(2) of the CIA.
385 Section 138(3) of the CIA.
386 [2015] WASC 306 at [35].
387 At [53].
because it was inconsistent with section 128 of the CIA, and that the right to be informed of the reason for the arrest occurs after arrest. McLure P was supported in her conclusion by the statutory right of an arrested suspect under section 138(2)(a). Her Honour stated:

“Section 138(3) places an obligation on the officer in charge of the investigation as soon as practicable after arrest to afford the suspect his or her rights under s 138(2). It is clear from the statutory text and context that the right and obligation arise after arrest.”

Mazza JA said:

“In my opinion, s 128 and s 138 of the CIA, when read together, provide a scheme which sets out the power to arrest, the rights of a suspect once arrested and the duty to provide those rights.”

In other jurisdictions, additional rights are conferred on arrested persons. For example:

1. the right to be treated with humanity and respect for human dignity;
2. the right of non-Australian nationals to communicate with an embassy or consular office;
3. the right to be provided with reasonable refreshments and reasonable access to toilet facilities;
4. the right to be told of any requests for information as to his or her whereabouts by any of his or her relatives, friends or legal representatives; and
5. the right to be provided with facilities to wash, shower, bathe and, if appropriate, to shave.

389 At [7] per McLure J (Buss J agreeing) and at [127] per Mazza JA.
390 At [15].
391 At [127].
392 Section 23Q Crimes Act (Cth).
393 Section 23P of the Crimes Act (Cth); section 434 of the PPR Act (Qld); section 124 of the LEPR Act (NSW); section 464F of the Crimes Act (Vic).
394 Section 130(1) of the LEPR Act (NSW).
395 Section 23M of the Crimes Act (Cth).
396 Section 130(2) of the LEPR Act (NSW).
In some cases, issues have arisen as to whether or not a confession was unfairly obtained because the suspect was fatigued when interviewed.\textsuperscript{397} It is noted that one of the relevant factors to be taken into account under section 140 of the CIA in determining the period of detention, is “the time needed to allow the suspect to ... rest or to receive refreshment”.\textsuperscript{398}

**Issue - 78**

*Are there any other rights that should be conferred on an arrested person or an arrested suspect?*

**Issue - 79**

*Should the rights in section 138 be expanded to include the common law rights relating to the principles of voluntariness and fairness?*

**Issue - 80**

*Should some of the rights in sections 137 and 138 be detached from applying as a 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? Which rights should be continuing rights?*

9.3 Rights of suspect and others who have not been arrested but who are voluntarily assisting police

Under section 139 of the CIA, a police officer may detain an arrested suspect for, amongst other things, the purpose of interviewing the suspect in relation to any offence that the suspect is suspected to have committed.\textsuperscript{399} The power of detention in section 139 is subject to time limits as set out in section 140.

However, a police officer may request a suspect to voluntarily accompany the police officer where:

- it is not considered necessary to arrest a suspect to meet the needs of the investigation;
- the suspect is co-operative and willing to help police; or

\textsuperscript{397} See, for example, the *State of Western Australia v. Camus* [2013] WASC 158 at [26]-[32] per Martin CJ.

\textsuperscript{398} See section 141(h) of the CIA.

\textsuperscript{399} Section 139(2)(c) of the CIA.
• the offence suspected is not a serious offence and the officer cannot justify arrest under section 128(3).

If a suspect voluntarily accompanies a police officer, then he or she must be given the rights conferred by section 28. However, the suspect is not entitled to the rights conferred by sections 137 and 138 until he or she is arrested (although there is nothing to prevent a police officer from conferring those rights on the suspect). This means that there is a gap in the conferral of rights on a suspect who is voluntarily assisting police (including a suspect who is interviewed without being arrested). Further, there is nothing in Part 11 of the CIA (Interviewing suspects) which sets out what rights a suspect (whether under arrest or not) has prior to being interviewed.

In *Criminal Law Western Australia* Looseleaf edition (LexisNexis, Butterworths), the author refers to "a person of interest" as being "someone about whom a police officer has some suspicions or misgivings in relation to an alleged offence, but in respect of whom the reasonable suspicion referred to in s 129 of the Criminal Investigation Act 2006 has not been formed". The author adds:

*During the course of an investigation, the police refer on occasions to "persons of interest". That term has no legal definition, but is one of common police usage. Seemingly, it describes someone whom the police consider to be a legitimate subject of inquiry, but who does not satisfy the criteria in s 128 of the Criminal Investigation Act 2006 so as to provide a power of arrest. At this stage, therefore, that person cannot be arrested under s 128 of the Criminal Investigation Act 2006 and thus cannot become an arrested suspect within s 139 of the Criminal Investigation Act 2006. Consequently, the provisions of s 139(2) do not apply to those "persons of interest". There is no power to arrest someone at large merely for the purpose of conducting an interview...*

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400 The reference to "s 129" is incorrect and should read "s 128".
401 At [99,055.73].
402 Ian Weldon, *Criminal Law Western Australia* Looseleaf edition (LexisNexis, Butterworths) at [99,260.10]
Should a new section be inserted into the CIA which confers rights on suspects or persons of interest (but not arrested suspects) who are voluntarily assisting police with their investigations?

There are a number of rights which could be conferred on persons who are suspects or persons of interest, who are voluntarily assisting police with their investigation, having regard to the rights conferred under sections 28, 137 and 138. At the very least, and as far as applicable, a suspect who is voluntarily assisting police should have the following rights:

a) The right to be informed that:
   i. he or she is not under arrest;
   ii. he or she does not have to accompany the officer concerned; and
   iii. 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) to any necessary medical treatment;

c) to a reasonable degree of privacy from the mass media;

d) to a reasonable opportunity to communicate or to attempt to communicate with a relative or friend to inform that person of his or her whereabouts;

e) to be assisted by an interpreter or other qualified person, if he or she is for any reason unable to understand or communicate in spoken English sufficiently;

f) to be informed of the offence(s) that he or she is suspected of having committed;

g) to be cautioned before being interviewed as a suspect;

h) to a reasonable opportunity to communicate or to attempt to communicate with a legal practitioner; and

i) not to be interviewed until the services of an interpreter or other qualified person are available, if he or she is for any reason unable to understand or communicate in spoken English sufficiently.

A person of interest who is voluntarily assisting police should have the same rights as the suspect, save that it would not be necessary to comply with (f) above, although the person of interest should be told of the matter in relation to which his or her assistance is sought.
Since the suspect or person of interest has not been arrested, there is no need to inform them of the reason for their arrest.

Issue - 82

*What rights should be conferred on a suspect or person of interest who is voluntarily assisting police with their investigation?*

If a suspect, or a person of interest who becomes a suspect, is voluntarily assisting police but subsequently withdraws their assistance, then he or she may need to be arrested and detained for the purposes set out in section 139(2) of the CIA. If the offence is a "serious offence", then the suspect may be arrested under section 128(2) of the CIA. However, if the offence is not a "serious offence" then the suspect may only be arrested in the circumstances set out in section 128(3). It is noted that section 128(3) of the CIA does not permit a person to be arrested so that they may be detained for the purposes in section 139(2).

Issue - 83

*Does provision need 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?*

9.4 **Circumstances in which right to communicate may be refused**

Section 138(4) of the CIA sets out the circumstances in which the right of an arrested suspect to communicate or attempt to communicate with another person may be refused. 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, disturbed⁴⁰³ or fabricated; or
- c) a person’s safety being endangered.

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⁴⁰³ The term “disturb” is defined in section 3(1) of the CIA to include “damage, destroy, interfere with and remove.”
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\textsuperscript{404} or taking steps to avoid been arrested/apprehended;\textsuperscript{405}
b) an accomplice or accessory being present during questioning;\textsuperscript{406}
c) hindering the recovery of any person or property concerned in the offence under investigation;\textsuperscript{407}
d) evidence being destroyed\textsuperscript{408} or lost;\textsuperscript{409} and
e) a witness being intimidated.\textsuperscript{410}

Issue - 84

Are there any other circumstances in which an officer should be able to refuse an arrested suspect the right to communicate with another person?

9.5 Use of interpreters to inform a person about their rights and the right not to be interviewed until the services of an interpreter are available

Section 10 of the CIA imposes a duty on an officer with respect to the use of an interpreter or other qualified person. That section provides that:

\begin{quote}
If under this Act an officer is required to inform a person about any matter and the person is for any reason unable to understand or communicate in spoken English sufficiently, the officer must, if it is practicable to do so in the circumstances, use an interpreter or other qualified person or other means to inform the person about the matter.
\end{quote}

Section 10 of the CIA applies, \textit{inter alia}, to the provision of information to a person about their rights under sections 28, 137 and 138 of the CIA.

\begin{itemize}
\item \textsuperscript{404} Section 6(3)(b) of the CLDI Act 1995 (Tas).
\item \textsuperscript{405} 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).
\item \textsuperscript{406} Section 441(1)(b) of the PPR Act (Qld);
\item \textsuperscript{407} Section 125(1)(c) of the LEPR Act (NSW).
\item \textsuperscript{408} 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)
\item \textsuperscript{409} Section 125(1)(b) of the LEPR Act (NSW).
\item \textsuperscript{410} Section 441 of the PPR Act (Qld) and section 125(1)(b) of the LEPR Act (NSW).
\end{itemize}
Concern has been raised about three phrases in section 10:

1. "Understand English sufficiently"

It has been suggested that this phrase is subjective and leaves officers vulnerable to questions regarding how he or she established that the person they were talking to understood what was being explained to them. This has the potential to render evidence inadmissible.

2. "If it is practicable"

It has been suggested that interpreter services are available 24 hours a day, seven days a week. There will therefore be very few times where it can be genuinely argued that it was not practicable to access an interpreter. However, there may be circumstances where police are required to interview a person from a remote community where there is no telephone reception.

3. "Use of an interpreter or other qualified person or other means"

The reference to "other means" would appear to be a reference to the use of unqualified interpreters, such as a family member, or perhaps even computerised methods of interpreting. However, whilst it is open to use "other means", there are clear risks in doing so. It has been suggested that an unqualified interpreter may lack objectivity, or be incorrect in their interpretation. This is not going to be known by the officers at the relevant time.

If an arrested suspect is for any reason unable to understand or communicate in spoken English sufficiently, then section 138(2)(d) of the CIA acts as a prohibition on interviewing that suspect until the services of an interpreter or other qualified person are available.
In *The State of Western Australia v Gibson*, Hall J said:

> Where a person has no understanding of English at all an interpreter is obviously required as a matter of practical necessity. Where a person has some understanding of English the extent of that understanding needs to be considered. The understanding may not be sufficient for the person to appreciate their rights. An interpreter may also be required to ensure that any interview is fair and that any answers are reliable and not the subject of misunderstanding. 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 question 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 give their own account if they wish to do so.

His Honour also noted that the obligations of police interviewing witnesses or suspects who may have language difficulties was partly reflected in section 10 of the CIA. However, Hall J added that section 10:

> ...does not exhaust the need to consider English language proficiency. Whether an interviewee has the capacity to understand and communicate in English sufficient to be able to participate in an interview which may be lengthy and involve complex questions and detailed information must be considered. This is a factor that can impact on whether the interview is voluntary and also on whether it is fair.

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412 At [78].
Issue - 85

Should section 10 of the CIA be amended to clarify the duty imposed on officers to use interpreters, qualified persons or other means to inform a person of their rights?

Issue - 86

Should section 138(d) of the CIA 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?

9.6 The right to silence and the caution

In Petty v The Queen the right to silence was described by the High Court in the following terms:

A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played.

In Western Australia, no adverse inference can be drawn against an accused person by reason of the person's failure to answer questions or provide information. Further, at trial it cannot be suggested that "a previous silence by an accused about a defence he or she raises at the trial provides a basis for inferring the defence is a recent fabrication or otherwise suspect or unacceptable."

A caution is given to a suspect being questioned by a person in authority in recognition of the existence of the right to silence.

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413 (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ.
414 Durham v The Queen [2016] WASCA 121 at [88] per Mazza JA (McLure P and Buss JA agreeing).
415 Durham v The Queen [2016] WASCA 121 at [89] per Mazza JA (McLure P and Buss JA agreeing).
In *Nicholls v Woods*[^416], Miller J set out the circumstances in which a caution must be given:

> [T]here is clear authority that whilst an investigation is merely at the stage at which a police officer is gathering information or giving a possible suspect the opportunity of clearing himself, there is no need for a caution to be administered. It was put by King CJ in Dolan v The Queen (1992) 58 SASR 501 at 505 in these terms: "It has always been accepted that while the investigation is at the stage at which the police officer is simply gathering information or giving possible suspects the opportunity of clearing themselves, there is no need for a caution. At that point there can be no question of involuntariness or unfairness arising out of omission of the caution."

The caution required to be given to a suspect is not set out in the CIA or any other legislation. However, the usual police caution is expressed in the following terms:

> You are not obliged to say anything unless you wish to do so, but anything you say or do will be recorded and may be used in evidence.

In *The State of Western Australia v Gibson*[^417], Hall J stated:

> The obligation to administer a caution to an arrested suspect will not be satisfied by merely reciting the relevant phrases in the presence of that suspect. The caution must be understood by the suspect in order for it to be relevant to the question of voluntariness. In the case of a suspect who has an insufficient understanding of English this means that an interpreter should be used to explain the caution: s 10 CIA. Asking the suspect to then explain in their own words what the caution means will ensure that the suspect understands their rights.

It has been suggested that the police caution should be amended in accordance with the English police caution. The English caution is expressed in the following terms:


"You are not obliged to say anything – but it may harm your defence if you fail to mention whilst questioned, anything you later rely on in court. Anything you do say may be given in evidence."

In the United Kingdom, amendments were made with respect to the right to silence when a person is questioned by police. Sections 34, 36 and 37 of the CJPO Act provide that in certain circumstances, a court can draw an adverse inference from a charged suspect's silence.

Section 34 of the CJPO Act allows a court to draw an adverse inference when a person:

a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

b) on being charged with the offence or officially informed that he might be prosecuted, failed to mention any such fact.

Section 36 of the CJPO Act allows the court to draw an adverse inference when a person fails or refuses to account to a constable for objects, substances or marks found:

- on his person; or
- in/on his clothing or footwear; or
- otherwise in his possession; or
- in any place at the time of his arrest,

in circumstances where the investigating officer reasonably believes that the presence of such a mark, or substance or object may be attributable to that person's participation in the commission of an offence specified by the officer.

Section 37 of the CJPO Act allows the court to draw an adverse inference when a defendant fails or refuses to account to a constable for his presence at a particular place where it is believed that he may have committed an offence.

Sections 36 and 37 of the CJPO Act do not apply unless the accused was told in ordinary language by the constable when making the request, what the effect of the section would
be if he fails or refuses to comply with the request.\textsuperscript{418} Further, sections 34, 36 and 37 of the CJPO Act do not apply if the accused was at an authorised place of detention at the time of the failure or refusal and was not allowed an opportunity to consult with a solicitor.\textsuperscript{419}

The Crown Prosecution Service's Legal Guidance on Adverse Inferences contains an excellent summary of the relevant legislative provisions in the CJPO Act and case law applying to adverse inferences in the United Kingdom.\textsuperscript{420} It is clear from the Legal Guidance that no adverse inferences will be drawn if the facts were not known to the suspect at the time of the failure to disclose. The Legal Guidance states:

\textit{This means that the interviewing or investigating officer must disclose sufficient information to enable the suspect to understand the nature and circumstances of their arrest.}

In its \textit{Final Report on the Review of the Criminal and Civil Justice System}, the WALRC gave consideration to amendments to the right to silence.\textsuperscript{421} WALRC concluded that:

\textit{The existing prohibition on any adverse comment at trial concerning a defendant's exercise of the right to silence under police questioning should be maintained.}\textsuperscript{422}

In 2007, WA Police Legal Services prepared a discussion paper on the issues arising out of the UK-type caution. The requirement for pre-interview disclosure before an adverse inference may be drawn means that, in order to provide full disclosure, there would need to be a more comprehensive investigation at the time of detention. There would also need to be longer detention periods as a result of increased consultation with legal practitioners. WA Police Legal Services concluded that the WA Police resource base is not currently capable of sustaining this.

A number of Australian jurisdictions have a provision preserving the right to silence, which is identical to or similar in terms to the following provision:

\begin{itemize}
  \item \textsuperscript{418} Sections 36(4) and 37(3) of the CJPO Act.
  \item \textsuperscript{419} Sections 34(2A), 36(4A) and 37(3A) of the CJPO Act.
  \item \textsuperscript{420} <http://www.cps.gov.uk/legal/a_to_c/adverse_inferences/>
  \item \textsuperscript{421} WALRC, \textit{Review of the Criminal and Civil Justice System Final Report} (Project 92, September 1999) at 201-208.
  \item \textsuperscript{422} WALRC, \textit{Review of the Criminal and Civil Justice System Final Report} (Project 92, September 1999) at 203.
\end{itemize}
1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
   a) to answer one or more questions; or
   b) to respond to a representation;
put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

4) In this section:
   "inference" includes:
   an inference of consciousness of guilt; or
   an inference relevant to a party's credibility.  

However, in New South Wales, there has been a departure from the Uniform Evidence Law by the addition of section 89A of the Evidence Act 1995 (NSW) which provides:

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appears proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:
   (a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and
   (b) that is relied on in his or her defence in that proceeding.

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

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423 See, section 89 of the Evidence Act 1995 (Cth); section 89 of the Evidence Act 2011 (ACT); section 89 of the Evidence Act 1995 (NSW); section 89 of the Evidence (Uniform Legislation) Act (NT); section 89 of the Evidence Act 2001 (Tas); and section 89 of the Evidence Act 2008 (Vic).
(a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and
(b) the special caution was given before the failure or refusal to mention the fact, and
(c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and
(d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

(3) It is not necessary that a particular form of words be used in giving a special caution.

(4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

(5) This section does not apply:
   (a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or
   (b) if evidence of a failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.

(6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.

(7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.

(8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving
of the special caution in admissible in proceedings for any other offence (whether or not a serious indictable offence).

(9) In this section:

"official questioning" of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.

"special caution" means a caution given to the person that is to the effect that:

(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioning something the person later relies on in court, and
(b) anything the person does say or do may be used in evidence.

Issue - 87

Should the Western Australian police caution be amended to reflect the United Kingdom caution or the special caution in New South Wales?

9.7 Facilitation of right to communicate with a relative or friend and the right to communicate with a legal practitioner

It is noted that there is no common law right to communicate or to attempt to communicate with a legal practitioner, which is equivalent to the statutory right conferred by section 138(2)(c) of the CIA. However, non-compliance with a request to speak to a legal practitioner may be relevant to the voluntariness or fairness of confessional evidence.

In Wright v State of Western Australia, McLure P provided the following guidance about the rights and duties under section 137 and 138 of the CIA:

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426 [2010] WASCA 199; (2010) 43 WAR 1 at [29]-[30]. See also The State of Western Australia v Gandy [No 2] [2015] WASC 386 at [51] per Corboy J.
The proper construction of s 138(2)(c) is not without difficulty. What is relatively clear is that it is not the source of any duty imposed on police. Section 138(3)(a) is the source of the duty on police. The two provisions have to be read together to determine the scope of the duty on police in relation to a suspect’s right under s 138(2)(c). The only express duty on police is to inform the suspect of his right to communicate with a lawyer. That is to be contrasted with the obligation of the officer in charge under s 138(3)(b) which is to afford the suspect his or her other rights under s 137 and subs (2). The word ‘inform’ means tell and the word ‘afford’ means supply or furnish. The word ‘other’ can only mean other than the provisions expressly referred to in s 138(3)(a), which includes s 138(2)(c). Accordingly, the officer in charge is under a duty to caution the suspect or if the suspect is unable to understand or communicate in English, to provide an interpreter. The only obligation of the officer in charge in relation to s 138(2)(c) is to inform the suspect of his entitlement to a reasonable opportunity to communicate with a legal practitioner. However, what is a reasonable opportunity will depend on all the circumstances, including the suspect’s access to the means to communicate. Thus there is every practical incentive on police to permit access to the means necessary to facilitate communication.

Although the officer in charge is not obliged to supply or furnish an arrested suspect with any facilities (for example, a telephone or a telephone directory) which are reasonably necessary for the suspect to take advantage of his or her entitlement under s 138(2)(c) (namely, a reasonable opportunity to communicate or attempt to communicate with a legal practitioner), police must not by any act or omission prevent the suspect’s exercise of that entitlement.

Her Honour added:427

If an arrested suspect wishes to take advantage of his or her entitlement to a reasonable opportunity to communicate with a legal practitioner, what will constitute a 'reasonable opportunity' will, of course depend on the particular facts

427 At [32].
and circumstances of each case. But, ordinarily, the 'reasonable opportunity' will include the suspect travelling in the company of a police officer (see s 139(2) and (3)) to obtain access (if necessary) to a telephone and a telephone directory within the vicinity of the place where the suspect is being detained.

Accordingly, whilst the officer in charge of the 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 suspect his or her rights under section 137(3)(c) and 138(2)(c).

Once the police have exercised their duties under section 138 of the CIA, the onus is effectively cast on the suspect to exercise their rights if they wish to do so. There is no duty on the police to cease questioning the suspect, nor is there an obligation to provide the suspect with facilities for contacting a person who they are entitled to contact.428

In other jurisdictions, there are specific provisions for affording an arrested person the means to exercise their rights to communicate with a friend, relative or a legal practitioner.

Section 419 of the PPR Act (Qld) relevantly provides:

(1) If the relevant person asks to speak to a friend, relative or lawyer, the investigating police officer must-

(a) as soon as practicable, provide reasonable facilities to enable the person to speak to the other person; and

(b) if the other person is a lawyer and it is reasonably practicable-allow the relevant person to speak to the lawyer in circumstances in which the conversation cannot be overheard.

(2) If the relevant person arranges for another person to be present during questioning, the investigating police officer must allow the other person to be present and give advice to the relevant person during the questioning.

\[428\] *Wright v The State of Western Australia* [2010] WASCA 199; (2010) 43 WAR 1 at [38] per McLure P; See also *The State of Western Australia v Gandy [No 2]* [2015] WASC 386 at [51] per Corboy J.
(3) If the police officer considers the other person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.

Section 123 of the LEPR Act (NSW) relevantly provides that:

(2) If the person wishes to make any communication then the custody manager must, as soon as practicable:
   (a) give the person reasonable facilities to enable the person to do so, and
   (b) allow the person to do so in circumstances in which, so far as is practicable, the communication will not be overheard.

(3) The custody manager must defer for a reasonable period any investigative procedure in which the person is to participate:
   (a) to allow the person to make, or attempt to make, a communication referred to in subsection (1), and
   (b) if the person has asked any person so communicated with to attend at the place where the person is being detained:
      (i) to allow the person communicated with to arrive at that place, and
      (ii) to allow the person to consult with the person communicated with at that place

(4) If the person has asked a friend, relative, guardian or independent person communicated with to attend at the place where the person is being detained, the custody manager must allow the person to consult with the friend, relative, guardian or independent person in private and must provide reasonable facilities for that consultation.

(5) If the person has asked an Australian legal practitioner communicated with to attend at the place where the person is being detained, the custody manager must:
   (a) allow the person to consult with the Australian legal practitioner in private and must provide reasonable facilities for that consultation.
   (b) if the person has so requested, allow the Australian legal practitioner to be present during any such investigative procedure and to give advice to that person.
Section 6(1) of the CLDI Act (Tas) relevantly provides that a police officer conducting an investigation must inform the person in custody that he or she may communicate, or attempt to communicate, with a friend or relative to inform them or his or her whereabouts or a legal practitioner. Section 6 of the CLDI Act (Tas) further provides:

(7) Subject to subsections (3) and (6), if a person in custody wishes to communicate with a friend, relative or legal practitioner, the police officer in whose custody the person is-

(a) must afford the person reasonable facilities as soon as practicable to enable the person to do so; and
(b) must allow the person’s legal practitioner to communicate with the person in custody in circumstances in which as far as practicable the communication will not be overheard.

Section 464C(2) of the Crimes Act (Vic) relevantly provides:

Subject to subsection (1), if a person wishes to communicate with a friend, relative or legal practitioner, the investigating official in whose custody the person then is-

(a) must afford the person reasonable facilities as soon as practicable to enable the person to do so; and
(b) must allow the person’s legal practitioner or a clerk of the legal practitioner to communicate with the person in custody in circumstances in which as far as practicable the communication will not be overheard.

Section 140 of the PA Act (NT) provides that the investigating member must afford the person reasonable facilities to enable the person in custody to make, or attempt to make communication with a friend or relative, to inform the friend or relative of the person’s whereabouts.

Section 23G of the Crimes Act (Cth) relevantly provides:

\[ \text{footnote}{429} \text{ Subsection (3) sets out the circumstances in which the police officer conducting an investigation may deny the person in custody communication with others.} \]

\[ \text{footnote}{430} \text{ Subsection (6) provides for a magistrate to order that a person be denied their right to communicate for a specified period.} \]
(2) Subject to section 23L, if a person is under arrest or a protected suspect and wishes to communicate with a friend, relative or legal practitioner, the investigating official must:

(a) as soon as practicable, give the person reasonable facilities to enable the person to do so; and

(b) in the case of a communication with a legal practitioner—allow the legal practitioner or a clerk of the legal practitioner to communicate with the person in circumstances in which, as far as practicable, the communication will not be overheard.

(3) Subject to section 23L, if a person is under arrest or a protected suspect and arranges for a legal practitioner to be present during the questioning, the investigating official must:

(a) allow the person to consult with the legal practitioner in private and provide reasonable facilities for that consultation;

(b) allow the legal practitioner to be present during the questioning and to give advice to the person, but only while the legal practitioner does not unreasonably interfere with the questioning.

Issue - 88

*Should section 138 of the CIA 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?*

9.8 Interview friends

There is nothing in the CIA which makes provision for interview friends. However, it is noted that there are guidelines in the COPS Manual for questioning Aboriginal persons, including to the use of interview friends.\(^\text{432}\)

In *The State of Western Australia v Gibson*,\(^\text{433}\) Hall J stated:

\(^{431}\) Section 23L of the Crimes Act (Cth) is similar in terms to section 138(4) of the CIA.

\(^{432}\) See QS0.1.02.5.
The purpose of an interview friend is to act as a support for the suspect, particularly if the suspect wants to exercise the right to silence. The friend should be a person in whom the accused has confidence, who can speak the suspect’s language and who is independent of the police: R v Butler [No 1] (1991) 102 FLR 341; Njana (1998) 99 A Crim R 273. The friend should not play a role of assisting the police in the interrogation by urging or directing the suspect to answer questions. Whilst the presence of an interview friend is not required by law, it is also a factor that may bear upon the question of voluntariness.

Sections 23H, 23J, 23K and 23L of the Crimes Act (Cth) contain provisions relating to the role of an interview friend, namely:

- when an interview friend is required;
- who may act as an interview friend;
- choice of interview friend; and
- the exclusion of an interview friend from the questioning if he or she unreasonably interferes with it.

Issue - 89

**Should a provision be inserted into the CIA which sets out when an interview friend may be required and the role of the interview friend?**

9.9 Making a recording of an officer informing a person of their rights under sections 28, 137 and 138

There is nothing in the CIA which 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.

By way of contrast, it is noted that an officer who makes a request to a person under sections 83, 84, 91 or 92 of the CIA to undergo a forensic procedure must make a record of

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the request, of the information required to be given and any response.\textsuperscript{434} The record must be an audiovisual recording, or in writing.\textsuperscript{435}

In \textit{The State of Western Australia v Cox},\textsuperscript{436} Martin CJ noted the clear distinction in the CIA between the legal regime that applies to a person who is voluntarily assisting police, and the legal regime that applies to a person who is an arrested suspect. His Honour added:

\begin{quote}
It would be highly desirable, with a view to reducing arguments of this kind, for a general practice to be adopted whereby police identify on the video record of interview the precise status of the interviewee under the Criminal Investigation Act; that is to say, whether they are a person voluntarily assisting the police with their inquiries or alternatively, an arrested suspect. Further, it would also seem to be highly desirable for the police to adopt the general practice of then ensuring on the video record of interview itself that there is a permanent record of the conferral of the rights required to be conferred by the Criminal Investigation Act upon that person by reference to their status. So, in the case of a person who is assisting the police voluntarily with their inquiries, it would be highly desirable for the video record of interview to record the officers conferring upon that person the rights specifically identified by s 28 of the Criminal Investigation Act.

Similarly, in the case of a person who is identified in the course of the interview to be an arrested suspect, it would be highly desirable, and likely to reduce debates of this kind, if the police were to adopt the general practice of conferring the rights required to be conferred by s 138 in the course of the recorded interview, thus eliminating the scope for debate about whether or not those rights were conferred.\textsuperscript{437}
\end{quote}

In some jurisdictions, the giving of information to a person about their rights must be recorded.

In Queensland, section 435 of the PPR Act (Qld) provides that:

\begin{itemize}
\item \textsuperscript{434} See sections 85(1) and 93(1) of the CIA.
\item \textsuperscript{435} See sections 85(2) and 93(2) of the CIA.
\item \textsuperscript{436} [2008] WASC 287 at [69]-[70].
\item \textsuperscript{437} At [71]-[72].
\end{itemize}
A police officer who is required under this division to give to a relevant person information (including a caution) must, if practicable, electronically record the giving of the information to the person and the person’s response.

In Victoria, section 464G of the Crimes Act (Vic) provides that:

(1) If a person is in custody in relation to an indictable offence, an investigating official who is required by sections 464A(3), 464C(1) and 464F(1) to give the person in custody certain information must record (by audio recording or audiovisual recording), if practicable, the giving of that information and the person’s responses, if any.

(2) Subsection (1) is subject to section 464B(5H) and (15).

In the Northern Territory, section 141 of the PA Act (NT) provides that:

The investigating member who is required by section 140 to give the person in custody the information required by that section to be given shall, if practicable, electronically record the giving of the information and the person’s response, if any.

In other jurisdictions, a person who has been informed of their rights is requested to sign an acknowledgement that he or she has been so informed.

Issue - 90

Should the CIA 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)?

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438 Right to silence.
439 Right to communicate, or attempt to communicate, with a friend, relative or legal practitioner.
440 Right to communicate with consular office.
441 Requirement to make audiovisual recording.
442 The person in custody must be informed that he or she does not have to say anything but that anything the person does say or do may be given in evidence and that they may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person’s whereabouts.
443 See, for example, section 123(10) of the LEPR Act (NSW).
Chapter 10: Arrest and Detention

The legislative scheme for the arrest and detention of suspects under the CIA as follows:444

(a) The general power of arrest is contained in section 128 of the CIA. As Mazza JA observed in Johnson v Staskos,445 "the basis upon which the power is to be exercised differs according to whether the person to be arrested is reasonably suspected of committing a serious or non-serious offence." A police officer may arrest a person for a serious offence446 if the officer reasonably suspects the person has committed, is committing, or is just about to commit, the offence.447 A police officer may also arrest a person for an offence that is not a serious offence in certain circumstances.448

(b) An "arrested suspect" means a person who is under arrest having been arrested: under section 128, under an arrest warrant, or under another written law, on suspicion of having committed an offence; or under the Criminal Investigation (Extra-territorial Offences) Act 1987.449

(c) An arrested suspect has the rights conferred by section 138(2) in addition to the rights conferred by section 137.450

(d) The officer in charge of the investigation must as soon as practicable after the arrest of an arrested suspect:

(i) inform the suspect of his or her rights under sections 137(3)(c) and 138(2)(c);

(ii) afford the suspect his or her other rights under sections 137 and 138(2).451

(e) A police officer may detain an arrested suspect in custody after the suspect is arrested for the purposes set out in section 139(2).452

444 This summary is an adaptation of the summary contained in Kernaghan v The State of Western Australia [2015] WASC 306 at [26] and [36]-[41] per Corboy J.
446 See the definition of "serious offence" in section 28(1) of the CIA.
447 Section 28(2) of the CIA.
448 Section 28(3) of the CIA.
449 See the definition of "arrested suspect" in section 138(1) of the CIA.
450 Section 138(2) of the CIA. These rights are discussed in more detail in Chapter 10.
451 Section 138(3) of the CIA.
(f) A person who is arrested under any process or warrant must be dealt with according to the process or warrant. However, section 143(1) does not prevent Part 12 of the CIA from applying to a person referred to in that subsection if he or she is reasonably suspected to have committed an offence that is unrelated to the process or warrant.

(g) An "arrested suspect" for the purposes of sections 139, 140 and 142 means a person who is under arrest having been arrested under section 128, or under another written law, on suspicion of having committed an offence but who has not been arrested under an arrest warrant.

(h) The detention of the arrested suspect under section 139(2) must comply with section 140. That section prescribes the period for which an arrested suspect may be detained in custody having regard to the factors set out in section 141.

(i) If it is decided not to charge an arrested suspect with an offence then the officer who has custody of the suspect must release the suspect unconditionally. "Unconditionally" means released without being required to enter into, or without having entered into, a bail undertaking under the Bail Act 1982.

(j) Section 142(2) sets out the circumstances in which not releasing a suspect unconditionally is justified.

(k) If it is decided to charge an arrested suspect with a simple offence then, subject to section 142(8), the officer who has custody of the suspect must release the suspect unconditionally unless the officer reasonably suspects:

(i) that the presence of the suspect when the charge is first dealt with by a court is likely to be necessary for any reason or for sentencing purposes; or

(ii) not releasing the suspect unconditionally is justified under section 142(2),

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452 See Chapter 9.
453 Section 143(1) of the CIA.
454 Section 143(2) of the CIA.
455 See the definition of "arrested suspect" in section 139(1) of the CIA.
456 Section 142(3) of the CIA.
457 Section 125(1) of the CIA.
in which case the officer may detain the suspect in custody subject to section 142 (7) and (8).458

(l) If it is decided to charge an arrested suspect with an indictable offence that is not a serious offence, then, subject to section 142 (8), the officer who has custody of the suspect must release the suspect unconditionally unless:

(i) the officer reasonably suspects that if, under the Criminal Procedure Act 2004, the suspect were served with a summons in relation to the charge and released unconditionally the suspect would not obey the summons; or

(ii) not releasing the suspect unconditionally is justified under section 142(2), in which case the officer may detain the suspect in custody subject to section 142(7) and (8).459

(m) If it is decided to charge an arrested suspect with a serious offence (that is, an indictable offence the statutory penalty for which is or includes imprisonment for 5 years or more or life460), the officer who has custody of the suspect may detain

the suspect in custody subject to section 142(7) and (8).461

(n) Section 142(7) provides 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 must ensure the suspect is charged as soon as practicable and is dealt with under section 6 of the Bail Act or under section 196 of the Mental Health Act 1996.462

(o) Section 142(8) 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:

(i) the time needed to complete any identifying procedure under Part 7 of the CIIPA;

458 Section 142(4) of the CIA.
459 Section 142(5) of the CIA.
460 See the definition of "serious offence" in section 142 of the CIA.
461 See 10.11 below.
(ii) the time needed to complete any forensic procedure on the suspect under Part 9;

(iii) 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\(^\text{463}\) or any other written law.

(p) Section 5 of the Bail Act provides that an "accused"\(^\text{464}\), who is in custody for an offence awaiting his initial appearance in court, is entitled to have his case for bail for that appearance considered under, and in accordance with, the Bail Act as soon as is practicable,\(^\text{465}\) and if his case is not so considered, or if he is refused bail or is not released on bail, to be brought before a court as soon as is practicable.\(^\text{466}\)

(q) Section 6(4) of the Bail Act provides that as soon as practicable after the accused is charged, the police officer who charged the accused ("the arrester") must as soon as practicable after the accused is charged, either:

(i) bring the accused or cause the accused to be brought before a court; or

(ii) perform the other duties of the arrester under section 6.

(r) Section 6(5) of the Bail Act provides that if the arrester has the power to grant the accused bail, the arrester must consider the accused's case for bail. Section 6(6) provides that if the arrester does not have power to grant the accused bail, the arrester must bring or cause the accused to be brought before an authorised police officer or a justice who must consider the accused's case for bail as soon as is practicable. An "authorised police officer" is a police officer who holds the rank of sergeant or a higher rank, or who is the police officer for the time being in charge of a police station, or is the officer in charge of a lock-up.\(^\text{467}\)

\(^{463}\) Section 157 of the Mental Health Act 2014 provides for a police officer to arrange for a person who has been arrested to be assessed by a medical practitioner or authorised mental health practitioner if the police officer reasonably suspects that the person has a mental illness for which the person is in need of immediate treatment.

\(^{464}\) See the definition of "accused" in section 3(1) of the Bail Act.

\(^{465}\) Section 5(1)(a) of the Bail Act.

\(^{466}\) Section 5(1)(b) of the Bail Act.

\(^{467}\) Section 3 of the Bail Act.
(s) A person who is arrested under section 128 ceases to be under arrest when the person is released (whether on bail or unconditionally) or, if the person is not released, when the person is delivered into the custody of a court.\footnote{Section 125(2)(b) of the CIA.}

(t) A person who is arrested under an arrest warrant ceases to be under arrest when the person is delivered into the custody of the relevant court.\footnote{Section 125(2)(a) of the CIA.}

Section 142(6) of the CIA was considered in \textit{Kernaghan v The State of Western Australia}\footnote{2015 WASC 306 at [36].} by Corboy J who said:

\textit{The effect of section 142(6) is that on a decision to charge an arrested suspect with a serious offence:}

\begin{itemize}
  \item[(a)] the power to detain the suspect in custody pursuant to s 139 is exhausted;
  \item[(b)] a new and separate power to detain the suspect in custody is conferred by the section (the wording of s 142(6) and the terms of s 142(8) make it clear that the power is triggered by the decision to charge the suspect);
  \item[(c)] the power conferred by s 142(6) is subject to s 142(7) and s 142(8), whereas the power to detain a suspect in custody under s 139 is subject to the provisions of that section and s 140;
  \item[(d)] the power to detain in custody conferred by s 142(6) is for the purposes specified in s 142(7) and s 142(8), whereas the power conferred by s 139(2) is for the purposes specified in that subsection.
\end{itemize}

His Honour added:\footnote{At [40].}

\textit{Accordingly, the effect of s 142(6) CIA, read with s 142(7) and (8) and s 5 and s 6 of the Bail Act, is that the obligations imposed on the custody officer are not discharged merely on bringing or causing the suspect to be brought before an authorised police officer or a justice for the purpose of a case for bail being considered. To deal with a suspect under s 6 of the Bail Act requires the suspect to be brought before a court as soon as practicable if bail is refused. The effect of s 142(7) is that the custody officer...}
must ensure that this occurs. The officer’s power to detain the suspect in custody continues for so long as is necessary for him or her to ensure that the suspect is dealt with under s 6 of the Bail Act, including for as long as is necessary for the suspect to be brought before a court if bail is refused or the suspect is not otherwise released or if the suspect’s case for bail is not considered by an authorised police officer or a justice. The custody officer’s power to detain a suspect under s 142(6) and the exercise of that power is not disturbed (that is, not extinguished) by the decision to refuse bail.

10.1 Arrest for serious offences

Section 128(2) of the CIA is currently limited in application to “serious offences”, as defined in section 128(1) of the CIA.

Since the commencement of the CIA, the definition of “serious offence” in section 128 has been amended on two occasions.472

The first change was made to ensure that, under section 128(2) of the CIA, officers are able to arrest a person who is suspected of having committed, is committing, or is just about to commit domestic violence related offences.

The second change was made to ensure that, under section 128(2) of the CIA, officers are able to arrest a person who is suspected of having committed, is committing, or is just about to commit an offence contrary to section 38C(2) of the CIA (that is failing to comply with an order given by a police officer in respect to an out of control gathering).

Accordingly, the definition of “serious offence” currently means an offence:

a) the statutory penalty for which is or includes imprisonment for 5 years or more or life; or
b) under section 61(1) or (2a) of the RO Act; or

472 See the Restraining Orders Amendment Act 2011 (WA) and the Criminal Law Amendment (Out-of-Control Gatherings) Act 2012 (WA).
c) that involves an act of family and domestic violence as referred to in the definition of act of family and domestic violence paragraphs (a) to (c) and (f) in section 6(1) of the RO Act; or
d) under section 38C(2).

Issue - 91

Should section 128(2) of the CIA be amended to apply to all offences, and section 128(3) of the CIA deleted, with the COP issuing an instruction regarding the appropriate use of the arrest power for lesser offences?

Issue - 92

In the alternative, should the definition of "serious offence" in section 128(1) of the CIA 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";

Note: The issues as to whether the same definition of "serious offence" should apply throughout the CIA and whether the term "serious offence" should be replaced by the term "arrestable offence" are addressed in Chapter 1.

10.2 Arrest for non-serious offence

10.2.1 Circumstances in which the arrest power in section 128(3) may be used

A police officer or a public officer may also arrest a person for an offence that is not a serious offence in the circumstances set out in section 128(3) of the CIA, namely that the officer reasonably suspects:

a) that the person has committed, is committing, or is just about to commit, the offence; and

b) that if the person is not arrested:
   i. it will not be possible, in accordance with law, to obtain and verify the person’s name and other personal details; or
   ii. the person will continue or repeat the offence; or
   iii. the person will commit another offence; or
   iv. the person will endanger another person’s safety or property; or
v. the person will interfere with witnesses or otherwise obstruct the course of justice; or
vi. the person will conceal or disturb a thing relevant to the offence; or
vii. the person’s safety will be endangered.

Section 128(3)(b) of the CIA could be recast so that the second requirement for making an arrest for a non-serious offence reads:

The police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:

(i) to enable enquiries to be made to obtain and verify the person’s name and other personal details; or
(ii) to prevent the continuation of repetition of the offence; or
(iii) to prevent the commission of another offence; or
(iv) to prevent the person from endangering another person’s safety or property;
(v) to prevent the person from interfering with witnesses or otherwise obstructing the course of justice; or
(vi) to prevent the person from concealing or disturbing a thing relevant to the offence;
(vii) to prevent the person from endangering his or her own safety.

Issue - 93

Should section 128(3)(b) of the CIA be recast?

In other jurisdictions, a person may be arrested if the officer suspects on reasonable grounds that the person is committing, or has committed an offence, and the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:

a) to prevent the fabrication of evidence;\textsuperscript{473}
b) because of the nature and seriousness of the offence;\textsuperscript{474}

\textsuperscript{473} Section 99(1)(b)(vi) of the LEPR Act (NSW); Section 212(1)(b)(v) of the Crimes Act 1900 (ACT); Section 365(1)(f) of the PPR Act (Qld).
c) to obtain property in the possession of the person that is connected with the offence; 475

d) to stop the person fleeing from the officer or from the location of the offence; 476

e) to preserve public order; 477

f) to ensure the person's attendance at court; 478

g) to make inquiries to establish the person's identity or if the officer suspects that identify information provided is false. 479

Issue - 94

Does section 128(3)(b) of the CIA need to be amended to provide for additional circumstances in which the power of arrest in that subsection may be exercised? If so, what circumstances?

10.2.2 Verifying a person’s name and other personal details

The purpose behind 128(3)(b)(i) of the CIA is to ensure that police charging offenders with lesser offences do not arrest a person where an officer is satisfied that the person’s personal details are known and can be verified to be correct, without having to take the person into custody.

Section 128(3)(b)(i) of the CIA has been found to be problematic for police to interpret. It has been suggested that the reference to it not being "possible" in accordance with the law to obtain and verify the person’s details, imposes a very high threshold that may be difficult for a police officer to overcome.

In a world that embraces the use of intelligence DNA technology, retina scanning and facial recognition to discover the identity of a person, it could conceivably be argued that it is almost always possible to obtain and verify a person’s personal details, if the right resources are available.

474 Section 99(1)(b)(ix) of the LEPR Act (NSW); Section 365(1)(k) of the PPR Act (Qld)

475 Section 99(1)(b)(v) of the LEPR Act (NSW).

476 Section 99(1)(b)(ii) of the LEPR Act (NSW); Section 365(1)(h) of the PPR Act (Qld).

477 Section 458(1)(a)(ii) of the Crimes Act (Vic).

478 Section 458(1)(a)(i) of the Crimes Act (Vic); Section 365(1)(c) of the PPR Act (Qld); Section 212(1)(b)(i) of the Crimes Act 1900 (ACT);

479 Section 99(1)(b)(iii) of the LEPR Act (NSW); Section 365(1)(b) of the PPR Act (Qld).
It has been suggested that section 128(3)(b)(i) of the CIA should be redrafted to make it clear that police officers are only required to conduct inquiries that are practical based on the time, place and circumstances applying in relation to the particular offender. This is because it is not always possible at the scene to exhaust all possible avenues of inquiry, to identify the person prior to considering using the power of arrest.

In New South Wales, a person may be arrested if the officer suspects on reasonable grounds that the person is committing or has committed an offence, and the police officer is satisfied that the arrest is reasonably necessary to enable enquiries to be made to establish the person’s identity if it cannot readily be established, or if the police officer suspects on reasonable grounds that identity information provided is false.\(^{480}\)

**Issue - 95**

*Should section 128(3)(b)(i) be amended to reflect the investigative limitations in identifying an offender when officers are on the road?*

### 10.3 Discontinuance of arrest

An issue has arisen as to whether an arrest made under section 128 of the CIA may be discontinued, or the person "unarrested".

There is no express power to discontinue an arrest in the CIA. Section 125(2) of the CIA sets out, for the purposes of Part 12 of the CIA, when a person ceases to be under arrest. That section provides:

\[
(2) \text{For the purposes of this Part, a person who is under arrest ceases to be under arrest —} \\
(a) \text{if the person was arrested under an arrest warrant — when the person is delivered into the custody of the relevant court; or} \\
(b) \text{if the person is arrested under section 128 —} \\
(i) \text{when the person is released, whether on bail or unconditionally; or} \\
(ii) \text{if the person is not released, when the person is delivered into the custody of a court;}
\]

\(^{480}\) Section 99(1)(b)(iii) of the LEPR Act (NSW).
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.

"Unconditionally" in relation to the release of a person, means:

released without being required to enter into, or without having entered into, a bail undertaking under the Bail Act 1982.\(^{481}\)

Part 12 of the CIA does not prevent a person from being charged with an offence without having been first arrested for it.\(^{482}\) The fact that the power of arrest for non-serious offences is limited, also tends to favour a person being charged without having been arrested.

It is not clear whether section 125(2)(b)(i) of the CIA is intended to be confined to a reference to release of an arrested suspect under section 142 of the CIA. It is arguable that section 142 of the CIA is an exhaustive statement of the circumstances in which an arrested suspect may be released and, if that is so, then an arrest cannot be discontinued or the person unarrested, otherwise than under section 142. However, the position is not clear.

Further, a person who has been arrested has certain rights under sections 137 and 138 of the CIA and it is mandatory for the officer in charge of an investigation to inform the arrested person of those rights, and to afford the person some of those rights. It is not clear how sections 137 and 138 would operate in relation to a person who has been "unarrested". For example, would the officer in charge of the investigation have to inform the arrested suspect of his rights before he or she could be "unarrested"?

In New South Wales, section 105 of the LEPR Act (NSW) provides:

(1) A police officer may discontinue an arrest at any time.

(2) Without limiting subsection (1), a police officer may discontinue an arrest in any of the following circumstances:

\(^{481}\) Section 125(1) of the CIA.
\(^{482}\) Section 126 of the CIA.
(a) If the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason,

(b) If it is more appropriate to deal with the matter in some other manner, including, for example, by issuing a warning or caution or a penalty notice or court attendance notice or, in the case of a child, dealing with the matter under the Young Offenders Act 1997.

(3) A police officer may discontinue an arrest despite any obligation under this Part to take the arrested person before an authorised officer to be dealt with according to law.

Section 376 of the PPR Act (Qld) provides that:

(1) It is the duty of a police officer to release an arrested person at the earliest reasonable opportunity if the person is no longer reasonably suspected of committing the offence for which the person was arrested.

(2) Subsection (1) does not apply if the person-

(a) is reasonably suspected of another offence, whether or not arising out of the circumstances of the offence for which the person was arrested; or

(b) may be detained for another reason, for example because of a breach of a bail condition; or

(c) is in custody for another offence.

(3) Also, it is the duty of a police officer to release an arrested person who is reasonably suspected of committing the offence for which the person was arrested if, within a reasonable time after the arrest, the police officer considers there is not enough evidence to bring the person before a court on a charge of the offence. 483

Further, sections 377-380 inclusive of the PPR Act (Qld) contain additional cases in which an arrest may be discontinued. Section 377 provides:

(1) This section applies to an arrested person who is an adult.

483 See also sections 367-381 inclusive of the PPR Act (Qld) in relation to the discontinuance of an arrest in specific circumstances.
(2) It is the duty of a police officer to release the person at the earliest reasonable opportunity if—

(a) the reason for arresting the person no longer exists or is unlikely to happen again if the person is released; and

(b) either—

(i) if the person is arrested for an offence that is an infringement notice offence—it is more appropriate to serve an infringement notice on the person for the offence and the infringement notice has been served on the person; or

(ii) it is more appropriate to take the person before a court by notice to appear or summons and the notice to appear or summons has been served on the person.

(3) Subsection (2) does not apply to an adult who is arrested—

(a) to prevent the person fleeing from a police officer or the location of an offence; or

(b) if, because of the nature or seriousness of an offence for which the person is a suspect, it is inappropriate to release the person.

(4) Also, a police officer must release the person at the earliest reasonable opportunity if—

(a) the police officer reasonably considers it is more appropriate for the arrested person to be dealt with other than by charging the person with an offence; and

(b) the person and any victim of the offence agree to the person being dealt with in that way.

Examples for subsection (4)—

* A person arrested for a minor assault involving pushing a person during a heated argument with a neighbour may agree to attend alternative dispute resolution.

* A person may be released under a scheme developed by the commissioner for cautioning elderly first offenders.
Section 128(3)(b)(ii) and (iii) of the CIA are generally applied in circumstances where a police officer witnesses the commission of an offence and intervenes to halt the commission of that offence or any further offence. In many cases, particularly the types of public order offences that occur in an entertainment precinct, an officer will approach the situation and use his/her presence and or verbal directions to attempt to bring the situation under control. In other cases, where a person has been arrested for a public disorder type of offence, and they subsequently calm down, some officers are of the view that the grounds for arrest no longer exist and therefore the arrested person must be "unarrested" and summonsed for the offence.

Issue - 96

Should the CIA be amended to make it clear that an officer may discontinue an arrest at any time? If so, in what circumstances should an officer be able to discontinue an arrest?

Issue - 97

If an officer is able to discontinue an arrest, then should the CIA be amended to make it clear that:

a) the arrested person is not entitled to the rights under sections 137 and 138 of the CIA?

b) the officer in charge of the investigation is not obliged to inform the arrested suspect of his or her rights as required by section 138(3) of the CIA?

c) section 142 of the CIA does not apply to the release of the arrested suspect?

10.4 Making an arrest

In Cox v Western Australia, Pullin JA, with whom McLure P and Mazza JA agreed, observed:

"Although pt 12 of the Act specifies when a person may be arrested, the Act does not specify how an arrest is to be effected. At common law, an arrest occurs whenever it is made plain by what is said or done by the police officer that the suspect is no longer a free person: R v O'Donoghue (1988) 34 A Crim R 397, 401. No seizing or touching is required: Alderson v Booth [1969] 2 QB 216, 220; Hatzinikolaou v Snape"

Although touching is not necessary and words alone can be used to effect an arrest, the fact is that physical force must often be applied when doing so. This happens whenever the suspect attempts to flee or resists arrest. However, the police must not apply excessive physical force because they will then be liable for assault: Bennett v Commissioner of Police (1997) 10 Admin LR 245, 264; Tahche v Abboud [2002] VSC 42 [117].

Issue - 98

Should section 128 of the CIA be amended to set out how an arrest is to be made?

10.5 Ancillary powers to making an arrest

Division 3 of Part 12 of the CIA confers certain powers on officers, which are ancillary to the making of an arrest (for example, entry to places, stopping vehicles, search of places and vehicles of arrested suspects and powers to aid recapture of escapees). These powers are contained in sections 132, 133 and 134 of the CIA. The powers in Division 3 of Part 12 of the CIA may be exercised without a warrant. 485

Section 131 of the CIA states that an officer who is authorised under Division 3 to enter and search a place may, for the purposes of doing so, exercise any of the ancillary powers in section 44. 486 The powers in section 44 are those powers which are ancillary to the execution of a search warrant.

Section 44 of the CIA refers to "target places" and "target things". A "target place", in relation to a search warrant, means "the place described in the warrant that may be entered and searched under it." 487 A "target thing", in relation to a search warrant, means "the thing or class of thing described in the warrant that is the object of the

485 Section 129 of the CIA.
486 Section 131 of the CIA.
487 See the definition of "target place" in sections 43(1) and 44(1) of the CIA.
These terms are consistent with the references to target things and target places in search warrants. However, there are no references to "target things" or "target places" in sections 132, 133 and 134 of the CIA.

Issue - 99

**Should section 131 of the CIA 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".**

The ancillary powers may only be exercised for the purpose of entering and searching a place under Division 3 of Part 12. The definition of the term "place" does not include a vehicle, but instead means "any land, building, structure, tent or mobile home or a part of any land, building, structure, tent or mobile home." This means that the ancillary powers in section 44 of the CIA do not apply in relation to a vehicle the subject of a search under sections 132 and 133.

Issue - 100

**Should section 131 of the CIA be amended to enable police officers to exercise the ancillary powers in section 44 of the CIA when searching a vehicle without warrant under sections 132 or 133 of the CIA?**

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.

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488 See the definition of "target thing" in sections 43(1) and 44(1) of the CIA.

489 See the definition of "place" in section 3(1) of the CIA.
Should section 131 of the CIA 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?

10.6 Rights of arrested persons

Issues relating to the rights of arrested persons are dealt with in Chapter 9.

10.7 Detention of arrested suspect under section 139

A police officer may detain an arrested suspect in custody after the suspect is arrested for the following purposes:

(a) doing a search under section 133 or 135 of the CIA; and
(b) investigating any offence suspected of having been committed by the suspect; and
(c) interviewing the suspect in relation to any offence that the suspect is suspected to have committed; and
(d) deciding whether or not to charge the suspect with an offence. 490

Are there any other purposes for which an arrested suspect should be detained following arrest?

10.8 Detention periods

The detention period for arrested suspects is regulated by section 140 of the CIA as follows:

- Initial period of detention: must not exceed 6 hours from arrest; 491
- A further period of detention authorised by a senior officer (of or above the rank of sergeant who is not involved in the investigation of any offence that the suspect is suspected of having committed 492): not more than 6 hours (which period commences at the end of the initial period of detention); 493 and

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490 Section 139(2) of the CIA.
491 Section 140(3)(a) of the CIA.
492 See the definition of “senior officer” in section 140(1) of the CIA.
493 Section 140(3)(b), (4) and (5) of the CIA.
• 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).

The factors which must be taken into account in determining whether a period of detention is reasonable are set out in section 141 of the CIA.

Issue - 103

Should the length of the initial period of detention for an arrested suspect be increased?

Issue - 104

Should a senior officer be able to authorise more than one further period of detention?

Issue - 105

Are there any other factors which should be taken into account in determining a reasonable period of detention?

10.9 Charging and releasing arrested suspects

Section 142(2) of the CIA sets out the circumstances in which not releasing a suspect unconditionally is justified, namely that the officer who has custody of the suspect reasonably suspects that if the suspect were released unconditionally:

(a) the suspect would —

(i) commit another offence;

(ii) continue or repeat the offence for which he or she is under arrest;

(iii) endanger another person’s safety or property;

(iv) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to the suspect or any other person;

or

(b) the suspect’s safety would be endangered.

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494 Section 140(3)(b), (6)-(9) of the CIA.
Issue - 106

Are there any other factors which would justify a suspect not being released unconditionally?

10.10 Further detention of arrested suspect under section 142(4)-(6) subject to section 142(7) and (8)

In Kernaghan v. The State of Western Australia Corboy J stated:

It appears that a suspect may not be detained under s 142(6) for the purpose of conducting an interview or undertaking any further investigation that requires the suspect to be detained in custody, except as permitted by s 142(8)(a) and s 142(8)(b). If that is so, it would be contrary to the CIA for a suspect to be detained in custody under s 142(6) for the purpose of being further interviewed and it would be an improper exercise of the power conferred on an authorised police officer under the Bail Act to refuse bail for the purpose of facilitating further investigations by the police while the suspect is detained in custody pending an initial appearance in court.

Issue - 107

Should section 142(8) of the CIA 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?

10.11. Dealing with an arrested suspect under section 157 of the Mental Health Act 2014

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

495 [2015] WASC 306 at [51].
(b) may detain the suspect in a lock up or other place of confinement until that
    happens, subject to subsection (8).

Section 142(7) of the CIA was then amended by the Criminal Investigation Amendment Act
2014496 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.

Section 52 of the 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 Mental Health Act
2014.497 However, by the time the 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 Mental Health Act 1996 in section
142(7)(b) of the CIA has not been replaced with a reference to section 157 of the Mental
Health Act 2014.498

It is noted that a police officer would be expected to comply with the obligation contained
in section 157 of the Mental Health Act 2014 notwithstanding section 142(7) of the CIA
refers only to section 196 of the Mental Health Act 1996. This is because the Mental Health
Act 2014 being later in time would imply repeal the CIA to the extent of any
inconsistency.

Issue - 108

Should section 142(7) be amended to delete the reference to section 196 of the Mental
Health Act 1996 and replace it with a reference to section 157 of the Mental Health Act
2014?

496 The Criminal Investigation Amendment Act 2014 came into operation on 28 January 2015.
497 The Mental Health Legislation Amendment Act 2014 came into operation on 30 November 2015.
498 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 Mental Health Act 2014.
Chapter 11: Seizure of Property

Section 151 of the CIA provides a procedure for dealing with seized articles that may be subject to a claim of LPP or PIP. If a privilege is claimed by any person entitled to the record, or the officer seizing the record suspects that a privilege may apply, the officer must secure the record and apply to the Magistrates Court for a determination as to whether the information is privileged.

11.1 Privilege

LPP (Legal Professional Privilege)

Although LPP attaches to communications, it is frequently claimed in cases involving documents containing some record, or indication, of those privileged communications. In *Trade Practices Commission v Sterling*499, Lockhart J summarised the position as follows:

*Legal professional privilege extends to various classes of documents including the following:*

(i) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance...;

(ii) Any document prepared with a view to its being used as a communication of this class, although not in fact so used;

(iii) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance;

(iv) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client’s legal adviser to enable him to advise the client or to conduct litigation on his behalf...;

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499 (1979) 36 FLR 244 at 245-6.
(v) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence;

(vi) Communications passing between the party and a third person ... if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action;

(vii) Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent. (case references and footnotes omitted)

The High Court has held that LPP attaches to confidential communications between government agencies and salaried legal officers in government employment in respect to legal advice where the advice given is within the professional relationship between the legal officer and the client and the advice is independent in character.\(^{500}\)

LPP may be waived.

LPP is an important part of the legal process and is essential to the integrity of the legal system. It protects the interests of a client in their relationship with their legal advisor and promotes the administration of justice by, "inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor."\(^{501}\)

Section 151 of the CIA generally seeks to ensure that a client's rights are reserved in this respect. It stands as a fairly unique provision in Australian jurisdictions in its codification of a process, by which legal professional privilege claims can be determined. However, since the


\(^{501}\) Esso Australia Resources Ltd v FCT (1999) 201 CLR 49 at [35] per Gleeson CJ, Gaudron and Gummow JJ.
enactment of the CIA, a number of issues have emerged in the determination of LPP claims. These issues and the questions for review they raise are dealt with below.

**PIP (Public Interest Privilege)**

There are two different ways in which public interest immunity can be claimed: class claims and contents claims. "Class claims" refer to documents belonging to an identifiable class of documents which should generally be prohibited from disclosure (for example, Cabinet minutes). "Contents claims" are made on the basis that the particular document contains information the disclosure of which may be damaging to the public interest (for example, police and law enforcement matters, protection of identities of informants).

A claim of PIP may be contrasted with a claim of LPP. The former privilege requires the court "to undertake a balancing of competing public interests". The Court embarks on a process of weighing the considerations said to justify the document's immunity from production against "the competing public interest in the proper administration of justice".

In *Sankey v Whitlam*, Gibbs ACJ summed up the test as follows:

> The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other and decide where the balance lies.

Public interest privilege cannot be waived.

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502 *Sankey v Whitlam* (1978) 142 CLR 1 at 39 per Gibbs ACJ. See also the discussion of the legal principles relating to public interest immunity in *The Australian Statistician v Leighton Contractors Pty Ltd* [2008] WASCA 34; (2008) 36 WAR 83 at [30]-[34] per the Court.

503 *Sankey v Whitlam* (1978) 142 CLR 1 at 39 per Gibbs ACJ.


506 At 38-39.

11.1.1 Time limitations

Applications to determine a claim to privilege, specifically claims to LPP, under section 151 of the CIA can be lengthy and lead to prolonged delays in police investigations and the administration of justice more generally. Some of these claims have taken more than two years to conclude.\footnote{See, for example, AW v Rayney [2009] WASCA 203 at [45] per McLure JA (Buss and Newnes JJA agreeing).} For example, in AW v Rayney,\footnote{[2009] WASC 250 at [6].} Murray J commented:

The number and nature of the records seized in this case have created their own complexity in the determination of the question of privilege. I make no criticism of the fact that the process before his Honour the magistrate, who has had the carriage of the matter, has taken so long, but it is the case, as the applicant says in his submissions, that '[t]he determination of the claim of legal professional privilege over the electronic records has been protracted and remains, to date, unresolved', despite the appointment by the magistrate of a computer record forensic expert, who has been required to report to the court, identifying the relevant records contained in electronic form. They apparently include not only records recoverable in visual form, but also audio recordings.

To address these concerns about delay, it has been suggested that a time frame be added within section 151 to specify the maximum amount of time for the determination of a claim to privilege. This could be in the form of set time periods, in which parties must provide evidence to substantiate the privilege claim and file submissions so that the Court can make a timely determination.\footnote{See, for example, ALRC, Report 107 Privilege in Perspective: Client Legal Privilege in Federal Investigations ("Report 107") Recommendations 8-11-14 .} There could be room within these provisions for parties to apply for time extensions within this framework if necessary, and for orders similar to "springing orders", which are available in civil matters.

It has also been suggested that a provision should be included in section 151 of the CIA which provides that limitation periods will be delayed until a claim of privilege is finalised. In its Report 107: Privilege in Perspective: Client Legal Privilege in Federal Investigations ("Report 107") the ALRC considered whether there should be an automatic suspension of a
limitation period each time a privilege claim is challenged.\textsuperscript{511} Although, the ALRC ultimately determined that automatic suspension was unnecessary, it 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 the extension is in the interests of justice.\textsuperscript{512}

**Issue - 109**

*Should section 151 be amended to include maximum time frames to determine a claim for privilege?*

**Issue - 110**

*Should a provision be inserted in section 151 of the CIA which provides for the suspension of limitation periods until a claim for privilege is finalised?*

**Issue - 111**

*Should a provision be inserted into section 151 of the CIA which 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?*

11.1.2 Codification of the process to determine a claim to privilege

Issues have also arisen in the process by which these claims to privilege are determined. The Court of Appeal has set out its view that the procedure for claiming LPP that applies in the context of discovery and inspection between parties to civil litigation should ordinarily be applied, by analogy, to proceedings under section 151 of the CIA.\textsuperscript{513} In particular, that means the person claiming privilege should, ordinarily:

1. list each record in respect of which privilege is claimed;
2. state the form of the record;
3. state whether the record is an original or a copy, and the date on which it came into existence;


\textsuperscript{513} *Rayney v AW* [2009] WASCA 203 at [42] - [44] per McLure JA (Buss and Newnes JJA agreeing).
4. identify the person who brought the record into existence;
5. identify the persons between whom any communication or communications embodied in the record were made; and
6. state the basis on which the privilege is claimed, and provide any evidence necessary to substantiate the claim.\(^{514}\)

As observed by Buss JA this, "procedure should not involve the disclosure, directly or indirectly, of any communication the subject of the claim for privilege."\(^{515}\) A court may then 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."\(^{516}\)

Despite the Court of Appeal setting out this process, there have been instances where the party claiming LPP has put up significant resistance to proceeding in this manner and, in particular, resisted providing the necessary information to form the basis of the claim. This can lead to delay in the determination of the application while parties are in dispute over appropriate orders.

One concern that has been expressed by parties claiming LPP is that privilege may be waived by providing these details.\(^{517}\) While occasions where this could conceivably occur are rare, the legislation should make it clear that providing a description of documents or a bundle of documents in accordance with legislative requirements will not of itself amount to a waiver of privilege.\(^{518}\)


\(^{515}\) AW v Rayney [2010] WASCA 161 at [136] per Buss JA.

\(^{516}\) AW v Rayney [2010] WASCA 161 at [137]-[138] per Buss JA.


\(^{518}\) A similar recommendation was made in ALRC, Report 107: Privilege in Perspective: Client Legal Privilege in Federal Investigations, Recommendation 8-4.
Issue - 112

Should section 151 of the CIA be amended to include the specific process to be followed by a Court in dealing with a claim to LPP in accordance with the procedure for LPP that applies in the context of discovery and inspection between parties to litigation? Should a similar process apply in relation to a claim for public interest immunity?

11.1.3 Seizure under the CIA where privilege is claimed

The case of CC v Rayney[^519] exposed a serious anomaly in the section 151 process. In this case, police had executed a search on the respondent's vehicle. The respondent claimed privilege on items in the vehicle. Police officers proceeded to seize the items. In doing so, they seized the items without having the opportunity to form the requisite "reasonable suspicion", as the respondent had claimed privilege before any inspection of the items could take place. An application was then made to the Magistrates Court under section 11 of the CFPD Act, for an order for police to release the seized items and that the items be returned, as the Court could not retain custody of the lawfully seized items.

The Magistrate found that the specific items seized were not seized in accordance with the CIA for the three reasons. First, police officers who seized the items did not at any time prior to, or at the time of seizure, reasonably suspect that the items were "things relevant to an offence". Second, none of the officers reasonably suspected that it was necessary to seize any of the items for the purpose of preventing it from being concealed, disturbed or lost or preserving its evidentiary value, or doing a forensic examination on it. Third, there was no evidence before the court which would enable the court to make an objective assessment of whether it was reasonably suspected that the items were things relevant to the offence.

The Magistrate also held that section 151 of the CIA had no application because the particular items had not been seized in accordance with the CIA. Accordingly, the Magistrate declined to proceed with consideration of the issue of legal professional privilege and concluded that the court did not have the power to retain custody of the items under section 151. The Magistrate ordered that pursuant to the CFPD Act, the items be returned.

due to the seizures not being in accordance with the CIA. This decision was upheld on appeal.

This creates practical challenges in the application of section 151. If a person claims privilege over an item prior to a police officer having the opportunity to inspect the item, the police officer is put in an invidious position. If they proceed to seize the items then, unless they can articulate why they reasonably suspect an item may be a thing relevant to an offence without inspecting it, the item will not have been seized in accordance with the CIA. The person may bring an application under the CFPD Act.\textsuperscript{520} Alternatively, if the officer chooses to not seize the item, they risk losing potential relevant evidence.

The resolution of this problem is not straightforward. Other jurisdictions have overcome this difficulty by permitting law enforcement officers to conduct a cursory inspection of the item, which it is agreed does not constitute waiver of LPP prior to seizure and determination of the LPP claim.\textsuperscript{521} It may be worth exploring inserting a provision such as this into section 151 with the express stipulation that any inspection under that provision does not constitute the waiver of privilege.

A less intrusive solution may be to make provision in section 151 so that any "thing" that is required to be dealt with in accordance with section 151 by virtue of section 151(2), is not to be considered a seized item. Rather, where privilege is claimed under section 151, the officer takes the item without it being seized and merely for the purposes of obtaining a decision under section 151. If the Court finds the thing is privileged, then no potential waiver of privilege has occurred and the item can be returned to the party claiming privilege. If the item is found to not be privileged, then it can be returned to the custody of the officer who can inspect the item and determine whether it is a thing relevant to an offence and, if so, seize the item.

\textsuperscript{520} As in \textit{CC v Rayney} [2012] WASC 56.
\textsuperscript{521} See, for example, Australian Securities and Investments Commission, \textit{Information Sheet 165: Claims of legal professional privilege}, http://asic.gov.au/about-asic/asic-investigations-and-enforcement/claims-of-legal-professional-privilege/, Section 5. It is noted that this is common agreed practice and not enshrined in legislation.
The provision would be similar in process to section 3K of the Crimes Act (Cth). The Federal Court has recognised that this provision amends the common law position such that it:

authorises pre-seizure examination of things at the premises... It is central to its logic that the removal of things for examination off-premises will not constitute a seizure if done under that section.522

Issue - 113

Should section 151 of the CIA 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”?

Issue - 114

Should section 151 of the CIA be amended to provide for officers to conduct an examination of things over which privilege is claimed to determine whether it is something relevant to an offence (without a loss of privilege)?

11.1.4 Seizures of electronic material

It is increasingly common that items seized by police officers in the course of their investigations are electronic. Where those items have privilege claimed over them, it makes for the difficult task of sifting through the data contained on the electronic item to determine whether the information they contain is privileged, or not. In the vast majority of cases, police officers are not interested in any of the privileged material contained on the electronic item. However, distilling the non-privileged material from privileged material is a difficult and lengthy task.

Over time, WA Police and legal practitioners in Western Australia have developed some ad-hoc practices to ease the process of distilling material that may be privileged. It has become common practice for there to be some kind of preliminary investigation of the electronic

522 Hart v Australian Federal Police [2002] FCAFC 392; (2002) 124 FCR 384 at [69] per the Court. It is acknowledged that a suspicion on “reasonable grounds” is still required prior to taking an item for processing under section 3K.
items seized, to determine what material might be relevant to the police investigation.\textsuperscript{523} This preliminary investigation is conducted in accordance with instructions provided by the investigating officers about what is relevant to the investigation. This leads to an analysis report being produced that identifies materials that may be relevant (without identifying the content of that material). That analysis report is then provided to the party claiming privilege to see what material in the analysis report may be subject to LPP. After identifying the material that may be subject to LPP, the LPP claim can then proceed in the normal way, whereby the Respondent must demonstrate that the material claimed in the report is privileged.

It should be added that the process of the "preliminary investigation" is usually carried out on "forensically sound copies" of the original seized material, rather than the actual seized material, to ensure that the original material is not damaged or destroyed. Provision is often made in the court orders to explicitly state that none of the investigation or copying of material should be taken as a waiver of privilege. The preliminary analysis may be conducted by officers of the Technology Crime Services Division of WA Police ("TCS")\textsuperscript{524}, or an independent expert. If an independent expert is used, there is commonly dispute over who should pay for those services.

Despite the attempts of WA Police and legal practitioners to address problems with the current system, there are a number of difficulties with current practices. Some of these difficulties have been addressed by making certain provisions in consent orders; however, the risk posed by them continues to exist. First, the authority for enforcement agencies to make forensic copies of intangible material that may include privileged material is uncertain and has been challenged in other jurisdictions.\textsuperscript{525} Second, the making of forensic copies

\textsuperscript{523} In this respect, it is noted that most of the time a blanket claim for privilege is made over the electronic material seized.

\textsuperscript{524} The officers of TCS who conduct the preliminary investigation are not involved in the investigation and are typically subject to confidentiality agreements.

\textsuperscript{525} See \textit{Kennedy v Baker (No 2)} [2004] FCA 809; (2004) 138 FCR 414 and \textit{JMA Accounting Pty Ltd v Carmody} [2004] FCAFC 274 where such a challenge was unsuccessful. There has been at least one successful challenge in at least one New Zealand case: see \textit{Calver v District Court at Palmerston North} (2004) 21 CRNZ 371 (HC) [59], [82]. However, that result could be confined to the particular legislation.
always risks compromising LPP. Third, the vast amount of intangible material makes it difficult for a party claiming privilege to identify specific privileged material even after an 'analysis report' is produced and leads to lengthy delays.

Given the above, it is suggested that a clear set of statutory procedures for determining privilege in these types of matters should be set out either in the CIA or the CI Regulations. The advantages of this will be that it would:

- set out a standard process to be followed by police and parties claiming privilege, thereby reducing the time taken up by parties in negotiating detailed orders;
- be able to make specific legislative provision that nothing in the standard process should be constituted as a waiver of privilege;
- make specific provision that any police officer involved in copying material to a forensically sound copy should be independent from the investigation and subject to confidentiality;
- make provision for who should pay for an independent expert to undertake the copying process, if the parties elect to use one; and
- provide for a mechanism by which the standard procedures could be varied by the agreement of the parties.

The suggested standard process where electronic records have been seized could look something like the following:

1. None of the provisions below shall be construed as a waiver of LPP.
2. Within 10 working days of the application being made a Digital Evidence Analyst (DEA) of the WA Police shall attend the Court and be permitted to collect the items that have been seized (the Seized Records).
3. The Seized Records shall be conveyed to the offices of the TCS and a DEA shall make 3 copies of each of the Seized Records (the Forensically Sound Copies).

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526 Hence, it has become common to have the persons making the forensic copies enter a confidentiality undertaking and for orders to stipulate that no waiver of privilege has taken place.

527 A similar recommendation was made in ALRC, Report 10: Privilege in Perspective: Client Legal Privilege in Federal Investigations, Recommendation 8-16.
a. The party claiming LPP or their legal representative is entitled to be present during the creation of the Forensically Sound Copies.

b. The party claiming LPP or their legal representative shall be given 3 clear working days’ notice of the date, time and place where the Forensically Sound Copies are to be created.

4. Within three (3) working days of the Forensically Sound Copies being created, one of the Forensically Sound Copies (the First Forensically Sound Copy) shall be returned to the Court in a sealed and secure bag.

a. The Seized Records will then be returned to the Court.

b. The second of the Forensically Sound Copies shall be retained in a secure location at the TCS offices for analysis (the Second Forensically Sound Copy).

c. The third of the Forensically Sound Copies shall be retained in a secure location at the TCS offices in a sealed and secure bag for back-up purposes (the Third Forensically Sound Copy).

5. A DEA and Supervisor (the Analysis Team) will conduct a preliminary investigation of the Seized Records.

a. The Analysis Team will conduct a preliminary investigation of the Second Forensically Sound Copy in accordance with the search warrant and a briefing given by investigators.

b. The party claiming LPP or their legal representative is entitled to be present during this preliminary investigation.

c. The Analysis Team shall give the party claiming LPP or their legal representative 3 clear working days’ notice of the date, time and venue where the preliminary investigation of the Second Forensically Sound Copy is to occur.

d. If the party claiming LPP or their legal representative elects to be present during the preliminary investigation of the Second Forensically Sound Copy then he or she may only take written notes or audio recordings during the preliminary investigation. The party claiming LPP or their legal representative may not otherwise interrupt or interfere with the preliminary investigation.
6. The Analysis Team shall produce a report identifying any materials which they
deqm to come within the scope of the search warrant and a briefing given by
investigators (the Analysis Report).

7. The Analysis Team shall produce 3 copies of the Analysis Report.

8. One copy of the Analysis Report is to be retained in a secure location at the TCS in
a sealed and secure bag for back-up purposes.

9. Within 3 clear working days of the Analysis Report being produced, the Analysis
Team shall
   a. File 1 copy of the Analysis Report with the Court in sealed and secure bag
   b. Notify the party claiming LPP or their legal representative in writing that the
      Analysis Report is available for inspection.
   c. Return the Second Forensically Sound Copy to the custody of the Court; and
   d. Return the First and Third Forensically Sound Copies to the Court in a sealed
      bag.

10. Within 10 clear working days of filing the Analysis Report, party claiming LPP or
     their legal representative or both, can attend at the Perth Magistrates Court, by
     appointment to view the Analysis Report.

11. Within 10 clear working days of receiving written notification in accordance with cl
     8.a, the party claiming LPP or their legal representative must file and serve on the
     Applicant an affidavit:
        a. identifying each item of information or communication, contained in the
           Analysis Report, over which a claim for LPP is maintained; and
        b. setting out, in relation to each item of information or communication:
           i. the subject of the claim for LPP;
           ii. the form of each item of information (for example, letter, email,
               photograph etc);
           iii. whether the item is an original or a copy;
           iv. the date on which it came into existence;
           v. the person who brought the item into existence;
           vi. the persons between whom any items or communications were made;
vii. the basis on which the LPP is claimed in respect of each item of information or communication; and

viii. the evidence as to the basis of each claim of LPP.

12. As an alternative to cl 11, the party claiming LPP or their legal representative may simply notify the Court and the police officer who made the application that they make no claim of LPP over any of the items identified in the Analysis Report within 10 clear working days of days of receiving written notification under cl 8.a:

13. Any items of information or communication contained in the Analysis Report over with the Respondent does not make a claim of LPP in accordance cl 10 may be viewed by the Applicant and other members of the investigative team.

Provision should also be made so that the timeframes and process may be varied on the application of either party, but that such application should not be granted unless there are "reasonable grounds" for doing so. Additionally, provision would be made for a qualified independent expert to produce the Analysis Report. However, if this is on the application of the party claiming privilege, then they will bear the costs of such an expert. The legislation could also provide for the original seized items to be returned to the party claiming privilege, provided that the person is not suspected of possessing objectionable material on the seized items.

Provision should also be made for what should happen if a party fails to comply with any of its obligations under the legislation. Given failure to comply may be for a range of reasons, a flexible process should be put in place to deal with failure. Nevertheless, as a step of last resort, there should be provision for either deemed waiver of privilege or return of the seized material to the party claiming privilege (depending on who the defaulter is). This could be by setting up a process to make application for something similar to a "springing order".528

528 See generally the comments in ALRC, Report 107, [8.171]-[8.179].
Issue - 115

Should section 151 of the CIA be amended or regulations inserted into the CI Regs to provide a clear set of statutory procedures for determining LPP where electronic records have been seized? Should a similar procedure apply in relation to a claim for PIP?

Issue - 116

If the answer to the above issue is yes, then should the set of statutory procedures for determining privilege where electronic records have been seized be in accordance with the proposal set out above?

11.2 Property return when more than one person lays claim

Somewhat related to issues with the CIA is how the CFPD Act operates in respect to items of property in possession of police that more than one person claims to be the person entitled.

A "person entitled" to property is defined by section 3 of the CFPD to be –

(a) the owner of the property, or a person authorised by the owner to possess the property; or

(b) a person who is otherwise legally entitled to possession of the property.

Pursuant to section 25(1)(a), the COP may only admit a claim to held property thus enabling release of the property to that claimant, if he is satisfied of two things. First, that the claimant is a "person entitled". Second, that he does not know, and has no notice of, any other "person entitled".

The COP often receives multiple claims for property. It is a common situation to have claims from:

1. a lawful owner, from whom the property was stolen; and
2. a bona fide purchaser for value without notice down the track.

In this situation, both claimants are "persons entitled" within the meaning of section 3 of the CFPD Act. The person from whom property was stolen is the "owner of the property", while the clear bona fide purchaser for value without notice is a person "otherwise legally entitled to possession of the property". Therefore, both claims satisfy section 25(1)(a)(i) of the CFPD Act. In these circumstances, the COP necessarily has notice of more than one
‘person entitled’ meaning that section 25(1)(a)(ii) cannot be satisfied. This is despite the clear priority of the claim of lawful owner from whom the property was stolen. There simply is no room in the CFPD Act for the COP to decide between the competing claims of claimants who are both "persons entitled" within the meaning of section 3.

In these circumstances, the COP is required by default to apply to the appropriate court to have the matter of ownership determined pursuant to section 26(3) of the CFPD Act, for an order under section 27. It is noted that in Condo v Commissioner of Police529 (the only reported decision on this aspect of the CFPD Act), Davis DCJ appears to have expressed the view, obiter, that the COP could resolve competing claims. However, the issue, being obiter, was not given any real reasoned consideration, and, with respect, does not accord with the literal interpretation of the relevant provisions. The section effectively replicates the previous position of interpleaders prior to the CFPD Act by not enabling the COP to properly decide competing claims.

WA Police’s current procedure, in respect to matters where more than one claim is received, is to conduct an internal review of the competing claims. If there is only one "person entitled to the property" within the meaning of the CFPD Act, then the property can be returned to that person. If there is more than one "person entitled to the property", then the State Solicitor's Office are instructed to apply to the appropriate court on behalf of the COP for orders to deal with the property. The COP acts as a disinterested party in the proceedings, who is willing to abide by any order of the court with respect to disposal of the property.

This step leads to further complications and delay for the claimants involved, who are often not legally represented. In circumstances where it is relatively clear which claimant has legal priority, such applications are arguably an unreasonable burden on the limited resources of the court. The COP should have the power to determine these competing claims. Where a person’s claim is rejected, the dissatisfied claimant would still have the right to apply for a court order under section 26(1).

529 [2011] WADC 155 at [30].
This process is consistent with what appears intended by sections 25 and 26 of the CFPD Act in that the COP can reject a claim, but must not deal with the property until 21 days have expired and the person has not lodged a claim with the relevant Court. In other words, a party always has a right to dispute the COP’s determination.

Issue - 117

Should the CFPD Act be amended to enable the Chief Officer of a prescribed agency (in the case of WA Police, the COP) to determine a claim where both claimants are ‘persons entitled’ within the meaning of section 3 of the CFPD Act as follows:

1. The Chief Officer would determine the claim on the balance of probabilities and admit the claim that has the superior claim to the property;

2. 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(1); and

3. If a claimant makes that application, the Chief Officer would maintain possession of the property until such time and the matter is finally determined by a Court?

Issue - 118

Alternatively, should the CFPD Act be amended so that the COP 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? Such a provision would expressly provide that the COP or any other party would not be liable for costs.
Chapter 12: Admissibility of Confessional Evidence

12.1 The interaction between the common law and the CIA

Audiovisual recordings of admissions

Section 118 of the CIA does not expressly require the audiovisual recordings of interviews between police officers and suspects to be recorded.\(^{530}\) However, where a person is suspected of having committed an offence, any admission made by them to a police officer is inadmissible at their trial unless:

a) the admissions are the subject of an audiovisual recording; or

b) where there is no audiovisual recording, the prosecution provides 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.\(^{531}\)

Section 118 of the CIA applies in respect of a child charged with an indictable offence,\(^{532}\) and an adult charged with an indictable offence, which charges cannot be dealt with by a court of summary jurisdiction.\(^{533}\)

It is noted that section 155 of the CIA expressly applies to admissions, which are not the subject of an audiovisual recording.\(^{534}\) In other words, a court may decide that an admission by a suspect, which has not been recorded, is admissible in the exercise of discretion under section 155 of the CIA.\(^{535}\)

However, the requirement to make an audiovisual recording of an admission does not apply where the admission was made before there were reasonable grounds to suspect that the person had committed the offence.\(^{536}\)

\(^{530}\) *Wright v The State of Western Australia* [2010] WASCA 199; (2010) 43 WAR 1 at [129] per Blaxell J.

\(^{531}\) Section 118(3) of the CIA.

\(^{532}\) Section 118(2)(a) of the CIA.

\(^{533}\) Section 118(2)(b) of the CIA.

\(^{534}\) Section 118(3)(b)(ii) of the CIA.

\(^{535}\) *Wright v The State of Western Australia* [2010] WASCA 199; (2010) 43 WAR 1 at [51] per McClure J (Buss JA agreeing) and at [175] per Blaxell J; *Dodd v The State of Western Australia* [2014] WASCA 13; (2014) 238 A Crim R 72 at [253] per Mazza JA (Buss and Newnes JJA agreeing).

\(^{536}\) Section 118(4) of the CIA. The burden of proof rests with the defence to show that the admission was not an admission made by a person before the police had reasonable grounds to suspect that he or she had committed the offence: *The State of Western Australia v Heath* [2015] WASC 172 at [87] per Simmonds J.
Voluntariness

In order to be admissible, an admission must be made voluntarily, meaning that it has been made in the exercise of the person's free will.\(^{537}\) The word "voluntary" does not mean "volunteered", but rather "made in the exercise of a free choice to speak or be silent".\(^{538}\)

Where the prosecution proves that a confession was made voluntarily, then it is prima facie admissible.\(^{539}\) Subject to there being no breach of the CIA rendering the evidence inadmissible, the onus is then on the accused to establish, on the balance of probabilities, that there is a substantial reason why the confession should be excluded in the exercise of the court's discretion.\(^{540}\)

Common law discretions

Even if an admission is voluntary at common law, the evidence may be excluded for a variety of reasons by operation of common law discretions.\(^{541}\) In *Wright v The State of Western Australia*\(^{542}\), Blaxell J set out the relevant common law principles in the following terms:

*There are three possible bases for a discretionary exclusion of a voluntary confession. These are that it is unfair to the accused to admit the confession, that public policy considerations make admission of the evidence unacceptable, or that the prejudicial effect of the statement outweighs its probative value (R v Swaffield (1998) 192 CLR 159 [51]). The focus of the unfairness discretion is on the rights of the accused whereas the public policy discretion is concerned with matters of public interest. The third discretion focuses on the probative value of the evidence and guards against a miscarriage of justice (Swaffield [52]). Depending upon the particular circumstances, these various considerations may well overlap (Swaffield [74]).*
The common law discretionary principles are discussed in more detail in the following cases: R v Lee; R v Ireland; Collins v The Queen; Seymour v Attorney General (CT); R v Swaffield; and Tofilau v The Queen. Further, the following Western Australian cases illustrate the application of the common law discretions: The State of Western Australia v Camus; Mansell v The State of Western Australia [No 2]; The State of Western Australia v Heath; and Steffert v The State of Western Australia.

Sections 154 and 155 of the CIA

Section 155 applies when any other section of the CIA makes it applicable to evidence which is otherwise inadmissible, namely sections 48, 118 and 154.

Initially, there was an issue as to whether sections 154 and 155 of the CIA applied to evidence of admissions obtained in contravention of sections 137 and 138 of the CIA. However, that issue was resolved in the affirmative by the Court of Appeal in Wright v The State of Western Australia.

The effect of section 154(2) of the CIA is that if a thing relevant to an offence is obtained in the purported exercise of a power conferred by the CIA and a requirement of the CIA in relation to exercising the power is contravened, then any evidence derived from the thing or from the exercise of the power is prima facie inadmissible unless, relevantly, the accused does not object to its admission, or the court directs otherwise under section 155.

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543 (1950) 82 CLR 133.
545 (1980) 31 ALR 257.
549 [2013] WASC 158.
552 [2016] WASC 50.
553 Wright v The State of Western Australia [2010] WASCA 199; (2010) 43 WAR 1 at [175] per Blaxell J.
556 Section 154(2)(c) of the CIA.
557 Section 154(2)(d) of the CIA.
A court may, under section 155 of the CIA, admit evidence which would otherwise be inadmissible, where the court is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. The factors to which the Court must have regard in making a decision under section 155(2) are:

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

Section 155 also expressly states that the probative value of the evidence does not by itself justify its admission.

The principles relating to the exercise of the discretion to admit otherwise inadmissible evidence under section 155 were conveniently summarised by Simmonds J in The State of Western Australia v Yarran as follows:

a) the factors identified in s 155(3) are both mandatory and exhaustive;

b) the burden of persuading the court to exercise the discretion under s 155(2) rests on the prosecution;

c) disputed questions of fact relevant to the application of the factors identified in s 155(3) are to be determined on the balance of probabilities;

d) questions concerning the fairness and reliability of admitting the evidence are relevant to s 155(3)(a);

558 Section 155(2) of the CIA; see also Wright v The State of Western Australia [2010] WASCA 199; [2010] 43 WAR 1 at [188] per Blaxell J.
559 Section 155(3) of the CIA.
560 Section 155(4) of the CIA.
e) the greater the seriousness of the offence the more likely it is that the court will admit the evidence in its discretion;

f) conversely, the more serious the contravention of the provisions of the CIA, the more likely it is that the court will exclude the evidence;

g) the greater the probative value of the evidence, the more likely the evidence will be admitted.

Examples of the application of the principles relevant to s 155(3) (a) – (f) can be found in the following cases:  *Wright v The State of Western Australia*;662  *The State of Western Australia v Yarran*;663;  *The State of Western Australian v. Heath*;664  *The State of Western Australia v Gandy [No 2]*;665;  *The State of Western Australia v Gibson*;666  *Dodd The State of Western Australia v Dodd*;667  *Blum v The State of Western Australia [No 2]*;668;  *The State of Western Australia v Cox*;669 and  *Thomas v The State of Western Australia*.670

**Voluntariness, common law discretions to exclude evidence and sections 154 and 155 of the CIA**

Depending upon the factual circumstances of the case, a party seeking to have an admission either excluded or admitted from evidence, will contend either that the CIA applies, the common law applies, or both apply.671

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.672

So, the relevant questions to be determined by a Court in Western Australia considering whether to admit evidence of a confession are as follows:

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662 [2010] WASCA 199; (2010) 43 WAR 1
672  *Wright v The State of Western Australia* [2010] WASCA 199; (2010) 43 WAR 1 at [188] per Blaxell J.
1) whether the confession was voluntary. If the confession was not voluntary then it is inadmissible and no question of discretionary exclusion arises.  

2) whether there have been breaches of the CIA and, if so, whether the discretion to admit the confessional evidence under section 155 should be exercised; and

3) whether any of the common law discretions to exclude evidence should be exercised.

In Queensland, under the PPR Act (Qld), if a person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded under section 436(4) or 437. However, a Court may admit confessional evidence notwithstanding non-compliance with Division 7 of Chapter 16, or where there is not enough evidence of compliance, if, having regard to the nature of and the reasons for the noncompliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice.

In Victoria, under the Crimes Act (Vic), a confession or admission is inadmissible unless a recording is made of the admission or confession, or the confirmation of the admission or confession, as required by section 464H(1). However, a court may admit evidence of a confession or admission otherwise inadmissible under subsection (1), if the person seeking to adduce the evidence satisfies the court, on the balance of probabilities, that the circumstance are exceptional and justify the reception of the evidence.

In the Northern Territory, under the PA Act (NT), evidence of a confession or admission is not admissible as part of the prosecution case in proceedings for a relevant offence, unless the confession or admission, or the confirmation of the admission or confession, was electronically recorded. However, a court may admit evidence to which Division 6A of

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573 See, for example, Allen v Director of Public Prosecutions (WA) [No 2] [2014] WASC 472.
574 Section 436(3) of the PPR Act (Qld).
575 Which division includes the requirements for an electronic or written recording: see sections 436 and 437 of the PPR Act (Qld).
576 Section 439 of the PPR Act (Qld)
577 Section 464H(1) of the Crimes Act (Vic).
578 Section 464H(2) of the Crimes Act (Vic).
579 Section 142(1) of the PA Act (NT).
Part VII applies, even if the requirements of that Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice.\footnote{580 Section 143 of the PA Act (NT).}

Under the Crimes Act (Cth), a confession or admission to an investigating official is inadmissible as evidence against the person in proceedings for a Commonwealth offence, unless it is tape recorded in accordance with section 23V. However, section 23V relevantly provides:

\begin{quote}
(5) A Court may admit evidence to which this applies even if the requirements of this section have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

\end{quote}

\begin{quote}
(6) If a judge permits evidence to be given before a jury under subsection (5) ... the judge must inform the jury of the non-compliance with the requirements of this section, or of the absence of sufficient evidence of compliance with those requirements, and give the jury such warning about the evidence as he or she thinks appropriate in the circumstances.
\end{quote}
12.2 Section 118

Definition of admission

Section 118 of the CIA requires the making of an audiovisual recording in respect of an admission. An admission means, "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." 581

In Wright v The State of Western Australia, 582 the suspect had, in the presence of police, made an unrecorded admission to his cousin in respect of the offence. One of the issues before the court was whether the admission had been made to a police officer for the purposes of section 118.

McLure P (with whom Buss J agreed) was of the opinion that "[a] statement made by a suspect to a third party in the presence of police would not fall within the mischief which section 118 is intended to address". 583 However, Blaxell J was of the opinion that an admission to a police officer included "an admission made by a suspect which is simply heard or observed by a police officer" 584 and that it was unnecessary "that the admission be directed towards a police officer, or that the suspect intend that it be heard or seen by a police officer." 585 Further, although it was not necessary to decide for the purposes of the appeal, Blaxell J expressed the view that there can be an admission when the suspect is unaware that a police officer is present. 586

581 See the definition of “admission” in section 118(1) of the CIA.
583 At [54].
584 At [136].
585 At [136].
586 At [139].
Issue - 120

Does the definition of "admission" in section 118(1) of the CIA require amendment to make it clear that an admission to a police officer or CCC officer does not include an admission made by a suspect to a third party (or while the suspect is talking to himself or herself), which is simply heard or observed by the officer?

Definition of "suspect"

Section 118 of the CIA requires the making of an audiovisual recording in respect of an admission by a suspect. A "suspect" means, "a person suspected or having committed an offence, whether or not he or she has been charged with the offence."

A decision by the police to treat a person as a witness rather than a suspect can have very significant consequences, particularly if the person makes admissions in respect of the crime being investigated or of another crime and that admission is not recorded.\(^{587}\)

Issue - 121

Does the definition of "suspect" in section 115 of the CIA require clarification?

Reasonable excuses for non-compliance with requirement to make audiovisual recording

As noted above, evidence of an admission made in the absence of an audio recording will be admissible if, \textit{inter alia}, the prosecution proves that there is a reasonable excuse for the absence of the recording.

A "reasonable excuse" for the absence of an audiovisual recording of an admission includes:

a) the admission was made when it was not practicable to make an audio-visual recording of the admission;

b) equipment to make an audiovisual recording of the admission could not be obtained while it was reasonable to detain the suspect;

c) the suspect did not consent to the recording of the admission;

d) the equipment used to make an audiovisual recording of the admission malfunctioned.\(^{588}\)

\(^{587}\) \textit{The State of Western Australia v Gibson} [2014] WASC 240; (2014) 243 A Crim R 68 at [17] and [45] per Hall J.
The definition of "reasonable excuse" is inclusive not exhaustive, so there may be a reasonable excuse that does not fall within any of the paragraphs of the section 118(1) of the CIA\(^{589}\).

**Admission made when not practicable to make an audiovisual recording**

In *Wright v The State of Western Australia*\(^{590}\), Blaxell J noted in relation to paragraph (a) of the definition of "reasonable excuse" that this necessarily involves the essential question as to whether in all the circumstances it:

...would have been reasonable for the investigating officer to have had the audiovisual equipment and the personnel on hand ready to record the admission, at the time, and in all of the circumstances in which it was in fact made. If the answer to that question is in the negative, then the admission was made when it was 'not practicable' to make an audiovisual recording of it.

An example of where it may not be practicable to make an audiovisual recording is where the suspect makes a voluntary and spontaneous admission.\(^{591}\)

**Equipment could not be obtained while reasonable to detain the suspect**

There do not appear to have been any decisions on paragraph (b) of the definition of "reasonable excuse".

**Suspect did not consent**

In order for paragraph (c) of the definition of "reasonable excuse" to apply, there must be evidence that the accused was asked whether he or she did, or did not, consent to an audiovisual recording being made of the admissions.\(^{592}\)

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588 See the definition of "reasonable excuse" in section 118(1) of the CIA.


591 See, for example, *Blum v The State of Western Australia [No.2]* [2012] WASCA 40 at [42] per Buss JA and at [67] per Mazza JA (with whom McLure P agreed); *The State of Western Australia v Newton [No.2]* [2016] WASC 214 at [21] per Hall J.

592 *The State of Western Australia v Yarran* [2014] WASC 1 at [66]-[77] per Simmonds J.
Equipment malfunction

In *Floyd v The State of Western Australia*[^593], McLure P (with whom Newnes and Mazza JJA agreed) held that in the absence of evidence as to why the equipment malfunctioned, it was not open to the trial judge to conclude that there was a reasonable excuse for the absence of the audiovisual recording under s 118(1)(d). Her Honour said:

*The function of audio-visual equipment is to capture what is said and done in the intended area of its operation. A malfunction is a failure to function properly. There may be a number of reasons for malfunction. It may be because the equipment was not suitable for the intended purpose or, if suitable, did not function as intended as a result of a fault related to the equipment itself. Alternatively a malfunction may arise as a result of the circumstances surrounding its use. The failure to capture what was said may result from ambient noise or the distance or position of the speakers from, or relative to, the microphone(s).*

*On the natural and ordinary meaning of par (d) of s 118(1), the malfunction must be attributed to a fault in, or in connection with, equipment that is suitable for the intended purpose...*  

*...in the absence of evidence as to the reason for the defective audio recording there cannot be a finding of reasonable excuse for the absence of an audio-visual recording of the admissions.*

**Issue - 122**

*Does the definition of "reasonable excuse" in section 118 of the CIA require amendment in any respect?*

**Audiovisual recordings of interviews with persons who are not suspects**

There is nothing in section 118 of the CIA, which requires an interview with a person who is not a suspect to be recorded.

In some cases, a person who is voluntarily assisting police may, during the course of the interview, say or do something which means that they are a suspect from that point on, in

[^593]: [2013] WASCA 33.
which case, any admissions must be recorded as required by section 118. However, it is always open to an accused to challenge the admissibility of any admissions on the basis that he or she was a suspect at the time the admission was made and the admissions should have been recorded.\footnote{See, for example, \textit{Dodd v The State of Western Australia} [2014] WASCA 13.}

**Issue - 123**

\textit{Should interviews with persons other than suspects be the subject of an audiovisual recording?}

12.3 Interviews with suspects who are Aboriginal or Torres Strait Islander

There have been a number of Supreme Court decisions in which confessional evidence against Aboriginal persons has been excluded because of involuntariness, unfairness, or non-compliance with the CIA.\footnote{See, for example, \textit{Narrier v The State of Western Australia} [2014] WASC 21; \textit{The State of Western Australia v Gibson} [2014] WASC 240; (2014) 243 A Crim R 68; \textit{Allen v Director of Public Prosecutions (WA)} [No.2] [2014] WASC 472.} There have also been a number of unsuccessful attempts to challenge the admissibility of confessional evidence of Aboriginal persons both at first instance and on appeal.\footnote{See, for example, \textit{The State of Western Australia v Cox} [2008] WASC 287; \textit{Pearce v The State of Western Australia} [2014] WASCA 15.}

There are no special provisions in the CIA for the conduct of interviews with suspects who are Aboriginal or Torres Strait Islander. However, it is noted that there are guidelines in the Police Manual for questioning Aboriginal persons, including reference to interview friends and the Anunga Rules.\footnote{See QS0.1.02.5.}

In other jurisdictions, special provisions exist for the conduct of such interviews. In Queensland, there are special provisions relating to the questioning of Aboriginal people and Torres Strait Islanders. Section 420 of the PPR Act (Qld) provides:

\begin{itemize}
  \item [(1)] This section applies if-
  \begin{itemize}
    \item [(a)] a police officer wants to question a relevant person; and
  \end{itemize}
\end{itemize}
(b) the police officer reasonably suspects the person is an adult Aborigine or Torres Strait Islander.

(2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must -

(a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and

(b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.

(3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.

(4) The police officer must not question the person unless -

(a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the support person, if practicable, in circumstances in which the conversation will not be overheard; and

(b) a support person is present while the person is being questioned.

(5) Subsection (4) does not apply if the person has, by a written or electronically recorded waiver, expressly and voluntarily waived his or her right to have a support person present.

(6) If the police officer considers the support person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.
Section 23H of the *Crimes Act 1914* (Cth) relevantly provides:

(1) Subject to section 23L, if the investigating official in charge of investigating a Commonwealth offence believes on reasonable grounds that a person who is under arrest, or who is a protected suspect, and whom it is intended to question about the offence is an Aboriginal person or a Torres Strait Islander, then, unless the official is aware that the person has arranged for a legal practitioner to be present during questioning, the official must:

(a) Immediately inform the person that a representative of an Aboriginal legal aid organisation will be notified that the person is under arrest or a protected suspect (as the case requires); and

(b) notify such a representative accordingly.

(2) Subject to subsection (7) and section 23L, if an investigating official:

(a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is an Aboriginal person or a Torres Strait Islander; or

(b) believes on reasonable grounds that a person who is under arrest or a protected suspect is an Aboriginal person or a Torres Strait Islander;

the official must not question the person unless-

(c) an interview friend\(^{598}\) is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard; or

(d) the person has expressly and voluntarily waived his or her right to have such a person present.

\(^{598}\) An interview friend means (a) a relative or other person chosen by the person; (b) a legal practitioner acting for the person; (c) a representative of an Aboriginal legal aid organisation; or (d) a person who name is included in the relevant list maintained under subsection 23J(1):see section 23H(9) of the *Crimes Act 1914* (Cth).
(2A) The person suspected, or under arrest, may choose his or her own interview friend unless:

(a) he or she expressly and voluntarily waives this right; or
(b) he or she fails to exercise this right within a reasonable period; or
(c) the interview friend chosen does not arrive within 2 hours of the person’s first opportunity to contact an interview friend.

(2B) If an interview friend is not chosen under subsection (2A), the investigating official must choose one of the following to be the person’s interview friend:

(a) a representative of an Aboriginal legal aid organisation;
(b) a person whose name is included in the relevant list maintained under subsection 23J(1).

(3) An interview friend may be excluded from the questioning if he or she unreasonably interferes with it.

(4) In any proceedings, the burden lies on the prosecution to prove that an Aboriginal person or Torres Strait Islander has waived the right referred to in subsection (2) or (2A), and the burden is not discharged unless the court is satisfied that the person voluntarily waived that right, and did so with full knowledge and understanding of what he or she was doing.

...

(5) An investigating official is not required to comply with subsection (1), (2) or (2B) in respect of a person if the official believes on reasonable grounds that, having regard to the person’s level of education and understanding, the person is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally.

Issue - 124

Should special provision now be made in the CIA for the conduct of interviews with Aboriginal persons or Torres Strait Islanders?
Chapter 13: Powers for Dealing with Public Disorder and Other Emergencies

The Review of the CIA provides an excellent opportunity to consider whether the CIA should be amended to codify some of the statutory and common law powers relating to civil disturbances and emergencies, and whether any additional powers should be conferred on police officers in relation to these matters. Whilst the primary focus of the CIA is the investigation of criminal offences, the CIA does contain miscellaneous powers to deal with public disorders and emergency incidents.

In some situations, special powers may be conferred on police officers to deal with specific events which might attract civil disturbances, or terrorist attacks. For example, the CHOGM Act conferred special powers on police officers during the CHOGM, which was held in Perth in 2011. However, once CHOGM was over, the CHOGM Act expired.599

13.1 Public disorder

The duty to preserve the peace

In *R v Howell*600, the Court of Appeal held:

...there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.

It is a central function of the office of a police officer to preserve the peace and public order at common law601, which function is preserved by virtue of section 7(1) of the CIA.602 The duty to keep the peace is considered to be exceptional, because it enables police to prevent people from committing offences (an example of preventive justice”).603

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599 See section 96 of the CHOGM Act and the Government Gazette published on 9 October 2015 at 3891.
600 [1982] 1 QB 416 at 427 per Watkins LJ (giving the judgment of the Court).
601 *Elwin v Robinson* [2014] WASCA 46 at [61] per Mazza JA (Pullin and Newnes JJA agreeing); See also *Rice v Connolly* [1966] 2 All ER 649 at 651 per Lord Parker CJ; *Albert v Lavin* [1981] 3 All ER 878 at 880 per Lord Diplock; *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 All ER 529 at [29] per Lord Bingham.
602 See also "CMS" (A Child) v Giacomini [2003] WASCA 42 at [66] per Murray and Burchett JJ.
603 *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 All ER 529 at [62] per Lord Roger of Earlsferry.
A police officer must take reasonable steps to make a person who is breaching the peace, or threatening to breach the peace, refrain from doing so. The duty to take preventative action in relation to an anticipated breach of the peace, does not arise unless and until the police officer reasonably apprehends that a breach of the peace is imminent. What steps are reasonable will depend on the circumstances of the case. At common law, in order to deal with a breach of the peace, police officers may, for example:

1) restrict the movement of protesters and other members of the public caught up in the protest for their own protection and to prevent violence to persons and property;
2) interfere with property rights such as temporary taking and detention of chattels;
3) use force;
4) enter onto private premises to prevent a breach of the peace (but not to investigate whether there has been a breach of the peace or determining whether one is threatened); and
5) arrest a person who is committing a breach of the peace.

The right to protest

The ability of a person to protest and to make their views known is accepted as a right, which every citizen has in Australia.

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604 R (on the application of Moos) v Commissioner of Police of the Metropolis [2011] All ER (D) 146 (Apr) at [56] per Sir Anthony May and Sweeney J.
605 R (on the Application of Laporte) v Chief Constable of Gloucestershire Constabulary [2007] 2 All ER 529; Austin v Metropolitan Police Commissioner [2008] 3 All ER 455 at [58] per Lord Neuberger and at [23] per Lord Hope; R v Castle [2012] 1 All ER 953.
609 R v Howell [1982] QB 416 at 426 per the Court; Nilsson v McDonald [2009] TASSC 66 at [27] per Blaw J.
610 Watson v Trener (1998) 100 A Crim R 408 at 413 per Angel J.
The way in which the right to protest is exercised may require intervention by a police officer or officers, in accordance with the duty cast upon police officers to keep the peace. This was recognised in *Kay v Metropolitan Police Commissioner* 611

...the ability to balance the freedom of citizens to hold protests and processions with the amount of regulation necessary to preserve order and protect the rights of others is one of the distinguishing features of a developed democracy...It goes together with skilful and tolerant control by those in good authority, a hallmark of good policing...

The role of the Police Incident Controller is to determine what kind of an operational response is required to a planned protest and to implement that response when the demonstration is in full swing. This is not an easy task. 612

The policing of the protest in Perth during CHOGM 2011 is an example of the way in which WA Police successfully dealt with a large-scale protest.

The 2016 riot in Kalgoorlie is an example of where a situation may quickly and unexpectedly take a disastrous turn for the worse, where officers of WA Police and members of the public come under attack from rioters, and where property is damaged.

**Police powers for responding to public disorder**

There are a number of statutory powers which may be of use in dealing with, and responding to, public disorder (e.g. riots, unlawful assemblies, out-of-control gatherings). Each of these powers is listed below.

**Powers in the CIA:**

1) use of force to prevent acts of violence and breaches of the peace; 613
2) move on notices; 614
3) entry to public places to keep peace and order; 615

612 See *R (on the Application of Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 All ER 529 at [92] per Lord Carswell.
613 Section 24 of the CIA.
614 Section 27 of the CIA.
615 Section 34 of the CIA.
4) entry to places of vehicles to prevent acts of violence and breaches of the peace;\(^{616}\)
5) entry of place of vehicle to prevent or disperse out-of-control gathering;\(^{617}\)
6) search of people and vehicles in public places for security purposes;\(^{618}\) and
7) arrest.\(^{619}\)

*Powers in the Criminal Code:*

1) ordering persons forming an unlawful assembly to disperse;\(^{620}\)
2) ordering rioters to disperse;\(^{621}\) and
3) use of force to prevent wrongful entry to place and to remove a person who wrongfully remains on or in a place or who is behaving in a disorderly manner.\(^{622}\)

*Powers in the LQ Act*

1) closure of licensed premises or cessation of sale, supply or consumption of liquor from licensed premises.\(^{623}\)

Both the POIS Act and regulation 290 of the *Road Traffic Code 2000* (WA), contain provisions regulating processions and assemblies. Part VA of the *Road Traffic Act 1974* (WA) deals with events on roads (other than an event that is a public meeting or procession under the POIS Act).

The powers in the CIA relating to out-of-control gatherings are not directed at the following types of gatherings: gatherings on licensed premises; public meeting or processions for which a permit under the POIS Act has been issued; and gatherings primarily for the purposes of political advocacy, protest or industrial action.\(^{624}\)

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\(^{616}\) Section 35 of the CIA.

\(^{617}\) Section 38B of the CIA

\(^{618}\) Section 69 of the CIA

\(^{619}\) Sections 25 and 128 of the CIA. There is no power under the CIA to arrest a person for breach of the peace since breach of the peace by itself is not an offence.

\(^{620}\) Section 64(1) of the Criminal Code.

\(^{621}\) Section 66(1) of the Criminal Code.

\(^{622}\) Section 254 of the Criminal Code.

\(^{623}\) Section 114 of the LQ Act.

\(^{624}\) See the definition of "out-of-control gathering" in section 75A of the CIA and, in particular, subsection (3).
The EM Act does not authorise the taking of measures directed at ending an industrial dispute, or controlling a riot or other civil disturbance. Further, the powers in the TEP Act are directed towards terrorist acts and terrorism offences and not lawful advocacy, protest, dissent or industrial action.  

Issue - 125

**Should the common law and statutory powers of police officers to deal with public disorder be codified in the CIA (in whole or in part)?**

**New powers to deal with public disorder**

Officers of WA Police have a variety of common law and statutory powers at their disposal to deal with public disorder.

It is noted that the *Criminal Law Amendment (Out-of-Control Gatherings) Act 2012 (WA)* amended the CIA to confer necessary powers on police officers, to enable them to effectively respond to out-of-control gatherings. These powers were primarily directed at out-of-control parties and have been used on many occasions since the amendments came into force.

In New South Wales, under Part 6A of the LEPR Act (NSW), emergency powers have been conferred on police officers to deal with public disorder (a "riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations"). These powers were introduced as a response to the Cronulla riots in 2005. The key features of the new suite of powers are set out below:

A police officer of or above the rank of Superintendent may authorise the closure of any licensed premises, or the prohibition of the sale or supply of liquor on any licensed premises for a total period of up to 48 hours, if the police officer:

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625 See the definition of "terrorist act" in section 5 of the TEP Act and, in particular, subsection (4).

626 See the definition of "public disorder" in section 87A(1) of the LEPR Act (NSW).

627 Part 6A of the LEPR Act (NSW) was inserted by the *Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW).*
a) has reasonable grounds for believing that there is a large scale public disorder occurring in the vicinity of the licensed premises or there is a threat of such a disorder occurring in the near future; and

b) is satisfied that the closure or prohibition will reasonably assist in preventing or controlling the public disorder.628

A police officer of or above the rank of Superintendent may establish in an area within a public place an emergency alcohol-free zone for a total period of up to 48 hours if the police officer:

a) has reasonable grounds for believing that there is a large scale public disorder occurring in the vicinity of the area or there is a threat of such a disorder occurring in the near future; and

b) is satisfied that the establishment of the zone will reasonably assist in preventing or controlling the public disorder.629

An authorisation may be given by the COP or by a Deputy or Assistant COP which authorises for a total period of up to 48 hours (or more if the Supreme Court approves) the exercise in a public place630 of special powers if the police officer giving the authorisation:

a) has reasonable grounds for believing that there is a large scale public disorder occurring or a threat of such a disorder occurring in the near future; and

b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder;631 and

c) is satisfied that the nature and extent of the powers to be conferred by the authorisation are appropriate to the public disorder that is occurring or threatened.632

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628 Section 87B of the LEPR Act (NSW).
629 Section 87C of the LEPR Act (NSW).
630 The term “public place” includes a school: see the definition of “public place” in section 87A of the LEPR Act.
631 Section 87D(1) of the LEPR Act (NSW).
632 Section 87D(2) of the LEPR Act (NSW).
The purposes for which the authorisation of the exercise of special powers may be given are:

a) for preventing or controlling a public disorder\(^{633}\) in a particular area described in the authorisation; or

b) for the purpose of preventing persons travelling by a road specified in the authorisation to an area to create or participate in a public disorder (whether or not the area is also subject to an authorisation).\(^{634}\)

The area or road is the target of the authorisation.\(^{635}\)

The special powers are:

a) the power to place a cordon around a target area or any part of it or to establish a roadblock on a target road (including any road in a target area) for the purposes of stopping and searching persons or vehicles or preventing persons entering or leaving an area without the permission of a police officer;\(^{636}\)

b) the power, without warrant, to stop and search a vehicle, and anything in or on the vehicle, if the vehicle is in an area that is the target of an authorisation or the vehicle is on a road that is the target of the authorisation;\(^{637}\)

c) the power, without warrant, to stop and search a person, and anything in the possession or under the control of the person, if the person is in an area that is the target of the authorisation or the person is in or on a vehicle on a road that is the target of an authorisation;\(^{638}\)

d) the power to require a person whose identity is unknown to the officer to disclose his or her identity (including proof of identity):

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\(^{633}\) For the purposes of Part 6A, controlling a public disorder includes containing or reducing the disorder or bringing the disorder to an end: see section 87A(2) of the LEPR Act (NSW).

\(^{634}\) Section 87E(1) of the LEPR Act (NSW).

\(^{635}\) Section 87E(2) of the LEPR Act (NSW).

\(^{636}\) Section 87I(1) of the LEPR Act. A police officer must not refuse permission for a person to leave the area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person’s own safety: see section 87I(2) of the LEPR Act (NSW).

\(^{637}\) Section 87(1) of the LEPR Act (NSW).

\(^{638}\) Section 87K(1) of the LEPR Act (NSW).
i. if the person is in an area that is the target of the authorisation or the person is in or on a vehicle on a road that is the target of an authorisation; and

ii. the police officer reasonably suspects that the person has been involved in or is likely to be involved in a public disorder.  

(e) the power, in connection with a search authorised under Division 3 of Part 6A, to:

i. seize and detain, for a period of not more than 7 days, a vehicle, mobile phone or other thing if the seizure and detention of the vehicle, phone or thing will assist in preventing or controlling a public disorder;

ii. seize and detain all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may provide evidence of the commission of a serious indictable offence (whether or not related to a public disorder), and

(f) the power, where a group of persons is assembled within an area that is the target of an authorisation, to give a direction to those persons, or to any of them, to disperse immediately.

A police officer may detain a vehicle/person for so long as is reasonably necessary to conduct a search under section 87J or 87K.

For the purposes of Part 6A:

a) a person in an area that is the target of an authorisation under Division 3 includes a person who is about to enter the area or who has recently left the area; and

b) a vehicle that is in an area the target of an authorisation under Division 3 includes a vehicle that is about to enter the area or that has recently left the area.

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639 Section 87L of the LEPR Act (NSW).
640 The Local Court may authorise the continued detention of a thing seized under section 87(1)(a) for an additional period or periods of 14 days: see section 87M(2) of the LEPR Act (NSW).
641 Section 87M of the LEPR Act (NSW).
642 Section 87MA of the LEPR Act (NSW).
643 See sections 87J(2) and 87K(3) of the LEPR Act (NSW).
644 Section 87A of the LEPR Act (NSW).
A police officer may exercise the powers conferred under Division 3, Part 6A in relation to a vehicle that is on a road that is not (or not in an area) the target of an authorisation (and any person or thing in or on the vehicle) without the authorisation extending to the vehicle if:

   a) the officer suspects on reasonable grounds that the occupants of the vehicle have participated or intend to participate in the public disorder; and
   b) the officer is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder.\(^{645}\)

The special powers may be exercised by any police officer in a public place for which purposes for which the authorisation was given.\(^{646}\)

The special powers in relation to a vehicle (and any person or thing in or on the vehicle) may be exercised without an authorisation having been granted but with the approval or a police officer of or above the rank of inspector if:

   a) a police officer suspects on reasonable grounds that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future; and
   b) the officer suspects on reasonable grounds that the occupants of a vehicle on a road have participated or intend to participate in the public disorder.\(^{647}\)

The Ombudsman is required to scrutinise the exercise of powers conferred on police officers under Part 6A.\(^{648}\)

In South Australia, police officers may be authorised to exercise special powers to prevent serious violence as follows:

A police officer of or above the rank of Superintendent may authorise the exercise of powers under section 72B of the SO Act (SA) in relation to an area if he or she has reasonable grounds to believe:

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\(^{645}\) Section 87MB of the LEPR Act (NSW).
\(^{646}\) Section 87H(1) of the LEPR Act (NSW).
\(^{647}\) Section 87N of the LEPR Act (NSW).
\(^{648}\) Section 87O of the LEPR Act (NSW).
a) that an incident of serious violence involving a group or groups of people may take place in the area; and  
b) such powers are necessary to prevent the incident.\textsuperscript{649}

If an authorisation is given then a police officer may, for the purpose of locating weapons and other articles in an area to which the authorisation relates, carry out a search in relation to:

a) any person who is in, or is apparently attempting to enter or to leave the area;  
b) any property in the possession of such a person.\textsuperscript{650}

The authorisation lasts for a specified period of not more than 24 hours.\textsuperscript{651}

The Commissioner must establish procedures to be followed by police officers in the exercise of powers under section 72B which procedures are designed to prevent, as far as reasonably practicable, undue delay, inconvenience or embarrassment to persons being subjected to the powers.\textsuperscript{652}

A police officer must ensure that any exercise of powers under section 72B does not unreasonably interfere with a person's right to participate in lawful advocacy, protest, dissent or industrial action.\textsuperscript{653}

Ancillary powers are contained in section 72C(5) and (6).

In the Northern Territory, under the PA Act (NT), the COP may close public places:

1) Where 12 or more persons take part in an assembly at a public place and conduct themselves in manner that results in unlawful physical violence to any person or unlawful damage to property, the COP may direct, either orally in writing, that the place or any part thereof shall be closed and be kept closed to the public for such

\textsuperscript{649} Section 72B(2) of the SO Act (SA).
\textsuperscript{650} Section 72B(1) of the SO Act (SA).
\textsuperscript{651} Section 72B(4)(d) of the SO Act (SA).
\textsuperscript{652} Section 72C(2) of the SO Act (SA).
\textsuperscript{653} Section 72C(3) of the SO Act (SA).
period of time as the Commissioner considers to be necessary to prevent the continuation of such conduct at that place.\textsuperscript{654}

2) Where a person conducts himself in such a matter that creates an immediate and substantial risk of unlawful physical violence.\textsuperscript{655}

If any person is at any public place that has been closed and is advised by a member of the Police Force that the place has been closed, that person must forthwith leave that place upon being requested to do so by the member. A person who refuses or fails to comply with the request commits an offence.\textsuperscript{656}

It would seem that some riots are fuelled by negative social media. Accordingly, it may be necessary for police officers to be given power to:

- a) prohibit persons from making posts to social media sites; and
- b) order persons to remove posts from social media sites,

for the purpose of preserving public order.

**Issue - 126**

*Should the CIA be amended to include additional powers to deal with public disorder? If so, what additional powers should be included in the CIA?*

### 13.2 Emergencies

Police officers have common law and statutory powers to deal with emergencies. For example, a police officer’s common law powers are generally accepted as including a general duty to protect people from danger.\textsuperscript{657} This would extend to, for example, controlling accident scenes\textsuperscript{658} and searching for missing persons.\textsuperscript{659}

\textsuperscript{654} Section 148(1) of the PA Act (NT).
\textsuperscript{655} Section 148(2) of the PA Act (NT).
\textsuperscript{656} Section 148(3) of the PA Act (NT).
\textsuperscript{657} New South Wales v Tyszyk [2008] NSWCA 107 at [130] and [138] per Campbell J (Mason P and Giles JA agreeing).
\textsuperscript{658} Mackley v Police (1994) 11 CRNZ 497 at 499-500 per Tipping J.
Powers in the CIA

Under the CIA, if an officer reasonably suspects that there is, in a place or vehicle, a person who has died, or who is so ill or injured as to be likely to die or suffer permanent injury to his or her health unless the officer enters the place or vehicle, the officer may enter the place, or stop and enter the vehicle, in order to ascertain the facts and if necessary, attend to the person. 660

Further, under the CIA, a police officers has the power to enter a place 661 or stop and search a vehicle 662, in relation to a serious event (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 663). The powers may only be exercised if, and for so long as, the officer suspects that it is necessary to do so as a matter of urgency in order:

a) to ensure there is no danger to people or property; or

b) to establish whether the serious event is connected to an offence and to decide whether or not to establish a protected forensic area at the place. 664

Powers in the EM Act

Under the EM Act, an emergency is "the occurrence or imminent occurrence of a hazard 665 which is of such a nature or magnitude that it requires a significant and co-ordinated response." 666 The powers in Part 6 may be exercised, for the purposes of emergency management, by hazard management officers during an emergency situation and authorised officers during a state of emergency. A police officer may be appointed as a hazard management officer or an authorised officer. The powers in Division 1 and 3 of Part 6 may be used during an emergency situation and a state of emergency. The powers in Division 2 of Part 6 may only be used during a state of emergency. The Part 6 powers include:

660 Section 36 of the CIA.
661 Section 37(2) of the CIA.
662 Section 37(3) of the CIA.
663 See section 3 of the EM Act and regulation 15 of the Emergency Management Regulations 2006 (WA) for a list of hazards.
664 Section 37(4) of the CIA.
665 Section 3 of the EM Act.
1) powers to obtain identifying particulars;\textsuperscript{667}
2) powers concerning movement and evacuation;\textsuperscript{668}
3) use of vehicles;\textsuperscript{669}
4) powers of officers to control or use property;\textsuperscript{670}
5) powers in relation to persons exposed to hazardous substances;\textsuperscript{671}
6) powers to exchange information;\textsuperscript{672}
7) power to direct public authority during state of emergency;\textsuperscript{673}
8) general powers during state or emergency (entry to place or vehicle; search of place or vehicle etc.);\textsuperscript{674} and
9) use of force and assistance.\textsuperscript{675}

A police officer may also direct the owner, occupier or the person apparently in charge of any place of business, worship or entertainment in the emergency area, to close that place to the public for the period specified in the direction.\textsuperscript{676} A police officer may also exercise the powers in section 67 and 75(I)(i) of the EM Act.

Under the \textit{Emergency Management Amendment Bill 2016}, proposed section 67B provides for emergency management officers (including police officers) to exercise the powers of movement and evacuation, prior to the declaration of an emergency situation or a state of emergency.\textsuperscript{677}

\textbf{Powers in the DGS Act}

It is also noted that a police officer has and may exercise all of the powers of a dangerous goods officer (DGO) under the DGS Act.\textsuperscript{678} In particular, it is noted that a DGO may exercise

\begin{itemize}
\item \textsuperscript{667} Section 66 of the EM Act.
\item \textsuperscript{668} Section 67 of the EM Act.
\item \textsuperscript{669} Section 68 of the EM Act.
\item \textsuperscript{670} Section 69 of the EM Act.
\item \textsuperscript{671} Section 70 of the EM Act.
\item \textsuperscript{672} Section 72 of the EM Act.
\item \textsuperscript{673} Section 74 of the EM Act.
\item \textsuperscript{674} Section 75 of the EM Act.
\item \textsuperscript{675} Section 76 of the EM Act.
\item \textsuperscript{676} Section 71(1) of the EM Act.
\item \textsuperscript{677} Clause 23 of the Emergency Management Amendment Bill 2016.
\item \textsuperscript{678} See section 31 of the DGS Act.
\end{itemize}
the primary powers in section 50 of the DGS Act and the ancillary powers in section 53 of the DGS Act.

Issue - 127

Should the common law and statutory powers of police officers to deal with emergencies (other than an emergency under the EM Act) be codified in the CIA (in whole or in part)?

New powers to deal with emergencies

In South Australia, provision has been made in the SO Act (SA) for dangerous areas to be declared as follows:

1) A senior police officer may declare a particular area, locality or place to be dangerous where he or she believes on reasonable grounds that it would be unsafe for members of the public to enter a particular area, locality or place because of conditions temporarily prevailing there.\footnote{Section 83B(1) of the SO Act (SA).}

2) The declaration must be broadcast by public radio etc. and remains in force for a period not exceeding 2 days.\footnote{Section 83B(2) of the SO Act (SA).}

3) Where a declaration is in force, a police officer may:
   a) warn any person apparently proceeding towards, or in the vicinity of, the dangerous area, locality or place against entering it;
   b) require or signal the driver of a motor vehicle to stop so that such a warning may be given to the occupants of the vehicle.\footnote{Section 83B(3) of the SO Act (SA).}

5) It is an offence for a person to:
   a) enter a dangerous area, locality or place contrary to a warning under section 83B; or
   b) fail, without reasonable excuse, to stop a vehicle when required or signaled to do so under section 83B against entering it.\footnote{Section 83B(5) of the SO Act (SA).}

6) The offence provisions do not apply to:
a) a person if it is reasonably necessary for the person to enter the area, locality or place in order to protect life or property; or
b) a representative of the news media, unless the police officer who gave the warning believes on reasonable grounds that the entry of the representative into the area, locality or place would give rise to a risk of death or injury to any person other than the representative and advises the representative accordingly.

7) If a person enters a dangerous area, locality or place contrary to a warning and the person is found guilty of an offence contrary to section 83B(5), the person is liable to compensate the Crown for the costs of operations reasonably carried out for the purpose of finding or rescuing the person.\textsuperscript{683}

9) The Commissioner must provide quarterly reports to the Minister about declarations made under section 83B.

10) The reports are to be tabled before both Houses of Parliament.\textsuperscript{684}

11) A declaration cannot be made under section 83B in relation to circumstances arising in an emergency for which a declaration under the \textit{Emergency Management Act 2004 (SA)} or Part 11 of the \textit{South Australian Public Health Act 2011 (SA)} is in force.\textsuperscript{685}

Issue - 128

\textbf{Should the CIA be amended to include additional powers for police officers to deal with emergencies (other than an emergency under the EM Act)?}

\textbf{Role of WA Police}

Police officers are often the first responders to emergencies (whether or not they arise from a criminal offence, a breach of the peace, an accident, natural event or deliberate act).

Police officers often work in tandem with other emergency responders such as: Fire and Emergency Services; State Emergency Services Units; Volunteer Marine Rescue Services; and St John’s Ambulance.

\textsuperscript{683} Section 83B(7) of the SO Act (SA).
\textsuperscript{684} Section 83B(9) and (10) of the SO Act (SA).
\textsuperscript{685} Section 83B(11) of the SO Act (SA).
Whilst it has been said that a constable generally has a duty to protect persons from injury and property from damage, it is not clear whether the duty is confined to protecting persons and property from injury and damage caused by criminal acts or a breach of the peace. Further, there are no provisions under the Police Act or the CIA, which set out the role and responsibilities of police officers in relation to the protection of life and property when there is an emergency incident (but which is not an "emergency" under the EM Act.

In some jurisdictions, there is a clear statement of the role of the Police Force with respect to the protection of life, property in emergencies. For example:

In New South Wales, one of the functions of the New South Wales Police Force (and members thereof) is to provide police services for New South Wales, namely:

(a) services by way of prevention and detection of crime,
(b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and
(c) the provision of essential services in emergencies, and
(d) any other service prescribed by the regulations.  

In the Northern Territory, the core functions of the Police Force are:

(a) to uphold the law and maintain social order; and
(b) to protect life and property; and
(c) to prevent, detect, investigate and prosecute offences; and
(d) to manage road safety education and enforcement measures; and
(e) to manage the provision of services in emergencies.  

In Queensland, the functions of the Queensland Police Service are:

(a) the preservation of peace and good order—

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687 See section 6 of the Police Act 1990 (NSW).

688 Section 5 of the PA Act (NT).
(i) in all areas of the State; and
(ii) in all areas outside the State where the laws of the State may lawfully be applied, when occasion demands;

(b) the protection of all communities in the State and all members thereof—
   (i) from unlawful disruption of peace and good order that results, or is likely to result, from—
   (ii) from commission of offences against the law generally;

(c) the prevention of crime;

(d) the detection of offenders and bringing of offenders to justice;

(e) the upholding of the law generally;

(f) the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of—
   (i) the provisions of the Criminal Code;
   (ii) the provisions of all other Acts or laws for the time being committed to the responsibility of the service;
   (iii) the powers, duties and discretions prescribed for officers by any Act;

(g) the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are—
   (i) required of officers under any Act or law or the reasonable expectations of the community; or
   (ii) reasonably sought of officers by members of the community.

In South Australia, the purpose of South Australia Police is to:

reassure and protect the community in relation to crime and disorder by the provision of services to—

(a) uphold the law; and
(b) preserve the peace; and
(c) prevent crime; and
(d) assist the public in emergency situations; and

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689 Section 2.3 of the PSA Act (Qld).
In Victoria, the functions of Victoria Police include:

(a) preserving the peace;
(b) protecting life and property;
(c) preventing the commission of offences;
(d) detecting and apprehending offenders;
(e) helping those in need of assistance.\(^{691}\)

Issue - 129

Should provisions be inserted in the CIA which set out the role and responsibilities of police officers in relation to the protection of life and property and emergencies?

\(^{690}\) Section 5 of the Police Act 1998 (SA).
\(^{691}\) Section 9 of the Victoria Police Act 2013 (Vic).
Chapter 14: Compensation for property damage and provision of alternative accommodation

The exercise of powers under the CIA may, in some cases, 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.

The situation is exacerbated when premises are searched many years after the commission of an alleged offence and the occupiers are not suspects. This may require the occupants to leave the premises to enable the police to conduct a full search.692

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 female.693

In Queensland, under the PPR Act (Qld), provision has been made for a person who suffers loss in consequence of the exercise of powers under the PPR Act (Qld). Section 804 of the PPR Act (Qld) provides:

(1) This section applies if a person suffers loss because-

(a) a police officer exercises powers under this Act; or

(b) an assistant exercises powers under this Act in accordance with a request of a police officer given under section 612.

(2) Compensation is payable by the State to the person whose property is damaged.

(3) 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.

(4) Also, compensation is not payable for the lawful seizure of a thing under this Act.

692 See article “Police search house linked to kill accused” in The West Australian 19th January 2017 at page 9.

693 See article “Kahu Smiler still homeless 12 months after police searched his Badgingarra property as part of Hayley Dodd probe” at www.perthnow.com.au 26 November 2014.
(5) The Minister is to decide the amount of compensation.

(6) A person who is dissatisfied with the Minister’s decision under subsection (5) may apply to a court, within 28 days, for compensation under this section.

(7) If the person applies under subsection (6), the court may decide the amount of the compensation.

In Western Australia, under the EM Act a person who suffers loss or damage because of the exercise, or purported exercise, of a power under section 46, 47, 48, 69 or 75(1)(f) of the EM Act is entitled to be paid just and reasonable compensation for the loss or damage. Compensation is excluded where:

(a) an amount for the loss or damage is recovered or recoverable by the person under a policy of insurance, or
(b) the conduct of the person contributed to the loss or damage; or
(c) if the loss or damage would have happened in any event irrespective of the exercise, or purported exercise, of the power.

Applications for compensation must be made to the Minister for Emergency Services within 90 days after the person suffers the loss or damage. The Applicant must provide relevant information to the Minister and the application may lapse if the Applicant fails to do so. The Minister must give written notice of his reasons for decision. An applicant who is dissatisfied with a decision of the Minister to refuse to pay compensation or the quantum of compensation may apply to the State Administrative Tribunal for a review of the decision. Compensation is paid out of the Consolidated Account.

This Chapter considers some of the issues relating to compensation for property damage and provision of alternative accommodation.

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694 Section 78(1) of the EM Act.
695 Note that in certain circumstances, policies of insurance may be extended under section 84 of the EM Act.
696 Section 79(1) of the EM Act.
697 Section 79(2) of the EM Act. However, under section 79(5) of the EM Act, the Minister has a discretion to accept an application for compensation after 90 days in certain circumstances.
698 Section 79(4) of the EM Act.
699 Section 80(5) of the EM Act.
700 Section 81 of the EM Act.
701 Section 83 of the EM Act.
702 Section 82 of the EM Act.
14.1 Compensation for damage caused during execution of search warrant

A search warrant issued under the CIA authorises entry to the target place and search of a target place for a target thing or a person. In addition, other powers in the CIA, confer a power of entry alone or a power of entry and search without warrant.

When a person is exercising a power under the CIA, including the power to enter and search, he or she may a person may use force against any thing that it is reasonably necessary to use in the circumstances to exercise the power. Further, if a person uses force, the force may be such as causes damage to the property of another person.

If an officer damages fixtures such as doors or windows, or damages goods present in the place, during the execution of a search warrant or in the exercise of a statutory power to enter/search, then liability for trespass will only arise if the force used was not reasonably necessary.

A person who suffers damage as a result of the execution of a search warrant or the exercise of a statutory power to enter/search, may have a claim for trespass to land or trespass to goods against the State but only if the person is able to prove that the force used was not reasonably necessary.

A person who suffers damage as a result of the execution of a search warrant may also have a claim in negligence. For example, in Attorney-General v Williams the Appellant sued the Crown for damage to his yacht which had been seized and forfeited by the Customs Department (as a result of having been used by another person without the Appellant’s knowledge, to import heroin into New Zealand). The yacht was held for 3 years prior to its return to the Appellant because the Crown waived forfeiture. The yacht had been damaged

703 Section 43(8)(a) of the CIA.
704 Section 43(8)(b) and (c)(i) of the CIA.
705 See, for example, sections 35-37, section 38B, sections 38-40 and sections 132-134 of the CIA.
706 Section 16(1)(a) of the CIA.
707 Section 16(2) of the CIA.
708 Richard Clayton QC and Hugh Tomlinson QC, Civil Actions Against the Police, Thomson Sweet & Maxwell 3rd edition) at 6-105.
709 Ibid.
as a result of a search conducted by customs officers and during the period of forfeiture its condition had deteriorated. The majority of the New Zealand Court of Appeal held that the Crown owed a duty of care in respect of goods seized pursuant to customs legislation, that duty being for the benefit of the Crown and for any other person ultimately entitled to the goods.

The circumstances in which payments for forced entry repairs may be made under 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 damaged caused on entry or during the search.

Issue - 130

Should the CIA 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 of entry/search? If so, what sort of process?

14.2 Compensation for damage or destruction during forensic examination

Under the CIA, an officer who is doing a search under a search warrant and who finds a target thing or a thing relevant to an offence may do a forensic examination on it (whether or not the officer seizes the thing).

A person conducting a forensic examination on a thing may in accordance with section 21(1) of the CIA:

- (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.

Further, section 21(2) of the CIA provides that 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.
A person whose thing is dismantled, damaged or destroyed as a result of a forensic examination may have a claim for trespass to goods against the State but only if the person is able to prove that it was not reasonably necessary to dismantle, damage or destroy the thing.

Issue - 131

Should the CIA 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?

14.3 Alternative accommodation for persons affected by establishment of PFA

The establishment of a PFA may cause inconvenience to the occupier(s) of a place.

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.712

In Queensland, under the PPR Act, 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. Section 179 of the PPR Act provides:

(1) This section applies to the occupier of a dwelling if–

(a) the occupier can not continue to live in the dwelling while the crime scene is established because of a direction given at a crime scene; or

712 Section 49(7) of the CIA.
(b) the occupier can not continue to live in the dwelling because of damage caused to the dwelling in the exercise of powers under this part.

(2) The commissioner must, if the occupier asks, arrange suitable accommodation for the occupier for the time the occupier can not live in the dwelling.

(3) The accommodation must, if reasonably practicable, be in the same locality as, and of at least a similar standard to, the occupier's dwelling.

(4) This section does not apply to an occupier who is detained in lawful custody.

Issue - 132

Should the CIA 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 established; (c) damage caused to the place by the exercise of powers under Part 5 of the CIA?

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