

Passed by both Houses



New South Wales

Crimes Legislation Amendment Bill 2002

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

Legislative Council
2002

Clerk of the Parliaments



New South Wales

Crimes Legislation Amendment Bill 2002

Act No , 2002

An Act to amend certain Acts with respect to criminal offences and procedure;
and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes Legislation Amendment Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Acts

The Acts specified in Schedules 1–10 are amended as set out in those Schedules.

4 Explanatory notes

The matter appearing under the heading “Explanatory note” in any of the Schedules does not form part of this Act.

Schedule 1 Amendment of Bail Act 1978

(Section 3)

[1] Section 4 Definitions

Insert at the end of the section:

- (8) A reference in this Act to a court:
 - (a) in relation to applications for and the grant of bail by a court (including imposing conditions on bail), or
 - (b) in relation to applications for and the giving of bail undertakings to a court,includes a reference to a justice exercising the functions concerned.

[2] Section 8A Presumption against bail for certain drug offences

Insert “, or an offence under Division 11 of Part 2.4 of the *Criminal Code* of the Commonwealth where that offence relates to section 233B of the *Customs Act 1901*” after “Commonwealth” in section 8A (1) (b).

[3] Section 9 Presumption in favour of bail for certain offences—exceptions

Insert “, or an offence under Division 11 of Part 2.4 of the *Criminal Code* of the Commonwealth where that offence relates to section 233B of the *Customs Act 1901*” after “Commonwealth” in section 9 (1) (e).

[4] Section 9 (3)

Insert “and section 9B (1) (e)” after “subsection (4)”.

[5] Section 9B Additional exceptions to presumption in favour of bail

Insert at the end of section 9B (1) (d):

- , or
- (e) was in custody.

[6] Section 35 Giving of bail undertakings

Insert “or justice” after “court” in section 35 (a).

[7] Section 48A Special limited review—bail conditions

Omit section 48A (5).

[8] Schedule 1 Savings and transitional provisions

Insert at the end of the Schedule (with appropriate Part and clause numbers):

Part Crimes Legislation Amendment Act 2002

Operation of amendments

An amendment made to this Act by the *Crimes Legislation Amendment Act 2002* extends to an offence alleged to have been committed before the amendment commences if a person is charged with the offence on or after that commencement.

Validation

Anything:

- (a) that was done or omitted to be done by a justice before the commencement of this clause, and
- (b) that would have been lawful if the amendments made to this Act by the *Crimes Legislation Amendment Act 2002* had been in force when the thing was done or omitted to be done,

is as valid as it would have been had those amendments been in force when the thing was done or omitted to be done.

Explanatory note

Functions of justices

Item [1] makes it clear that provisions of the Act that refer to applications for bail, the granting of bail (including bail conditions) and the giving of undertakings, in relation to courts, also include references to justices carrying out the same functions.

Item [6] makes it clear that bail undertakings may be given to a justice of the peace.

Commonwealth provisions

Under section 8A of the *Bail Act 1978* there is a prohibition on the granting of bail to an accused person in relation to certain specified drug offences except in certain circumstances. Under section 9 of the *Bail Act 1978* there is a presumption in favour of the granting of bail to an accused person except in relation to certain specified offences and certain circumstances.

The offences specified in both sections include offences against section 233B of the *Customs Act 1901* of the Commonwealth. That section creates various offences relating to narcotic goods, and used to include offences (**ancillary offences**) of attempting or conspiring to commit certain of those offences and of aiding, abetting, counselling or procuring the commission of the offences. Section 233B has been amended to remove those ancillary offences because they are now provided for

generally in relation to offences against Commonwealth law by Division 11 of Part 2.4 of the *Criminal Code* of the Commonwealth.

Items [2] and [3] ensure that sections 8A and 9 continue to operate in respect of those ancillary offences, and in relation to the other ancillary offences (such as incitement) created by Division 11 of Part 2.4, by inserting in those sections references to the relevant provisions of the *Criminal Code* of the Commonwealth in so far as those provisions relate to section 233B of the *Customs Act 1901* of the Commonwealth.

Presumptions against bail

Under section 9 of the *Bail Act 1978* there is a presumption in favour of the granting of bail to an accused person except in relation to certain specified offences and certain circumstances. Generally, a person who is already in custody for another offence is entitled to be granted bail unless the person is likely to remain in custody for a longer period than that for which bail would be granted.

Item [5] removes the presumption in favour of bail if a person is in custody for another offence at the time the offence concerned is alleged to have been committed.

Item [4] makes a consequential amendment.

Review of bail undertakings

Currently, under the *Bail Act 1978* the courts may review conditions of bail as part of a general review of bail or as part of a review limited to bail conditions where a person remains in custody after being granted bail because a condition of bail has not been complied with. However, the Supreme Court may not conduct a limited review of bail conditions where the bail was not granted by the Supreme Court.

Item [7] removes the general prohibition on the Supreme Court conducting a limited review where it has not granted the bail. This result is to enable the Supreme Court to conduct a limited review of bail conditions where bail was not granted by the Supreme Court if the person concerned remains in custody after being granted bail because a condition of bail has not been complied with.

Savings and transitional provisions

Item [8] inserts savings and transitional provisions applying the proposed amendments to offences committed before their commencement if the person concerned was charged on or after their commencement. It also inserts a provision validating acts or omissions by justices that would have been valid after the commencement of the amendments.

Schedule 2 Amendment of Children (Criminal Proceedings) Act 1987

(Section 3)

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

juvenile justice officer means a juvenile justice officer employed in the Department of Juvenile Justice.

person subject to control has the same meaning as it has in the *Children (Detention Centres) Act 1987*.

[2] Section 3 Definitions

Insert after paragraph (c) of the definition of *serious children's indictable offence* in section 3 (1):

- (c1) an offence under the *Firearms Act 1996* relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years,

[3] Section 18 Other indictable offences

Insert after section 18 (1):

- (1A) In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:
- (a) the seriousness of the indictable offence concerned,
 - (b) the nature of the indictable offence concerned,
 - (c) the age and maturity of the person at the time of the offence and at the time of sentencing,
 - (d) the seriousness, nature and number of any prior offences committed by the person,
 - (e) such other matters as the court considers relevant.

[4] Section 33A Cumulative or concurrent orders etc

Insert after section 33A (5):

- (6) This section does not apply to a control order to which section 33AA applies.

[5] Section 33AA

Insert after section 33A:

33AA Cumulative or concurrent orders—assault on juvenile justice officers

- (1) In this section, *control order* means an order referred to in section 33 (1) (g).
- (2) This section applies to a control order made by the Children's Court (the *new control order*) if:
 - (a) the order is made in relation to an offence involving an assault, or any other offence against the person, on a juvenile justice officer committed by a person while the person was a person subject to control, and
 - (b) the person is subject to another control order (the *existing control order*) at the time the new control order is made.
- (3) The period for which the person is required to be detained under the new control order commences when the period for which the person is required to be detained under an existing control order expires, unless the Children's Court directs that the period is to commence sooner.
- (4) Such a direction may not be given unless the Children's Court is of the opinion that there are special circumstances justifying such a direction.
- (5) The Children's Court must not make a new control order, or give such a direction, if the order or direction would have the effect of requiring a person:
 - (a) to be subject at any time to control orders requiring the person to be detained for more than 3 years (taking into account any period for which the person has already been detained under an existing control order), or
 - (b) to be detained for more than 2 periods specified in different control orders, being periods that are not to any extent concurrent.

[6] Schedule 2 Savings and transitional provisions

Insert at the end of clause 1 (1):

Crimes Legislation Amendment Act 2002 (but only to the extent that it amends this Act)

[7] Schedule 2

Insert at the end of the Schedule (with appropriate Part and clause numbers):

**Part Provision consequent on enactment of
Crimes Legislation Amendment Act 2002**

Application of section 33AA

Section 33AA, as inserted by the *Crimes Legislation Amendment Act 2002*, applies only to a new control order (within the meaning of that section) made in relation to an offence committed after the commencement of that section, and so applies whether or not the existing control order (within the meaning of that section) was made before the commencement of that section.

Explanatory note

Item [2] amends the definition of **serious children's indictable offence** in section 3 of the *Children (Criminal Proceedings) Act 1987* to include offences under the *Firearms Act 1996* relating to the manufacture or sale of firearms that are punishable by imprisonment for 20 years. Offences that are serious children's indictable offences must be dealt with according to law in the District Court or Supreme Court rather than before a Children's Court.

Item [3] amends section 18 of the Act to specify the criteria that a court must take into account in deciding whether to sentence a child who has committed an indictable offence according to law or in accordance with the provisions of Division 4 of Part 3 (Criminal proceedings in the Children's Court) of the Act.

Item [5] inserts a new section 33AA into the Act dealing with the making of a control order by the Children's Court for an offence involving an assault, or other offence against the person, against a juvenile justice officer committed while the person being dealt with by the Children's Court was detained in a detention centre after being found guilty of committing an offence.

The new section requires the new control order to be consecutive with any other control order to which the person is subject, unless the Children's Court is satisfied that there are special circumstances justifying the control order being concurrent with another control order.

Items [1] and [4] make consequential amendments.

Item [6] amends Schedule 2 to the Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed amendments to the Act.

Item [7] inserts a transitional provision consequential on the insertion of proposed section 33AA into the Act.

Schedule 3 Amendment of Confiscation of Proceeds of Crime Act 1989

(Section 3)

[1] Section 4 Definitions

Insert in section 4 (1) in alphabetical order:

public promotion means any of the following:

- (a) a film, slide, video tape or any other form of recording from which a visual image can be produced,
- (b) a record, tape, compact disk or any other form of recording from which words or sounds can be produced,
- (c) a book, newspaper, magazine or other written or pictorial matter,
- (d) a radio or television production,
- (e) a publication of matter on the Internet,
- (f) a live entertainment of any kind.

[2] Section 4 (1), definition of “tainted property”

Insert at the end of paragraph (c) of the definition:

, or

- (d) was derived or realised, directly or indirectly, by any person for the depiction of a serious offence, or the expression of the offender’s thoughts, opinions or emotions regarding the offence, in any public promotion.

[3] Section 13 Applications for confiscation orders

Omit “conviction.” from section 13 (3).

Insert instead “conviction, except with the leave of the Supreme Court.”

[4] Section 13 (3A)

Insert after section 13 (3):

- (3A) The Supreme Court must not grant leave under subsection (3) unless:

-
- (a) the property or benefit to which the application relates is:
 - (i) property of the kind referred to in paragraph (d) of the definition of *tainted property* in section 4 (1), or
 - (i) a benefit of the kind referred to in section 25 (2) (a1), and
 - (b) the Court is satisfied that:
 - (i) the property or benefit was derived, realised or identified only after the end of the relevant period, or
 - (ii) necessary evidence became available only after the end of that period, or
 - (iii) it is otherwise in the interests of justice to do so.

[5] Section 18 Forfeiture orders

Insert after section 18 (1) (a):

- (a1) if the application relates to property of the kind referred to in paragraph (d) of the definition of *tainted property* in section 4 (1)—the court is satisfied that, having regard to subsection (1A), it is appropriate to treat the property as having been derived or realised by the defendant (or by a person at the request or by the direction of the defendant) because of the commission of a serious offence, and

[6] Section 18 (1A)

Insert after section 18 (1):

- (1A) In considering whether to treat property of the kind referred to in paragraph (d) of the definition of *tainted property* in section 4 (1) as property derived or realised by the defendant (or by a person at the request or by the direction of the defendant) because of the commission of a serious offence, a court may have regard to any matter that it thinks fit, including:
 - (a) whether or not it is in the public interest to treat it as such property, and

- (b) whether or not the depiction of the offence, or the expression of the defendant's thoughts, opinions or emotions regarding the offence, in the public promotion for which the property was derived or realised has any general social or educational value, and
- (c) the nature and purposes of the public promotion for which the property was derived or realised, including its use for research, educational or rehabilitative purposes.

[7] Section 25 Assessment of pecuniary penalty

Insert after section 25 (2) (a):

- (a1) subject to subsection (2A), the value of any benefit that was provided for the defendant (or for another person at the request or direction of the defendant) for the depiction of the offence or offences, or the expression of the defendant's thoughts, opinions or emotions regarding the offence or offences, in any public promotion,

[8] Section 25 (2) (b)

Insert "or (a1)" after "paragraph (a)".

[9] Section 25 (2A) and (2B)

Insert after section 25 (2):

- (2A) In considering whether to treat a benefit of the kind referred to in subsection (2) (a1) as a benefit derived by the defendant because of having committed a serious offence or serious offences, a court may have regard to any matter that it thinks fit, including:
 - (a) whether or not it is in the public interest to treat it as such a benefit, and
 - (b) whether or not the depiction of the offence or offences, or the expression of the defendant's thoughts, opinions or emotions regarding the offence or offences, has any general social or educational value, and
 - (c) the nature and purposes of the public promotion for which the benefit was provided, including its use for research, educational or rehabilitative purposes.

(2B) If a court is satisfied that part (but not all) of a public promotion relates to a depiction or an expression of the kind referred to in subsection (2) (a1), the court may, for the purposes of section 24, treat the value of the benefit derived by the defendant because of having committed an offence as being such proportion of the total value of any benefit derived by the defendant for the promotion as seems just and equitable to the court in the circumstances.

[10] Schedule 1 Savings, transitional and other provisions

Omit “this Act.” from clause 2 (1).

Insert instead “this Act or any of the following Acts:”.

[11] Schedule 1, clause 2 (1)

Insert at the end of the subclause:

Crimes Legislation Amendment Act 2002 (but only to the extent that it amends this Act)

[12] Schedule 1, clause 2 (2)

Omit “this Act”. Insert instead “the Act concerned”.

Explanatory note

Items [1]–[9] amend the *Confiscation of Proceeds of Crime Act 1989* to make it clear that a court, in making confiscation orders under that Act, may take into account any property or benefit derived by a defendant who has committed a serious offence (or by another person at the defendant’s request or direction) for the depiction of the offence or the expression of the defendant’s views about the offence in a publication, recording or in the media.

Items [10]–[12] amend Schedule 1 to the Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed amendments to the Act.

Schedule 4 Amendment of Crimes Act 1900

(Section 3)

[1] Section 60AA Meaning of “law enforcement officer”

Insert at the end of paragraph (k) of the definition of *law enforcement officer*:

, or

- (l) a Crown Prosecutor or an Acting Crown Prosecutor, or
- (m) a solicitor who is employed as a member of staff of the Director of Public Prosecutions, or
- (n) a sheriff’s officer.

[2] Section 356D Investigation period

Omit section 356D (1). Insert instead:

- (1) The investigation period is a period that:
 - (a) if the person was arrested on premises during the execution of a search warrant and detained under Part 3A of the *Search Warrants Act 1985*—begins when the person ceases to be detained under that Part and ends at a time that is reasonable in all the circumstances (but does not exceed the maximum investigation period), or
 - (b) in any other case—begins when the person is arrested and ends at a time that is reasonable in all the circumstances (but does not exceed the maximum investigation period).

[3] Section 356E Determining reasonable time

Insert after section 356E (2) (k):

- (k1) if the person was arrested on premises during the execution of a search warrant and detained on the premises under Part 3A of the *Search Warrants Act 1985*:
 - (i) the period of time that the person was detained on the premises, and
 - (ii) the time taken to execute the search warrant, and
 - (iii) whether, in the circumstances, the search warrant was executed diligently and without undue delay,

[4] Section 356FA

Insert after section 356F:

356FA No person may be detained for period of time that is not reasonable

- (1) Nothing in this Part authorises the detention of any person for a continuous period of time that is not reasonable having regard to all the circumstances of the case.
- (2) Without limiting subsection (1), the following periods of time are to be taken into account in determining whether a person has been detained for a continuous period of time that is not reasonable:
 - (a) such of the periods of time referred to in section 356F (1) as are relevant,
 - (b) if the person was first arrested on premises during the execution of a search warrant—any period of time that the person was detained under Part 3A of the *Search Warrants Act 1985* before being detained under this Part.

[5] Section 356I Information in application for detention warrant

Insert after section 356I (1) (f):

- (f1) if the person was arrested on premises during the execution of a search warrant and detained on the premises under Part 3A of the *Search Warrants Act 1985*:
 - (i) details of the premises being searched, and
 - (ii) the time and date of the commencement of the execution of the search warrant and the time and date of the completion or cessation of that execution, and
 - (iii) the period of time that the person was detained on the premises,

[6] Section 421 Self-defence—excessive force that inflicts death

Omit “intentional or reckless” from section 421 (1) (a).

[7] Section 562AL

Insert after section 562AK:

562AL Non-inclusion of protected person's residential address in APVO or complaint for APVO if health care provider

- (1) The address at which a protected health care provider resides must not be stated in the complaint for an apprehended personal violence order (or the application for an order relating to such an order), unless:
 - (a) the protected health care provider consents to the address being included in the complaint or application, or
 - (b) if the complaint is made by a police officer—the police officer is satisfied that the defendant knows the address.
- (2) The address at which a protected health care provider resides, or intends to reside, must not be stated in an apprehended personal violence order (or an order relating to such an order), unless the court is satisfied that:
 - (a) the defendant knows the address, or
 - (b) it is necessary to state the address in order to achieve compliance with the order and the personal safety of the protected health care provider would not be seriously threatened, or damage would not be likely to be caused to any property of the protected health care provider, by stating the address, or
 - (c) the protected health care provider consents to the address being stated in the order.
- (3) If the address at which a protected health care provider resides or intends to reside must not be stated in a complaint, application or order because of subsection (1) or (2), the address at which the protected health care provider ordinarily provides health care services is to be stated instead in the complaint, application or order.
- (4) In this section:

court includes the Clerk of a Local Court or the Registrar of the Children's Court.

protected health care provider means a person who is employed or engaged to provide any care, treatment, advice or service in respect of the physical or mental health of any person for whose protection an apprehended personal violence order is made or sought.

[8] Eleventh Schedule Savings and transitional provisions

Insert at the end of the Schedule (with appropriate Part and clause numbers):

Part Crimes Legislation Amendment Act 2002

Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the *Crimes Legislation Amendment Act 2002* (but only to the extent that it amends this Act).
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to that Act or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Explanatory note

Assaults against law enforcement officers

Item [1] amends section 60AA of the *Crimes Act 1900* to provide that Crown Prosecutors, Acting Crown Prosecutors, sheriff's officers and solicitors employed by the Director of Public Prosecutions are law enforcement officers for the purposes of Division 8A (Assaults and other actions against police and other law enforcement officers) of Part 3 of the Act.

Amendments consequential on amendments to Search Warrants Act 1985

Items [2], [3] and [5] make amendments to Part 10A (Detention after arrest for purposes of investigation) of the Act that are consequential on the insertion of Part 3A (Detention after arrest during execution of warrant) of the *Search Warrants Act 1985* by Schedule 10 [3] to the proposed Act. The amendments ensure that detention under the new Part 3A is taken into account for the purposes of determining an appropriate period of detention under Part 10A. Item [2], in particular, amends Part 10A to provide that a

person may be detained under Part 10A for an appropriate period commencing when the person ceases to be detained under new Part 3A.

Person cannot be detained for an excessively long period of time under Part 10A of Act

Item [4] amends Part 10A of the Act to provide that a person cannot be detained under Part 10A for a continuous period of time that is not reasonable having regard to all the circumstances.

Self-defence

Section 421 of the *Crimes Act 1900* currently provides that a person is not criminally responsible for murder where the person uses force that involves the intentional or reckless infliction of death in circumstances where the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary to defend the person or another person or to prevent or terminate the unlawful deprivation of the person's or another person's liberty. The section operates to allow a verdict of manslaughter to be given if the person is otherwise criminally responsible for manslaughter.

Item [6] of the proposed amendments to the Act seeks to remove a possible anomaly by making it clear that the exclusion of criminal responsibility for murder for such conduct in those circumstances applies to any conduct that would otherwise amount to murder. The effect of the amendment is to require murder to be reduced to manslaughter if death is inflicted where the accused intends only to cause grievous bodily harm (since it is to be so reduced where the accused intends to kill).

Disclosure of residential address of health care providers applying for apprehended personal violence orders

Item [7] amends Part 15A of the Act to provide that generally the residential address of a health care provider who applies for or is granted an apprehended personal violence order does not need to be specified on the application or order and that a work address may be specified instead.

Savings and transitional provisions

Item [8] amends the Eleventh Schedule to the Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed amendments to the Act.

Schedule 5 Amendment of Crimes (Sentencing Procedure) Act 1999

(Section 3)

[1] Section 3 Interpretation

Insert in alphabetical order in section 3 (1):

detention centre has the same meaning as it has in the *Children (Detention Centres) Act 1987*.

juvenile justice officer means a juvenile justice officer employed in the Department of Juvenile Justice.

person subject to control has the same meaning as it has in the *Children (Detention Centres) Act 1987*.

[2] Section 55 Sentences for offences generally

Insert after section 55 (5) (a):

- (a1) a sentence of imprisonment imposed on an offender in relation to an offence involving an assault, or any other offence against the person, against a juvenile justice officer committed by the offender while a person subject to control, or

[3] Section 56 Sentences for offences involving assault by convicted inmate

Omit section 56 (1). Insert instead:

- (1) This section applies to:
 - (a) a sentence of imprisonment imposed on an offender in relation to an offence involving an assault, or any other offence against the person, committed by the offender while a convicted inmate of a correctional centre, or
 - (b) a sentence of imprisonment imposed on an offender in relation to an offence involving an assault, or any other offence against the person, against a juvenile justice officer committed by the offender while a person subject to control.

[4] Section 56 (3A)

Insert after section 56 (3):

- (3A) Such a direction may not be given in relation to:
- (a) an offence involving an assault, or other offence against the person, against a correctional officer committed by the offender while a convicted inmate of a correctional centre, or
 - (b) an offence involving an assault, or other offence against the person, against a juvenile justice officer committed by the offender while a person subject to control,

unless the court is of the opinion that there are special circumstances justifying such a direction.

[5] Section 56 (6)

Insert after section 56 (5):

- (6) In this section, a reference to *another sentence of imprisonment, other sentence of imprisonment* or *further sentence of imprisonment* is taken to include a reference to a period for which a person is required to be detained in a detention centre under an order referred to in section 33 (1) (g) of the *Children (Criminal Proceedings) Act 1987*.

[6] Section 58 Limitation on consecutive sentences imposed by Local Courts

Omit section 58 (3). Insert instead:

- (3) This section does not apply if:
- (a) the new sentence relates to an offence committed by an offender involving an assault, or other offence against the person, against a correctional officer while a convicted inmate of a correctional centre, or against a juvenile justice officer while a person subject to control, and

- (b) either:
 - (i) the old sentence was imposed by a court other than a Local Court or the Children's Court, or
 - (ii) the old sentence was imposed by a Local Court or the Children's Court and the date on which the new sentence would end is not more than 3 years and 6 months after the date on which the old sentence began.

- (4) In this section, a reference to an *old sentence of imprisonment* or *another sentence of imprisonment* is taken to include a reference to a period for which a person is required to be detained in a detention centre under an order referred to in section 33 (1) (g) of the *Children (Criminal Proceedings) Act 1987*.

[7] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Crimes Legislation Amendment Act 2002 (but only to the extent that it amends this Act)

[8] Schedule 2, clause 21 (3)

Insert “, or made after the appointed day under that subsection,” after “1989 Act”.

[9] Schedule 2, clause 21 (4)

Insert “, or given after the appointed day under that subsection,” after “1989 Act”.

[10] Schedule 2

Insert at the end of the Schedule (with appropriate Part and clause numbers):

Part Provisions consequent on enactment of Crimes Legislation Amendment Act 2002

Application of amendments to sections 55 and 56

- (1) An amendment to section 55 or 56 made by the *Crimes Legislation Amendment Act 2002* applies only to a new sentence of imprisonment imposed in relation to an offence committed after the commencement of the amendment, and so applies whether or not the old sentence was imposed before the commencement of the amendment.
- (2) In subclause (1), *new sentence of imprisonment* means a sentence of imprisonment imposed on an offender who, when being sentenced, is subject to another sentence of imprisonment that is yet to expire, or in respect of whom another sentence of imprisonment has been imposed in the same proceedings, and *old sentence of imprisonment* means that other sentence of imprisonment (that term having the extended meaning given by section 56 (6), as inserted by the *Crimes Legislation Amendment Act 2002*).

Application of amendment to section 58

The amendment to section 58 made by the *Crimes Legislation Amendment Act 2002* applies only to a new sentence (within the meaning of that section) imposed in relation to an offence committed after the commencement of the amendment, and so applies whether or not the old sentence (within the meaning of that section, as amended by the *Crimes Legislation Amendment Act 2002*) was imposed before the commencement of the amendment.

Explanatory note

Consecutive sentences

Item [4] amends section 56 of the *Crimes (Sentencing Procedure) Act 1999* to deal with the imposition of a sentence of imprisonment for an offence involving an assault, or other offence against the person, against a correctional officer committed while the offender was a convicted inmate of a correctional centre, or against a juvenile justice officer committed while the offender was detained in a detention centre under the *Children (Criminal Proceedings) Act 1987* after being found guilty of an offence.

The amendment requires the sentence of imprisonment to be served consecutively on any other sentence of imprisonment to which the offender is subject, or on any control order detaining the offender in a detention centre under the *Children (Criminal Proceedings) Act 1987*, unless the sentencing court is of the opinion that there are special circumstances justifying the sentence of imprisonment being served concurrently, or partly consecutively and partly concurrently, with another sentence of imprisonment or control order.

Items [1]–[3] and [5] make consequential amendments.

At present, under section 58 of the *Crimes (Sentencing Procedure) Act 1999* a Local Court may not impose a sentence of imprisonment that is consecutive on another sentence of imprisonment if the total accumulated sentence would be more than 3 years. There is an exception to this in section 58 (3) that allows a Local Court to impose a consecutive sentence of imprisonment that would result in an accumulated sentence of more than 3 years where the first sentence was imposed by a court other than the Local Court, and the new sentence relates to an offence involving an assault on a correctional officer committed by the offender while a convicted inmate of a correctional centre.

Item [6] amends section 58 to allow a Local Court to impose a sentence of imprisonment that is consecutive or partly consecutive on another sentence of imprisonment imposed by a Local Court (or on a control order made by the Children's Court) that will result in a total accumulated sentence of up to 3 years and 6 months, where the new sentence relates to an offence involving an assault, or other offence against the person, against a correctional officer committed by the offender while a convicted inmate of a correctional centre, or against a juvenile justice officer committed while the offender was detained in a detention centre after being found guilty of an offence.

The amendment also makes it clear that the length of a period of detention in a detention centre under a control order made by the Children's Court is taken into account in calculating the limit applying to a Local Court on accumulation of sentences of imprisonment.

Item [10] inserts consequential transitional provisions in Schedule 2 to the Act.

Existing life sentences

Items [8] and [9] clarify the operation of certain transitional provisions dealing with applications for re-determination of an existing life sentence made under the *Sentencing Act 1989*.

Section 13A of the *Sentencing Act 1989* enabled a person previously sentenced to imprisonment for life to apply to the Supreme Court for the life sentence to be re-determined to a minimum period and an additional period during which the person could be released on parole. Section 13A also enabled the Supreme Court to direct that a person who made such an application never re-apply to the Court for a re-determination, or not re-apply for a specified period.

Section 13A was repealed when the *Sentencing Act 1989* was repealed and replaced by the *Crimes (Sentencing Procedure) Act 1999*. Schedule 1 to the *Crimes (Sentencing Procedure) Act 1999* contains provisions similar to section 13A.

The transitional provisions in Schedule 2 to the *Crimes (Sentencing Procedure) Act 1999* provide that certain applications for re-determination made under section 13A of the *Sentencing Act 1989* continue to be dealt with under section 13A, rather than under Schedule 1 to the *Crimes (Sentencing Procedure) Act 1999*. The transitional provisions also provide that a re-determination made under section 13A before the commencement of the *Crimes (Sentencing Procedure) Act 1999* is taken to be a re-determination under Schedule 1, and that a direction by the Supreme Court about a person re-applying for a re-determination given before that commencement is taken to be a direction under Schedule 1.

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Schedule 5 Amendment of Crimes (Sentencing Procedure) Act 1999

The transitional provisions do not provide expressly for the circumstance where a re-determination is made, or a direction is given, under section 13A of the *Sentencing Act 1989* (as its operation is continued in force by the transitional provisions) after the commencement of the *Crimes (Sentencing Procedure) Act 1999*.

Items [8] and [9] amend the transitional provisions to make it clear that a re-determination made, or a direction given, under section 13A after the commencement of the *Crimes (Sentencing Procedure) Act 1999* is taken to be a determination made under, or a direction given under, Schedule 1 to the *Crimes (Sentencing Procedure) Act 1999*.

Savings and transitional regulations

Item [7] amends Schedule 2 to the Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed amendments to the Act.

Schedule 6 Amendment of Criminal Procedure Act 1986

(Section 3)

[1] Section 54 Attendance of accused person at proceedings (as inserted by the Criminal Procedure Amendment (Justices and Local Courts) Act 2001)

Insert after section 54 (3):

- (3A) If an accused person is not present at the day, time and place set down for the hearing of committal proceedings (including any day to which proceedings are adjourned), or absconds from the committal proceedings, the Magistrate may issue a warrant to arrest the accused person if the Magistrate is satisfied there are substantial reasons to do so and that it is in the interests of justice to do so.

[2] Section 181 Attendance of accused person at proceedings (as inserted by the Criminal Procedure Amendment (Justices and Local Courts) Act 2001)

Insert after section 181 (3):

- (3A) If an accused person is not present at the day, time and place set down for the hearing of proceedings (including any day to which proceedings are adjourned), or absconds from the proceedings, the Magistrate may issue a warrant to arrest the accused person if the Magistrate is satisfied there are substantial reasons to do so and that it is in the interests of justice to do so.

Explanatory note

Items [1] and [2] clarify the power of Magistrates to issue warrants for the arrest of accused persons who are not present at committal hearings or summary proceedings or who abscond from any such proceedings.

Schedule 7 Amendment of Justices Act 1902

(Section 3)

[1] Section 31 On non-appearance or absconding, warrants may be issued

Insert after section 31 (1):

- (1A) If an accused person is not present at the day, time and place set down for the hearing of committal proceedings (including any day to which proceedings are adjourned), or absconds from the committal proceedings, the Magistrate may issue a warrant to arrest the accused person if the Magistrate is satisfied there are substantial reasons to do so and that it is in the interests of justice to do so.

[2] Section 31 (2)

Insert “or (1A)” after “subsection (1)”.

[3] Section 66 On non-appearance or absconding, warrants may be issued

Insert after section 66 (1):

- (1A) If an accused person is not present at the day, time and place set down for the hearing of proceedings (including any day to which proceedings are adjourned), or absconds from the proceedings, a Magistrate may issue a warrant to arrest the accused person if the Magistrate is satisfied there are substantial reasons to do so and that it is in the interests of justice to do so.

[4] Section 66 (2)

Omit “subsection (1) or 80AA”. Insert instead “subsection (1) or (1A)”.

Explanatory note

Items [1] and [3] clarify the power of Magistrates to issue warrants for the arrest of accused persons who are not present at committal proceedings or summary hearings or who abscond from any such proceedings.

Items [2] and [4] make consequential amendments to enable the issue of warrants of commitment for any such persons after arrest.

Schedule 8 Amendment of Mental Health Act 1990

(Section 3)

[1] Section 100A

Insert after section 100:

100A Transfer of patients back to prison

- (1) A forensic patient transferred from a prison to a hospital must be transferred back to a prison not later than 7 days after the patient is transferred from the prison, unless the Chief Health Officer or an authorised person is of the opinion:
 - (a) that the patient is a mentally ill person or the patient is suffering from a mental condition for which treatment is available in a hospital, and
 - (b) that other care of an appropriate kind would not be reasonably available to the patient in prison.
- (2) The Chief Health Officer or an authorised person may, at any time, transfer a forensic patient transferred from a prison to a hospital back to a prison if of the opinion:
 - (a) that the patient has ceased to be a mentally ill person or to be suffering from a mental condition for which treatment is available in a hospital, or
 - (b) that other care of an appropriate kind would be reasonably available to the patient in prison.
- (3) Nothing in this section affects the powers of the Tribunal under this Act to review and make recommendations in respect of a patient transferred to a hospital from a prison.
- (4) In this section:

authorised person means a person authorised by the Chief Health Officer for the purposes of this section.

[2] Schedule 7 Savings, transitional and other provisions

Insert at the end of clause 2 (1A):

Crimes Legislation Amendment Act 2002 (but only to the extent that it amends this Act)

[3] Schedule 7, Part 8

Insert at the end of Part 7:

**Part 8 Provisions consequent on enactment of
Crimes Legislation Amendment Act 2002**

44 Patients in prisons

Section 100A (2), as inserted by the *Crimes Legislation Amendment Act 2002*, extends to persons transferred to a hospital from a prison before the commencement of that section.

Explanatory note

Under sections 97 and 98 of the *Mental Health Act 1990*, prisoners may be transferred from a prison to a hospital if they are mentally ill persons or suffering from a mental condition for which treatment is available in a hospital. References in that Act to prisons are (under other legislation) taken to be references to correctional centres, and references to prisoners are in the same way taken to be references to inmates of correctional centres.

Item [1] inserts proposed section 100A. The proposed section requires persons transferred to hospital from prison to be transferred back within 7 days unless the Chief Health Officer, or a person authorised by the Chief Health officer, is of the opinion that they are mentally ill persons or suffering from a mental condition for which treatment is available in a hospital and that other appropriate care would not be reasonably available in prison. The proposed section also enables the Chief Health Officer, or a person authorised by the Chief Health Officer, to transfer a forensic patient back to a prison at any time, if of the opinion that the person is not a mentally ill person or suffering from a mental condition for which treatment is available in a hospital or that other appropriate care is reasonably available in a prison. This power does not affect the review powers of the Mental Health Review Tribunal.

Items [2] and [3] insert savings and transitional provisions.

Schedule 9 Amendment of Mental Health (Criminal Procedure) Act 1990

(Section 3)

[1] Section 32 Persons suffering from mental illness or condition

Omit section 32 (1) (a). Insert instead:

- (a) that the defendant is:
 - (i) developmentally disabled, or
 - (ii) suffering from mental illness, or
 - (iii) suffering from a mental condition for which treatment is available in a hospital,
- but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, and

[2] Section 32 (3)

Omit “dismiss the charge”.

Insert instead “make an order dismissing the charge”.

[3] Section 32 (3A)–(3D)

Insert after section 32 (3):

- (3A) If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate may, within 6 months of the order being made, call on the defendant to appear before the Magistrate.
- (3B) If the defendant fails to appear, the Magistrate may:
 - (a) issue a warrant for the defendant’s arrest, or
 - (b) authorise an authorised justice within the meaning of the *Search Warrants Act 1985* to issue a warrant for the defendant’s arrest.
- (3C) If, however, at the time the Magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the Magistrate, the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately:
 - (a) issue a warrant for the defendant’s arrest, or

- (b) authorise an authorised justice within the meaning of the *Search Warrants Act 1985* to issue a warrant for the defendant's arrest.
- (3D) If a Magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

[4] Section 33 Mentally ill persons

Insert after section 33 (1):

- (1A) Without limiting subsection (1) (c), at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, the Magistrate may make a community treatment order in accordance with the *Mental Health Act 1990* for implementation by a health care agency in relation to the defendant, if the Magistrate is satisfied that all of the requirements for the making of a community treatment order by a Magistrate under that Act (other than the holding of an inquiry) have been met in respect of the defendant.
- (1B) The provisions of the *Mental Health Act 1990* (other than sections 131 (2), 132 and 133 (1) (a)) apply to and in respect of the defendant and that order as if the order had been made by a Magistrate under that Act.
- (1C) A Magistrate must, before making an order under subsection (1A), notify the Chief Health Officer, or a person authorised by the Chief Health Officer for the purposes of this section, of the proposed order.

[5] Schedule 1 Savings and transitional provisions

Insert before clause 1:

1A Savings and transitional regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
Crimes Legislation Amendment Act 2002 (but only to the extent that it amends this Act)

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- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
 - (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

[6] Schedule 1, clause 2

Insert after clause 1:

2 Amendments made by Crimes Legislation Amendment Act 2002

An amendment made to section 32 or 33 by the *Crimes Legislation Amendment Act 2002*:

- (a) applies to proceedings for offences whether committed before, on or after the commencement of the amendment, and
- (b) does not apply to proceedings commenced before the commencement of the amendment.

Explanatory note

Under the *Mental Health (Criminal Procedure) Act 1990*, a Magistrate may make certain orders as to the care of certain defendants if satisfied that it is more appropriate than proceeding according to law. Currently, that Act contains no enforcement procedure in relation to compliance with any conditions of release.

Item [1] clarifies that the persons who may be so dealt with are the following persons:

- (a) defendants who are developmentally disabled,
- (b) defendants who are suffering from mental illness,
- (c) defendants who are suffering from a mental condition for which treatment is available in a hospital.

Item [3] enables a warrant to be issued for the arrest of a defendant who fails to comply with an order within 6 months of the order being made. On being brought back before a Magistrate, the Magistrate may proceed to deal with the charge as if the order had not been made. This procedure is similar to the procedure applicable to a person who fails to comply with a good behaviour bond.

Item [2] makes a consequential amendment.

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Schedule 9 Amendment of Mental Health (Criminal Procedure) Act 1990

Item [4] enables a Magistrate who determines that a defendant is a mentally ill person to make a community treatment order, for the mandatory treatment of the defendant, under the *Mental Health Act 1990*. The order may be made only if the Magistrate could have made it under that Act. The effect of this is that before an order can be made the requirements of that Act, including requirements that the person is a mentally ill person and that a health care agency has an appropriate treatment plan and is capable of implementing it, apply. The Magistrate must notify the Chief Health Officer before making any such order.

Items [5] and [6] insert savings and transitional provisions.

Schedule 10 Amendment of Search Warrants Act 1985
(Section 3)

[1] Section 3A

Insert after section 3:

3A Notes

Notes included in this Act do not form part of this Act.

[2] Section 19A

Insert after section 19:

19A Recording execution of search warrants

- (1) The police officer in charge of the execution of a search warrant must ensure that an audio and visual recording of the execution of the warrant is made in accordance with any requirements prescribed by the regulations.
- (2) Nothing in subsection (1) requires the making of an audio and visual recording if there is an urgent need to execute the search warrant and it is not reasonably practicable in the circumstances for the recording to be made.
- (3) The police officer in charge of the execution of the search warrant must give each of the following persons the opportunity to view, free of charge, any such recording if the person requests it:
 - (a) an owner of the premises,
 - (b) an occupier of the premises,
 - (c) any person arrested on the premises during the execution of the warrant,
 - (d) a legal representative of a person referred to in paragraph (a), (b) or (c),
 - (e) any other person, or person belonging to a class of persons, prescribed by the regulations.
- (4) Nothing in subsection (3) requires a person (other than a legal practitioner of the kind referred to in subsection (3) (d)) to be given an opportunity to view any such recording if the police

officer in charge of the execution of the search warrant has reasonable grounds for believing that doing so is likely to result in:

- (a) a person avoiding arrest, or
 - (b) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or
 - (c) bodily injury being caused to any other person.
- (5) A failure to comply with this section does not affect the validity of the execution of any search warrant.

[3] Part 3A

Insert after Part 3:

Part 3A Detention after arrest during execution of warrant

Division 1 General

23A Definitions

- (1) In this Part:

Aboriginal person means a person who:

- (a) is a member of the Aboriginal race of Australia, and
- (b) identifies as an Aboriginal, and
- (c) is accepted by the Aboriginal community as an Aboriginal.

detained person means a person who is detained under this Part.

detention warrant means a warrant issued under Division 5.

permanent Australian resident means a person resident in Australia whose continued presence in Australia is not subject to any limitation as to time imposed by or in accordance with law.

person of non-English speaking background means a person who is born in a country outside Australia and whose first language is not English.

police officer in charge of a detained person means:

- (a) the police officer who is in charge of executing the search warrant on the premises concerned, or
- (b) a police officer on the premises to whom the police officer referred to in paragraph (a) has delegated the function of detaining the person.

search detention period means the period provided for by section 23F.

telephone includes radio, facsimile and any other communication device.

Torres Strait Islander means a person who:

- (a) is a member of the Torres Strait Island race, and
 - (b) identifies as a Torres Strait Islander, and
 - (c) is accepted by the Torres Strait Island community as a Torres Strait Islander.
- (2) A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer during the execution of a search warrant if:
- (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence in respect of a thing mentioned in the search warrant or seized during the execution of the warrant, or
 - (b) the police officer would arrest the person if the person attempted to leave, or
 - (c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.
- (3) A person is not taken to be under arrest because of subsection (2) merely because the police officer is exercising a power under a law to detain and search the person or to require the person to provide information or to answer questions.

Note. For example, both the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990* contain provisions that authorise police officers to detain mentally ill persons in certain circumstances.

- (4) For the purposes of this Part, a person ceases to be under arrest for an offence if the person is remanded by a justice, Magistrate or court in respect of the offence.

23B Persons to whom Part applies

- (1) This Part applies to a person, including a person under the age of 18 years, who is under arrest by a police officer for an offence. It is immaterial whether the offence concerned was committed before or after the commencement of this Part or within or outside the State.
- (2) This Part does not apply to a person who is detained under the *Intoxicated Persons Act 1979*.
- (3) This Part does not apply to any person who is being detained under Part 10A of the *Crimes Act 1900*.

23C Modification of application of Part to certain persons

- (1) The regulations may make provision for or with respect to the modification of the application of this Part to:
- (a) persons under the age of 18 years, or
 - (b) Aboriginal persons or Torres Strait Islanders, or
 - (c) persons of non-English speaking background, or
 - (d) persons who have a disability (whether physical, intellectual or otherwise).
- (2) Without limiting subsection (1), the regulations may provide for a search detention period for a person or class of persons referred to in that subsection that is shorter than the period provided for by section 23F.

23D Effect of Part on other powers and duties

- (1) **Existing powers of arrest and other matters**

This Part does not:

- (a) confer any power to arrest a person, or to detain a person who has not been lawfully arrested, or
- (b) prevent a police officer from asking or causing a person to do a particular thing that the police officer is authorised by law to ask or cause the person to do.

(2) **Certain evidentiary matters and rights not affected**

Nothing in this Part affects:

- (a) the operation of any of the provisions of the *Evidence Act 1995*, including the following:
 - (i) section 84 (Exclusion of admissions influenced by violence and certain other conduct),
 - (ii) section 85 (Criminal proceedings: reliability of admissions by defendants),
 - (iii) section 90 (Discretion to exclude admissions),
 - (iv) section 138 (Exclusion of improperly or illegally obtained evidence),
 - (v) section 139 (Cautioning of persons), or
- (b) any law that permits or requires a person to be present at the questioning of another person who is under arrest (for example, the presence of a parent at the questioning by a police officer of the parent's child), or
- (c) the right of a person to refuse to participate in any questioning of the person or any other investigative procedure unless the person is required by law to do so, or
- (d) the right of a person to leave police custody if the person is not under arrest, or
- (e) the rights of a person under the *Bail Act 1978*.

Division 2 Power to detain on search premises

23E Detention after arrest during execution of search warrant

- (1) A police officer who is executing a search warrant in respect of any premises may, in accordance with this section, detain in connection with the execution of the warrant, for the search detention period provided by section 23F, any person who is lawfully arrested on the premises for an offence in connection with a thing mentioned in, or seized during the execution of, the warrant.
- (2) The person must be:
 - (a) released (whether conditionally or on bail) within the search detention period, or

- (b) brought before a justice, Magistrate or court within that period, or if it is not practicable to do so within that period, as soon as practicable after the end of that period.
 - (3) Nothing in this section:
 - (a) authorises the detention of a person after the search warrant ceases to have effect, or
 - (b) prevents a police officer from detaining under Part 10A of the *Crimes Act 1900* any person who has ceased to be detained under this Part if such detention is otherwise authorised under Part 10A.
- Note.** Section 20 specifies the circumstances in which a search warrant ceases to have effect.
- (4) A requirement in another Part of this Act, the *Justices Act 1902*, the *Bail Act 1978* or under any other relevant law that a person who is under arrest be taken before a justice, Magistrate or court, without delay, or within a specified period, is affected by this Part only to the extent that the extension of the period within which the person is to be brought before such a justice, Magistrate or court is authorised by this Part.

23F Search detention period

- (1) The search detention period is a period that:
 - (a) begins when the person is arrested, and
 - (b) ends when the search warrant ceases to have effect or at a time that is reasonable having regard to all the circumstances (whichever is the earlier),but does not exceed the maximum search detention period.
- Note.** Section 20 specifies the circumstances in which a search warrant ceases to have effect.
- (2) The maximum search detention period is 4 hours or such longer period as the maximum search detention period may be extended by a detention warrant.

23G Determining reasonable time

- (1) In determining what is a reasonable time for the purposes of section 23F (1), all the relevant circumstances of the particular case must be taken into account.

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- (2) Without limiting the relevant circumstances that must be taken into account, the following circumstances (if relevant) are to be taken into account:
 - (a) the person's age, physical capacity and condition and mental capacity and condition,
 - (b) whether the presence of the person is necessary to assist in the execution of the search warrant,
 - (c) whether the presence of the person to observe the execution of the search warrant would assist in the protection of the person's interests,
 - (d) whether the person has indicated a willingness to assist in the execution of the search warrant,
 - (e) the time during which the person is in the company of a police officer before and after the person is arrested,
 - (f) the time required to execute the search warrant.
 - (3) In any criminal proceedings in which the reasonableness of any period of time that a person was detained under this Part is at issue, the burden lies on the prosecution to prove on the balance of probabilities that the period of time was reasonable.

Division 3 Rights of detained persons

23H Police officer in charge to caution, and give summary of Part to, detained person

- (1) The police officer in charge of a detained person must, as soon after the arrest of the person as is reasonably practicable in the circumstances:
 - (a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and
 - (b) give the person a summary of the provisions of this Part that is to include reference to the fact that the maximum search detention period may be extended beyond 4 hours by application made to an authorised justice and that the person, or the person's legal representative, may make representations to the authorised justice about the application.

- (2) The giving of a caution under subsection (1) (a) does not affect a requirement of any law that a person answer questions put by, or do things required by, a police officer.

231 Right to communicate with friend, relative, guardian or independent person

- (1) The police officer in charge of a detained person must, as soon after the arrest of the person as is reasonably practicable in the circumstances, inform the person that he or she may communicate, or attempt to communicate, with a friend, relative, guardian or independent person:
- (a) to inform that person of the detained person's whereabouts, and
 - (b) if the detained person wishes to do so, to ask the person communicated with to attend at the place where the person is being detained to enable the detained person to consult with the person communicated with.
- (2) If the person wishes to make any communication referred to in subsection (1), the police officer in charge must, as soon as is reasonably practicable in the circumstances:
- (a) provide the person with facilities that are reasonable in the circumstances to enable the person to do so, and
 - (b) allow the person to do so in circumstances in which, so far as is reasonably practicable in the circumstances, the communication will not be overheard.
- (3) 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 police officer in charge must:
- (a) allow the person to consult with the friend, relative, guardian or independent person, and
 - (b) provide facilities that are reasonable in the circumstances for that consultation, and
 - (c) allow the consultation to be in private if it is reasonably practicable to do so.
- (4) A requirement imposed on a police officer in charge under this section relating to a friend, relative, guardian or independent person need not be complied with if the police

officer in charge believes on reasonable grounds that doing so is likely to result in:

- (a) an accomplice of the detained person avoiding arrest, or
 - (b) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or
 - (c) hindering the execution of the search warrant, or
 - (d) bodily injury being caused to any other person.
- (5) The duties of the police officer in charge under this section owed to a person who is detained under this Part and who is not an Australian citizen or a permanent Australian resident are in addition to the duties of the police officer owed to the person under section 23K.

23J Right to communicate with legal practitioner

- (1) The police officer in charge of a detained person must, as soon after the arrest of the person as is reasonably practicable in the circumstances, inform the person that he or she may communicate, or attempt to communicate, with a legal practitioner of the person's choice and ask that legal practitioner to do either or both of the following:
- (a) attend at the place where the person is being detained to enable the person to consult with the legal practitioner,
 - (b) be present during the execution of any part of the search warrant.
- (2) If the person wishes to make any communication referred to in subsection (1), the police officer in charge must, as soon as is reasonably practicable in the circumstances:
- (a) provide the person with facilities that are reasonable in the circumstances to enable the person to do so, and
 - (b) allow the person to do so in circumstances in which, so far as is reasonably practicable in the circumstances, the communication will not be overheard.
- (3) If the person has asked a legal practitioner communicated with to attend at the place where the person is being detained, the police officer in charge must:
- (a) allow the person to consult with the legal practitioner, and

- (b) provide facilities that are reasonable in the circumstances for that consultation, and
 - (c) allow the consultation to be in private if it is reasonably practicable to do so, and
 - (d) if the person has so requested, allow the legal practitioner to be present during the execution of the search warrant and to give advice to the person.
- (4) The duties of the police officer in charge under this section owed to a person who is detained under this Part and who is not an Australian citizen or a permanent Australian resident are in addition to the duties of the police officer owed to the person under section 23K.

23K Right of foreign national to communicate with consular official

- (1) This section applies to a detained person who is not an Australian citizen or a permanent Australian resident.
- (2) The police officer in charge of a detained person to whom this section applies must, as soon after the arrest of the person as is reasonably practicable in the circumstances, inform the person that he or she may:
 - (a) communicate, or attempt to communicate, with a consular official of the country of which the person is a citizen, and
 - (b) ask the consular official to attend at the place where the person is being detained to enable the person to consult with the consular official.
- (3) If the person wishes to communicate with such a consular official, the police officer in charge must, as soon as is reasonably practicable in the circumstances:
 - (a) provide the person with facilities that are reasonable in the circumstances to enable the person to do so, and
 - (b) allow the person to do so in circumstances in which, so far as is reasonably practicable in the circumstances, the communication will not be overheard.
- (4) If the person has asked a consular official communicated with to attend at the place where the person is being detained, the police officer in charge must:

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- (a) allow the person to consult with the consular official, and
 - (b) provide facilities that are reasonable in the circumstances for that consultation, and
 - (c) allow the consultation to be in private if it is reasonably practicable to do so.
- (5) This section does not apply if the police officer in charge did not know, and could not reasonably be expected to have known, that the person is not an Australian citizen or a permanent Australian resident.

23L Provision of information to friend, relative or guardian

- (1) The police officer in charge of a detained person must inform the detained person, as soon as is reasonably practicable in the circumstances, of any request for information as to the whereabouts of the detained person made by a person who claims to be a friend, relative or guardian of the detained person.
- (2) The police officer in charge must provide, or arrange for the provision of, that information to the person who made the request unless:
 - (a) the detained person does not agree to that information being provided, or
 - (b) the police officer in charge believes on reasonable grounds that the person requesting the information is not a friend, relative or guardian of the detained person, or
 - (c) the police officer in charge believes on reasonable grounds that doing so is likely to result in:
 - (i) an accomplice of the detained person avoiding arrest, or
 - (ii) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or
 - (iii) hindering the execution of the search warrant, or
 - (iv) bodily injury being caused to any other person, or
 - (d) it is not reasonably practicable in the circumstances to do so.

23M Provision of information to certain other persons

- (1) The police officer in charge of a detained person must inform the detained person, as soon as is reasonably practicable in the circumstances, of any request for information as to the whereabouts of the detained person made by a person who claims to be:
 - (a) a legal practitioner representing the detained person, or
 - (b) in the case of a detained person who is not an Australian citizen or a permanent Australian resident, a consular official of the country of which the detained person is a citizen, or
 - (c) a person (other than a friend, relative or guardian of the detained person) who is in his or her professional capacity concerned with the welfare of the detained person.
- (2) The police officer in charge must provide, or arrange for the provision of, that information to the person who made the request unless:
 - (a) the detained person does not agree to that information being provided, or
 - (b) the police officer in charge believes on reasonable grounds that the person requesting the information is not the person he or she claims to be, or
 - (c) it is not reasonably practicable in the circumstances to do so.

23N Provision of interpreter

- (1) The police officer in charge of a detained person must, as soon as is reasonably practicable in the circumstances, arrange for an interpreter to be present for the person if the police officer has reasonable grounds for believing that the person is unable:
 - (a) because of inadequate knowledge of the English language, to communicate with reasonable fluency in English, or
 - (b) because of any disability, to communicate with reasonable fluency.
- (2) If an interpreter is not available to be present for the person, the police officer in charge must instead arrange for a telephone interpreter for the person.

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- (3) However, the police officer in charge need not arrange for an interpreter to be present or for a telephone interpreter if the police officer in charge believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance with the requirement not reasonably practicable.

23O Right to medical assistance

The police officer in charge of a detained person must arrange immediately for the person to receive medical attention if it appears to the police officer that the person requires medical attention or the person requests it on grounds that appear reasonable to the police officer.

23P Right to reasonable refreshments and facilities

The police officer in charge of a detained person must ensure that the person is provided with reasonable refreshments in the circumstances and reasonable access to toilet facilities.

23Q Execution of search warrant need not be deferred to secure rights and other matters

- (1) Nothing in this Division requires the execution of a search warrant to be deferred while the police officer in charge of a detained person informs the person of any right of the person under this Division or the person exercises (or seeks to exercise) any such right.
- (2) A failure to comply with a provision of this Division does not of itself affect the validity of the execution of any search warrant.

Note. Section 23D (2) provides that nothing in this Part affects the operation of certain provisions of the *Evidence Act 1995* relating to the exclusion of illegally obtained evidence.

Division 4 Records in relation to execution of search warrant and detention

23R Audio and visual recording of search

- (1) If a person is detained under this Part, the police officer in charge must ensure that an audio and visual recording (with appropriate time and date information) is made of the following:
- (a) the detention of the person on the premises,

- (b) any attempt to inform the person of his or her rights under Division 3,
 - (c) such other matters as may be prescribed by the regulations.
- (2) The regulations may also provide for any other matter relating to technical requirements for the making of an audio and visual recording for the purposes of subsection (1).
- (3) Nothing in subsection (1):
 - (a) requires the making of an audio and visual recording of any exercise of a right under Division 3 that is exercised in private, or
 - (b) requires the making of an audio and visual recording if there is an urgent need to conduct the execution of the search warrant and it is not reasonably practicable for the recording to be made in the circumstances.
- (4) The detained person (or the detained person's legal representative) must be given the opportunity to view, free of charge, any such recording if the person requests it.
- (5) Any such request may be made at any time after the person ceases to be detained under this Part.
- (6) Nothing in subsection (4) requires a person (other than a legal practitioner) to be given an opportunity to view any such recording if there are reasonable grounds for believing that doing so is likely to result in:
 - (a) a person avoiding arrest, or
 - (b) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or
 - (c) bodily injury being caused to any other person.
- (7) The requirements of this section are in addition to the requirements of section 19A.

23S Records to be maintained

- (1) The police officer in charge of a detained person must keep a record in the form (if any) prescribed by the regulations of the following matters:
 - (a) the date and time of the person's arrest,

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- (b) details of the search warrant that was being executed when the person was detained under this Part,
 - (c) the name and rank of the arresting officer and any accompanying officers,
 - (d) the grounds for the person's detention,
 - (e) if the person is denied any rights under this Part, the reason for the denial of those rights and the time when the person was denied those rights,
 - (f) details of any application for a detention warrant and the result of any such application,
 - (g) if a detention warrant is issued in respect of the person, the date and time a copy of the warrant was given to the person and the person was informed of the nature of the warrant and its effect,
 - (h) the date and time the person is released from detention,
 - (i) any other particulars prescribed by the regulations.
- (2) The police officer in charge is responsible for the accuracy and completeness of the record for the person and must ensure that the record (or a copy of it) accompanies the person if the person is transferred to another location for detention.
 - (3) The recording of any matters referred to in this section must be made contemporaneously with the matter recorded in so far as it is reasonably practicable to do so.
 - (4) As soon as practicable after the person is released or taken before a justice, Magistrate or court, the police officer in charge must ensure that a copy of the person's record is given to the person.

Division 5 Extension of maximum search detention period

23T Detention warrant to extend search detention period

- (1) A police officer may, before the end of the search detention period, apply to an authorised justice for a warrant to extend the maximum search detention period beyond 4 hours.
- (2) The person to whom an application for a detention warrant relates, or the person's legal representative, may make representations to the authorised justice about the application.

- (3) The authorised justice may issue a warrant that extends the maximum search detention period by up to 8 hours.
- (4) The maximum search detention period cannot be extended more than once.
- (5) After considering the information referred to in section 23W (1), an authorised justice must not issue a warrant to extend the maximum search detention period unless satisfied that:
 - (a) the execution of the search warrant concerned is being conducted diligently and without delay, and
 - (b) a further period of detention of the person to whom the application relates on the premises being searched is reasonably necessary to complete the execution of the search warrant because of the special and unusual circumstances of the search, and
 - (c) circumstances exist in the matter that make it impracticable for the execution of the search warrant to be completed within the 4-hour period.
- (6) A detention warrant ceases to have effect even if the extended maximum search detention period for which it provides has not expired when the search warrant by reason of which the detained person is being detained ceases to have effect.

Note. Section 20 specifies the circumstances in which a search warrant ceases to have effect.

23U Procedure for applying for and issuing detention warrant

- (1) An application for a detention warrant may be made by the applicant in person or by telephone.
- (2) An application for a detention warrant made in person must be made in writing in the form prescribed by the regulations. The authorised justice must not issue the detention warrant unless the information given by the applicant in or in connection with the application is verified before the authorised justice on oath or affirmation or by affidavit. An authorised justice may administer an oath or affirmation or take an affidavit for the purposes of an application for a detention warrant.
- (3) An application for a detention warrant made by telephone must be made by facsimile (instead of orally) if the facilities to do so are readily available for that purpose.

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- (4) If it is not practicable for an application made by telephone to be made directly to an authorised justice, the application may be transmitted to the authorised justice by another person on behalf of the applicant.
 - (5) An authorised justice who issues a detention warrant on an application made by telephone must:
 - (a) complete and sign the warrant, and
 - (b) furnish the warrant to the person who made the application or inform that person of the terms of the warrant and of the date and time when it was signed.
 - (6) If a detention warrant is issued on an application made by telephone and the applicant was not furnished with the warrant, the applicant is to complete a form of detention warrant in the terms indicated by the authorised justice under subsection (5) and write on it the name of that authorised justice and the date and time when the warrant was signed. A form of detention warrant so completed is taken to be a detention warrant issued in accordance with this section.
 - (7) A detention warrant issued on an application made by telephone is to be furnished by the authorised justice by transmitting it by facsimile, if the facilities to do so are readily available. The copy produced by that transmission is taken to be the original document.
 - (8) As soon as practicable after a detention warrant is issued, the police officer in charge:
 - (a) must give a copy of the warrant to the person to whom it relates, and
 - (b) must orally inform the person of the nature of the warrant and its effect.
 - (9) In the case of an application for a detention warrant made by telephone, the applicant for the warrant must, within one day after the day on which the warrant is issued, give or transmit to the authorised justice concerned an affidavit setting out the information on which the application was based that was given to the authorised justice when the application was made.
 - (10) In any criminal proceedings, the burden lies on the prosecution to prove on the balance of probabilities that the warrant was issued.

- (11) In this section, *facsimile* includes any electronic communication device that transmits information in a form from which written material is capable of being reproduced with or without the aid of any other device or article.

23V Detention warrants may be issued after end of search detention period in limited circumstances

- (1) An authorised justice may issue a detention warrant even after the search detention period has ended if the authorised justice is satisfied that:
- (a) the person applying for the warrant attempted to apply for the warrant by telephone before the end of that period, and
 - (b) the applicant's telephone call was answered but the applicant was not referred to an authorised justice to be dealt with until after the end of that period.
- (2) If an authorised justice issues a detention warrant after the end of the search detention period, the warrant is taken to have been issued immediately before the end of that period for the purposes of determining whether the detained person's further detention under this Part was authorised.

23W Information in application for detention warrant

- (1) An authorised justice must not issue a detention warrant unless the application for the warrant includes the following information:
- (a) the details of the search warrant that is being executed,
 - (b) the general nature of the evidence on which the person to whom the application relates was arrested,
 - (c) the extent to which the search warrant has been executed and what steps are required to complete the execution of that warrant,
 - (d) the reasons for believing that the continued detention of the person is reasonably necessary to assist in the completion of the execution of the search warrant,
 - (e) the extent to which the person is co-operating with the execution of the search warrant,
 - (f) the views of the person detained,

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- (g) if a previous application for the same, or substantially the same, warrant was refused, details of the previous application and of the refusal and any additional information required by section 23X,
 - (h) any other information required by the regulations.
- (2) The applicant must provide (either orally or in writing) such further information as the authorised justice requires concerning the grounds on which the detention warrant is being sought.
 - (3) Nothing in this section requires an applicant for a detention warrant to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of any person.

23X Further application for detention warrant after refusal

If an application by a person for a detention warrant is refused by an authorised justice, that person (or any other person who is aware of the application) may not make a further application for the same, or substantially the same, warrant to that or any other authorised justice unless the further application provides additional information that justifies the making of the further application.

23Y False or misleading information in applications

- (1) A person must not, in or in connection with an application for a detention warrant, give information to an authorised justice that the person knows to be false or misleading in a material particular.
Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.
- (2) This section applies to an application made by telephone as well as in person.
- (3) This section applies whether or not the information given is also verified on oath or affirmation or by affidavit.

23Z Provisions relating to detention warrants

- (1) An authorised justice who issues a detention warrant is to cause a record to be made of all relevant particulars of the grounds the authorised justice has relied on to justify the issue of the warrant.
- (2) The regulations may make provision for or with respect to:
 - (a) the keeping of records in connection with the issue and execution of detention warrants, and
 - (b) the inspection of any such records, and
 - (c) any other matter in connection with any such records.
- (3) Any matter that might disclose the identity of a person must not be recorded under this section if the authorised justice is satisfied that to do so might jeopardise the safety of any person.
- (4) A detention warrant must be in the form prescribed by the regulations.
- (5) A detention warrant is not invalidated by any defect other than a defect that affects the substance of the warrant in a material particular.

Division 6 Miscellaneous

23ZA Detention after arrest for purposes of investigation may count towards sentence

In passing sentence on a person convicted of an offence, a court may take into account any period during which the person was detained under this Part in respect of the offence and may reduce the sentence it would otherwise have passed.

23ZB Regulations may prescribe guidelines

The regulations may make provision for or with respect to guidelines to be observed by police officers regarding the exercise or performance of powers, authorities, duties or functions conferred or imposed on police officers (including police officers in charge of detained persons) by this Part.

23ZC Review of Part

- (1) The Attorney General is to review this Part to determine whether the policy objectives of the Part remain valid and whether the terms of the Part remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 12 months from the commencement of this Part.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period referred to in subsection (2).

23ZD Monitoring of operation of certain provisions of Part by Ombudsman

- (1) For the period of 2 years from the date of commencement of this Part, the Ombudsman is to keep under scrutiny the exercise of the functions conferred on police officers under this Part.
- (2) For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of those functions.
- (3) The Ombudsman must, as soon as practicable after the expiration of the 2-year period, prepare a report of the Ombudsman's work and activities under this section and furnish a copy of the report to the Attorney General and the Minister for Police and the Commissioner of Police.
- (4) The Attorney General is to lay (or cause to be laid) a copy of the report before both Houses of Parliament as soon as practicable after the Attorney General receives the report.
- (5) If a House of Parliament is not sitting when the Attorney General seeks to lay a report before it, the Attorney General may present copies of the report to the Clerk of the House concerned.
- (6) The report:
 - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
 - (b) may be printed by authority of the Clerk of the House, and

(c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and

(d) is to be recorded:

(i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and

(ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly,

on the first sitting day of the House after receipt of the report by the Clerk.

(7) In this section:

exercise a function includes perform a duty.

function includes a power, authority or duty.

[4] Section 26A

Insert after section 26:

26A Savings and transitional regulations consequent on enactment of Crimes Legislation Amendment Act 2002

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the *Crimes Legislation Amendment Act 2002* (but only to the extent that it amends this Act).

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to that Act or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Explanatory note

Item [1] amends the *Search Warrants Act 1985* to provide that notes included in the Act do not form part of the Act.

Item [2] amends the Act to provide that the execution of search warrants are to be recorded by means of an audio and visual recording.

Item [3] inserts a new Part 3A in the Act that authorises police officers executing search warrants in relation to premises to detain any person lawfully arrested on the premises for a certain period while the search warrant is being executed. The provisions of the Part are similar to the provisions of Part 10A of the *Crimes Act 1900* (which deal with the detention of persons after arrest for the purposes of investigation).

Item [4] amends the Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed amendments to the Act.