

FIRST PRINT

**CRIMES (DETENTION AFTER ARREST) AMENDMENT
BILL 1994**

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The objects of this Bill are:

- (a) to enable police to detain a person who has been arrested for a reasonable time for the purpose of investigating the person's involvement in the commission of an offence; and
- (b) to provide for the rights of an arrested person.

Currently there is no power to detain a person after arrest for the purposes of investigation for longer than the period within which a person must be brought before a justice or a court.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 is a formal provision that gives effect to the Schedule of amendments to the Crimes Act 1900.

Clause 4 amends the Children (Criminal Proceedings) Act 1987 as a consequence of the proposed amendments to the Crimes Act 1900.

SCHEDULE 1—AMENDMENTS

Power to detain persons after arrest

A new Part is to be inserted into the Crimes Act 1900 containing police powers to detain a person after arrest for the purposes of investigation (proposed Part 10A, inserted by **Schedule 1 (3)**).

The objects of the Part are set out in proposed section 354. The Part will apply to the detention of persons (including children) after arrest (proposed section 355). The Part

Crimes (Detention after Arrest) Amendment 1994

will not apply to a person arrested before the commencement of the Part or to a person detained under the Intoxicated Persons Act 1979. Proposed section 356A defines terms for the purposes of the Part.

The Part contains a new power for police to detain a person after arrest for a reasonable time to enable the person's involvement in the commission of an offence (including an offence other than the offence for which the person was arrested) to be investigated (proposed section 356B). The power applies in respect of offences committed in or out of the State. A list of criteria for determining what is a reasonable time to detain a person after arrest is set out (proposed section 356C). Investigative procedures which may be carried out during the detention are listed, including obtaining statements, searching the person and taking photographs and finger-prints (proposed section 356D).

Effect of proposed Part on existing powers, rights and rules of evidence

Proposed section 356 makes it clear that the Part does not confer any power to arrest a person, or to detain a person who has not been lawfully arrested, 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 or independently confer power to carry out an investigative procedure outlined in proposed section 356D.

The Part will not remove or derogate from certain existing rights of persons or rules of evidence (e.g. the right to remain silent, the prosecution's obligation to prove the voluntariness of a confession or the court's discretion to admit or exclude unfairly, improperly or unlawfully obtained evidence).

Rights of arrested persons

The Part requires police to give arrested persons an opportunity to communicate with a person (e.g. a friend or relative) and a legal practitioner of the person's choice and to defer the questioning of the person or the conduct of any other investigative procedure in which the person is to participate for up to 2 hours until the person contacted arrives (proposed section 356E). If the arrested person is not an Australian citizen, police are required, in addition, to give the person an opportunity to communicate with a consular official and to defer the questioning of the person or the conduct of any other investigative procedure in which the person is to participate for up to 2 hours until the consular official arrives (proposed section 356F).

However, these provisions will not apply (except to rights in relation to legal practitioners) if the police officer concerned believes on reasonable grounds that doing so could result in an accomplice of the arrested person avoiding apprehension, the concealment, fabrication, destruction or loss of evidence, the intimidation of a witness or could affect the safety of other people or could hinder the recovery of any person or property relating to the offence concerned (proposed section 356G).

Friends, relatives, guardians or legal representatives are entitled to information about the police station or other place where arrested persons are being detained (proposed section 356H). The custody officer for an arrested person may obtain an interpreter for the person in connection with the questioning of the person or any other investigative procedure in which the person is to participate if the person cannot communicate orally with reasonable fluency in English (proposed section 356I) or cannot communicate orally with reasonable fluency because of physical or intellectual disability (proposed section 356J).

Crimes (Detention after Arrest) Amendment 1994

An arrested person has a right to medical assistance (proposed section 356K) and to the provision of reasonable refreshments and access to toilet facilities and, in certain circumstances, access to washing facilities (e.g. showering) (proposed section 356L).

Police must maintain custody records (proposed section 356M). The regulations may provide for codes of practice relating to arrested persons to be observed by police and for the keeping of custody and other related records (proposed section 356N).

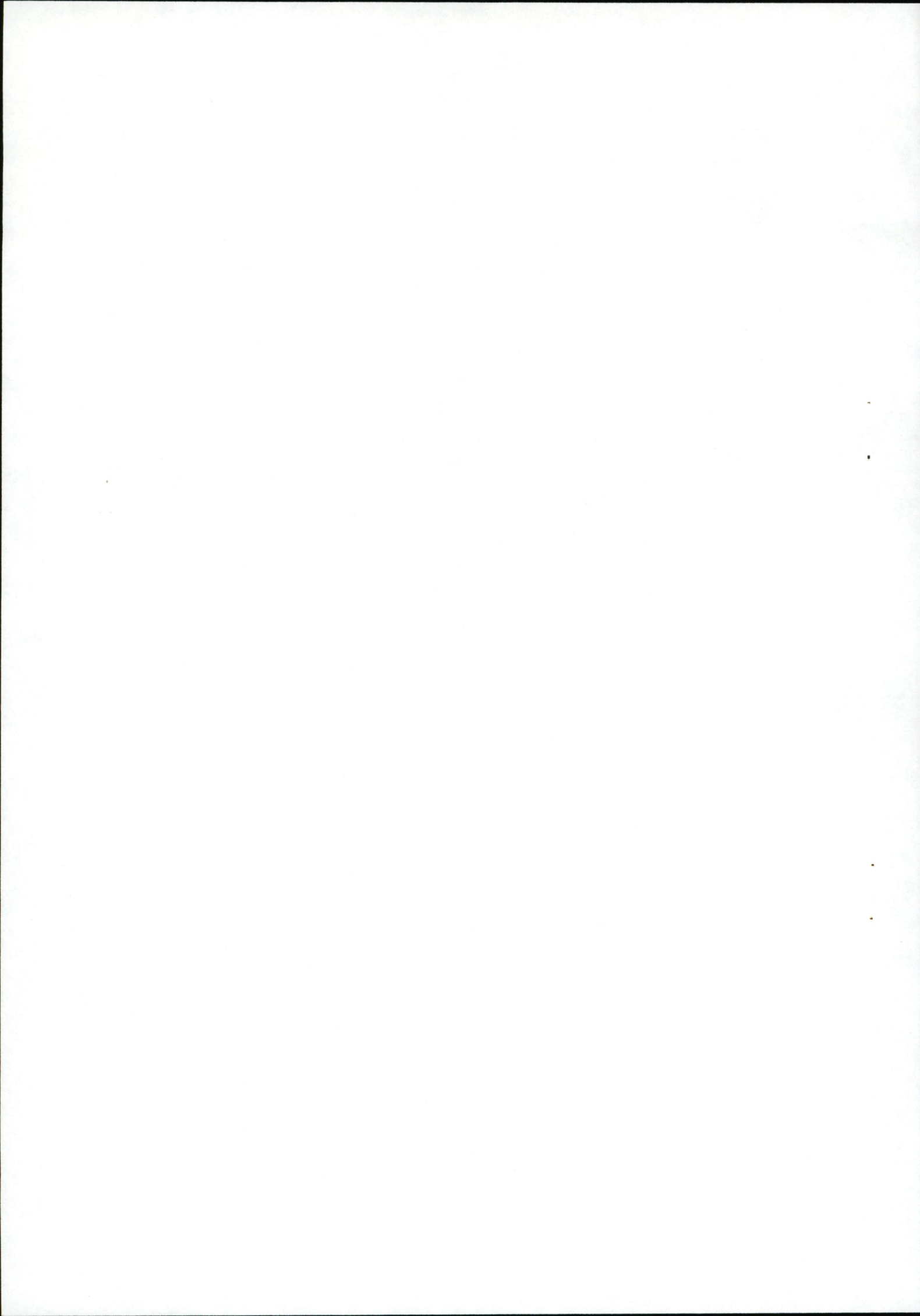
Effect on sentence

A court is to take into account in passing sentence on a person any period during which the person was detained after arrest under the Part in respect of the offence and may accordingly reduce the sentence it would otherwise have passed (proposed section 442C, inserted by **Schedule 1 (5)**).

Consequential amendments

Schedule 1 (1), (2) and (4) make minor consequential amendments.

The Part will apply to all offences by the operation of the Second Schedule to the Crimes Act 1900.



FIRST PRINT

**CRIMES (DETENTION AFTER ARREST) AMENDMENT
BILL 1994**

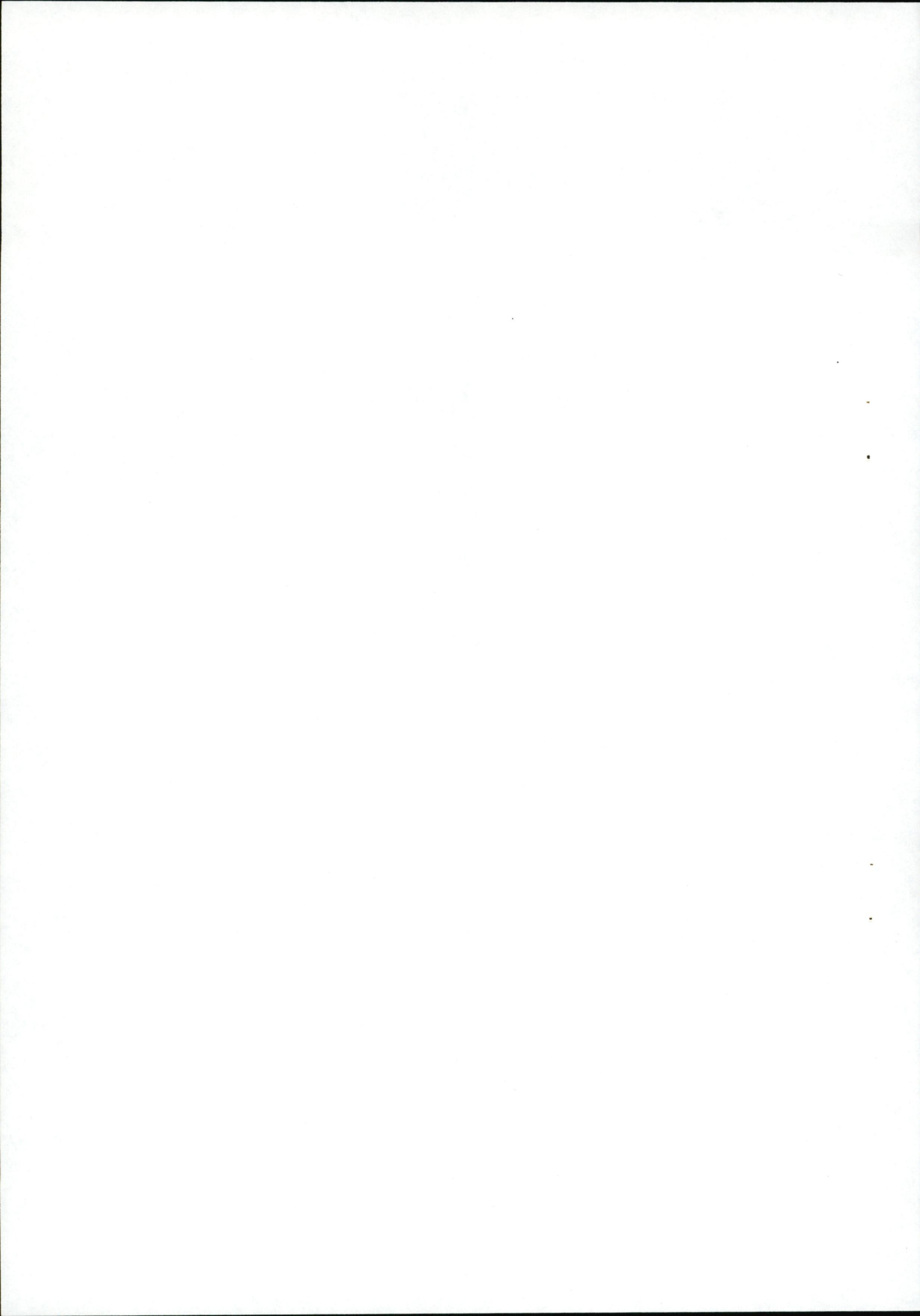
NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Crimes Act 1900 No. 40
4. Amendment of Children (Criminal Proceedings) Act 1987 No. 55, sec. 9
(Expedition where child in custody)

SCHEDULE 1—AMENDMENTS



**CRIMES (DETENTION AFTER ARREST) AMENDMENT
BILL 1994**

NEW SOUTH WALES



No. , 1994

A BILL FOR

An Act to amend the Crimes Act 1900 to make further provision with respect to the powers of police to detain a person after arrest and the rights of arrested persons; and for other purposes.

Crimes (Detention after Arrest) Amendment 1994

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Crimes (Detention after Arrest) Amendment Act 1994.

5 Commencement

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

Amendment of Crimes Act 1900 No. 40

3. The Crimes Act 1900 is amended as set out in Schedule 1.

10 Amendment of Children (Criminal Proceedings) Act 1987 No. 55, sec. 9 (Expedition where child in custody)

4. The Children (Criminal Proceedings) Act 1987 is amended by inserting after section 9 (2) the following subsection:

15 (3) Nothing in this section prevents a child being detained in accordance with Part 10A of the Crimes Act 1900.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Section 1 (Short title and contents of Act):

(a) Omit the matter relating to Part 10, insert instead:

20 PART 10—ARREST OF OFFENDERS—*ss.* 352–353C
 PART 10A—DETENTION AND RIGHTS OF PERSONS
 AFTER ARREST—*ss.* 354–356N
 PART 10B—POWERS OF SEARCH, POWERS OF ENTRY
 AND DISCHARGE OF PERSONS IN CUSTODY:

25 (1) *Powers of search*—*ss.* 357–357E
 (2) *Powers of entry and search in cases of child prostitution or pornography*—*s.* 357EA
 (3) *Powers of entry in cases of domestic violence*—*ss.* 357F–357I

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

- (4) *Discharge of persons in custody—s. 358*
- (5) *Disposal of property in the custody of the police—s. 358B*
- (b) From the matter relating to Part 12, omit “442B”, insert instead “442C”. 5
- (2) Part 10 (Headings):
- (a) Omit the heading to Part 10, insert instead:
PART 10—ARREST OF OFFENDERS
- (b) Omit the italicised heading before section 352. 10
- (3) Part 10A (sections 354–356N):
 After section 353C, insert:
- PART 10A—DETENTION AND RIGHTS OF
 PERSONS AFTER ARREST**
- Objects of Part** 15
354. The objects of this Part are:
- (a) to provide for the period of time that an arrested person may be detained by a police officer to enable the investigation of the person’s involvement in the commission of an offence; and 20
- (b) to authorise an arrested person to be detained for such a period despite any requirement imposed by law to bring the person before a justice or a court without delay or within a specified period; and
- (c) to specify the investigative procedures, otherwise authorised by law, that may be carried out while the person is so detained; and 25
- (d) to provide for the rights of an arrested person.
- Application of Part**
355. (1) This Part applies to the detention of a person, including a person under the age of 18 years, who has been arrested in connection with the investigation of an offence (whether committed within or outside the State). 30

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

(2) This Part applies whether the offence being investigated was committed before or after the commencement of this Part.

5

(3) This Part does not apply:

(a) to a person arrested before the commencement of this Part; or

(b) to a person detained under the Intoxicated Persons Act 1979.

10

Operation of Part

356. (1) **Existing powers relating to arrest and other matters.** This Part does not:

15

(a) confer any power to arrest a person, or to detain a person who has not been lawfully arrested; or

20

(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 (for example, the power to require a person to submit to a breath analysis under section 4E of the Traffic Act 1909); or

(c) independently confer power to carry out an investigative procedure.

(2) **Certain evidentiary matters and rights not affected.** Nothing in this Part removes or derogates from:

25

(a) the burden on the prosecution to prove the voluntariness of an admission or confession made by a person; or

(b) the discretion of a court to admit or exclude unfairly obtained evidence; or

30

(c) the discretion of a court to admit or exclude evidence obtained improperly, in contravention of a law, or in consequence of an impropriety or of a contravention of a law; or

35

(d) any law which 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

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

- (e) the right of a person to refuse to answer questions or refuse to participate in the investigation of an offence unless the person is required to do so by law; or
- (f) the right of a person to leave a police station or other police custody if the person is not under arrest; or 5
- (g) the rights of a person under the Bail Act 1978.

Definitions

356A. In this Part:

“**custody officer**” means the police officer having, or nominated by the officer in charge of a police station as having, the responsibility for the care, control and safety of persons detained at the police station or another place; 10

“**investigative procedure**” means a procedure specified in section 356D; 15

“**justice**” includes:

- (a) a Magistrate; or
- (b) a justice employed in the Department of Courts Administration. 20

Detention after arrest

356B. (1) A police officer may, for a reasonable time after a person is arrested, detain the person for the purposes set out in subsection (2).

(2) A police officer may detain a person after arrest only if it is necessary for any of the following purposes: 25

- (a) to establish the identity of the person;
- (b) to conduct any further inquiries that are reasonably necessary to confirm or dispel any reasonable suspicion held by the police officer as to the person’s involvement in the commission of an offence (including an offence other than the offence for which the person was arrested); 30
- (c) to conduct any further inquiries that are reasonably necessary to determine whether a prosecution against any person will be commenced; 35

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

- (d) to complete any necessary documentation relating to the investigation that requires the person's presence;
- (e) to conduct an investigative procedure.

5 (3) A requirement in another Part of this Act, the Justices Act 1902, the Bail Act 1978 or any other relevant law that an arrested person be taken before a justice or a court without delay, or within a specified period, is affected by this Part only to the extent that the extension of the period within
10 which the person is to be brought before the justice or court is authorised by this Part.

(4) For the purposes of this section, the period of detention ends when the person:

- (a) is released unconditionally; or
- 15 (b) is granted bail by a police officer under the Bail Act 1978; or
- (c) is brought before a justice or a court.

Determining reasonable time for detention after arrest

20 356C. (1) In determining what is a reasonable time to detain a person after arrest under section 356B, all the relevant circumstances of the particular case must be taken into account.

(2) Without limiting the relevant circumstances that must be taken into account, the following circumstances (if
25 relevant) are to be taken into account:

- (a) the age, the physical capacity and condition, the mental capacity and condition and the intellectual capacity, of the person;
- 30 (b) whether the presence of the person is necessary to the investigation of the offences concerned;
- (c) the number, seriousness and complexity of the offences under investigation;
- (d) whether the person has indicated a willingness to make a statement or to answer any questions;

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

- | | |
|---|----|
| (e) the time taken for police officers connected with the investigation to attend at the police station or other place where the person is being detained; | |
| (f) whether a police officer reasonably requires time to prepare for any questioning of the person; | 5 |
| (g) the need to transport the person from the place of detention to a place where facilities are available to conduct any questioning of the person or any other investigative procedure in which the person is to participate; | 10 |
| (h) the number and availability of other persons who need to be questioned or from whom statements need to be obtained in respect of an offence reasonably believed to have been committed by the person; | 15 |
| (i) the need to visit the place where the offence concerned is believed to have been committed or any other place reasonably connected with the investigation of the offence; | |
| (j) the time during which the person is in the company of a police officer before and after the person's arrest; | 20 |
| (k) the time taken to complete any searches or other investigative procedures that are reasonably necessary to the investigation (including any search of the person or other investigative procedure in which the person is to participate); | 25 |
| (l) the time taken for the person to establish communication with a friend, relative, guardian, independent person, legal practitioner or consular official; | 30 |
| (m) the time taken by a friend, relative, guardian, independent person, legal practitioner or consular official to arrive at the police station or other place where the person is being detained; | |
| (n) the time during which the questioning of the person or the conduct of any other investigative procedure in which the person is to participate is suspended or delayed to allow the person to rest or receive medical attention; | 35 |

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

- 5 (o) the time during which the questioning of the person or the conduct of any other investigative procedure in which the person is to participate is suspended or delayed because of the person's intoxication due to alcohol or another drug, or both.

Investigative procedures during detention

10 356D. The following procedures may, subject to section 356 (1) (c), be conducted while a person is detained under this Part:

- 15 (a) questioning the person;
(b) obtaining a statement from the person;
(c) questioning witnesses or other persons who may have relevant information relating to the offence under investigation;
20 (d) obtaining statements from witnesses or other persons who may have relevant information relating to the offence under investigation;
(e) searching the person;
(f) searching of premises, a vehicle or other conveyance;
(g) taking of finger-prints;
(h) taking of palm-prints;
(i) taking of photographs;
25 (j) filming;
(k) videotaping;
(l) examining the person's body;
(m) obtaining blood, urine or other bodily samples;
(n) subjecting things or matter to analysis;
(o) conducting identification parades;
30 (p) taking voice samples;
(q) taking handwriting samples;
(r) any other procedure prescribed by the regulations for the purposes of this section.

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

Right to communicate with friend, relative, guardian, independent person and legal practitioner

356E. (1) After a person is arrested and before the first questioning of the person or conduct of any other investigative procedure in which the person is to participate starts, the police officer concerned must inform the person that he or she may: 5

(a) communicate, or attempt to communicate, with a friend, relative, guardian or independent person to inform that person where the person is being detained and arrange, or attempt to arrange, for a friend, relative, guardian or independent person to attend the police station or other place where the person is being detained; and 10 15

(b) communicate, or attempt to communicate, with a legal practitioner of the person's choice and arrange, or attempt to arrange, for a legal practitioner of the person's choice to be present during the questioning or the conduct of any other investigative procedure in which the person is to participate. 20

(2) If the person wishes to make any communication referred to in subsection (1), the police officer concerned must, as soon as practicable:

(a) give the person reasonable facilities to enable the person to do so; and 25

(b) allow the person to do so in circumstances in which, so far as is practicable, the communication will not be overheard.

(3) The police officer concerned must defer the questioning of the person or the conduct of any other investigative procedure in which the person is to participate for a reasonable period to allow the person to make, or attempt to make, the communication and: 30

(a) if the person has arranged for a friend, relative, guardian or independent person to attend the police station or other place where the person is being detained, to allow that person to arrive at that place; and 35

*Crimes (Detention after Arrest) Amendment 1994*SCHEDULE 1—AMENDMENTS—*continued*

5 (b) if the person has arranged for a legal practitioner of the person's choice to be present, to allow the legal practitioner to be present at the questioning of the person or the conduct of any other investigative procedure in which the person is to participate.

10 (4) The police officer concerned must, if the person arranges for a legal practitioner of the person's choice to be present during the questioning of the person or the conduct of any other investigative procedure in which the person is to participate:

15 (a) allow the person to consult with the legal practitioner in private and provide reasonable facilities for that consultation; and

(b) allow the legal practitioner to be present during the questioning of the person or the conduct of any other investigative procedure in which the person is to participate and give advice to the person.

20 (5) Anything said by the legal practitioner during the questioning or the conduct of the investigative procedure is to be recorded and form part of the formal record of the investigation.

25 (6) The police officer concerned is not required to defer the questioning of the person or any other investigative procedure in which the person is to participate for more than 2 hours, from the time the person made, or attempted to make, any communication referred to in subsection (1), for the person contacted to arrive at the police station or other place where the arrested person is being detained.

30 (7) The duties of a police officer under this section to an arrested person referred to in section 356F are in addition to those set out in that section.

Right of foreign national to communicate with consular official

35 356F. (1) After a person is arrested and before the first questioning of the person or the conduct of any other investigative procedure in which the person is to participate starts, the police officer concerned must inform the person that he or she may communicate, or attempt to communicate, with a consular official of the country of which the person is

40

*Crimes (Detention after Arrest) Amendment 1994*SCHEDULE 1—AMENDMENTS—*continued*

a citizen if the person appears to the police officer concerned not to be an Australian citizen.

(2) The police officer concerned must, as soon as practicable, if the person wishes to communicate with a consular official: 5

(a) give the person reasonable facilities to enable the person to do so; and

(b) allow the consular official to communicate with the person in circumstances in which, so far as is practicable, the communication will not be overheard. 10

(3) The police officer concerned must defer the questioning of the person or the conduct of any other investigative procedure in which the person is to participate, for a reasonable period to allow the person to make, or attempt to make, the communication and, if the person has arranged for a consular official to attend the police station or other place where the person is being detained, to allow the consular official to arrive at that place. 15

(4) The police officer concerned is not required to defer the questioning of the person or the conduct of any other investigative procedure in which the person is to participate for more than 2 hours, from the time the person communicated, or attempted to communicate, with the consular official, for the consular official to arrive at the police station or other place where the person is being detained. 20
25

Circumstances in which questioning or other investigative procedure in which arrested person is to participate need not be deferred 30

356G. (1) An investigative procedure need not be deferred in accordance with section 356E or 356F if the police officer concerned believes on reasonable grounds that doing so is likely to result in:

(a) an accomplice of the arrested person avoiding apprehension; or 35

(b) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness; or

*Crimes (Detention after Arrest) Amendment 1994*SCHEDULE 1—AMENDMENTS—*continued*

(c) hindering the recovery of any person or property concerned in the offence under investigation.

5 (2) An investigative procedure need not be deferred in accordance with section 356E or 356F if the police officer concerned believes on reasonable grounds that the investigation is so urgent, having regard to the safety of other people, that it should not be deferred in accordance with that section.

10 (3) However, this section does not permit a police officer to proceed with an investigative procedure without complying with a requirement under section 356E relating to communication with, or the presence of, a legal practitioner.

15 **Provision to friends, relatives and others of information relating to arrested person**

20 356H. (1) The police officer concerned must, if a friend, relative, guardian or legal representative of an arrested person requests information as to the police station or other place where the person is being detained, inform the arrested person of the request.

(2) The police officer concerned must provide, or arrange for the provision of, that information to the person who made the request unless:

25 (a) the arrested person does not agree to that information being provided; or

(b) the police officer believes on reasonable grounds that the person requiring the information is not a friend, relative, guardian or legal representative of the arrested person.

30 **Provision of interpreter**

35 356I. (1) The custody officer for an arrested person may arrange for an interpreter to be present for the person in connection with the questioning of the person or any other investigative procedure in which the person is to participate.

(2) In determining whether an interpreter is required, the custody officer is to consider the following matters:

(a) any request by the person for an interpreter;

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

- (b) whether the person is unable, because of inadequate knowledge of the English language, to communicate orally with reasonable fluency in English;
- (c) the difficulty of obtaining an interpreter; 5
- (d) the urgency of the investigation, having regard to the safety of other people.
- (3) The custody officer must, if a decision is made that an interpreter is required, ensure that any questioning or other investigative procedure in which the person is to participate is deferred until the interpreter arrives. 10
- Provision of interpreting assistance if arrested person has physical or intellectual disability**
- 356J. (1) The custody officer for an arrested person may arrange for an interpreter to be present for the person in connection with the questioning of the person or any other investigative procedure in which the person is to participate if the person has a physical or intellectual disability. 15
- (2) In determining whether an interpreter is required, the custody officer is to consider the following matters: 20
- (a) any request by the person for an interpreter;
- (b) whether the person is unable, because of physical or intellectual disability, to communicate orally with reasonable fluency;
- (c) the difficulty of obtaining an interpreter; 25
- (d) the urgency of the investigation, having regard to the safety of other people.
- (3) The custody officer must, if a decision is made that an interpreter is required, ensure that any questioning or other investigative procedure in which the person is to participate is deferred until the interpreter arrives. 30
- Right to medical assistance**
- 356K. The custody officer for an arrested person must arrange immediately for the person to receive medical attention if it appears to the custody officer that the person requires medical attention or the person requests it on grounds that appear reasonable to the custody officer. 35

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

Provision of reasonable refreshments and facilities

5 356L. (1) The custody officer for an arrested person must ensure that the person is provided with reasonable refreshments and reasonable access to toilet facilities.

(2) The custody officer for an arrested person must ensure that the person is provided with facilities to wash, shower or bathe and (if appropriate) to shave if:

- 10 (a) it is reasonably practicable to provide access to such facilities; and
- (b) the custody officer is satisfied that the investigation will not be hindered by providing the person with such facilities.

Custody records to be maintained

15 356M. The custody officer for an arrested person is to record the particulars prescribed by the regulations relating to the detention of arrested persons.

Regulations

20 356N. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that is required or permitted to be prescribed under this Part or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part.

25 (2) In particular, the regulations may make provision for or with respect to the following:

- (a) a code of practice relating to arrested persons;
- (b) requiring police officers to observe any such code of practice;
- 30 (c) the consultation process to be undertaken in the preparation of the code of practice;
- (d) the manner in which breaches of the code of practice are to be dealt with;
- 35 (e) the keeping of records relating to the detention of arrested persons, including the formal record of the conduct of investigative procedures in which an arrested person participates.

Crimes (Detention after Arrest) Amendment 1994

SCHEDULE 1—AMENDMENTS—*continued*

(4) Part 10B (Heading):

Before the heading "*Powers of search*" appearing before section 357, insert:

PART 10B—POWERS OF SEARCH, POWERS OF ENTRY AND DISCHARGE OF PERSONS IN CUSTODY 5

(5) Section 442C:

After section 442B, insert:

Detention after arrest for purposes of investigation to count towards sentence 10

442C. (1) In passing sentence on a person convicted of an offence, a court must take into account any period during which the person was detained under Part 10A in respect of the offence and may accordingly reduce the sentence it would otherwise have passed. 15

(2) This section applies to a person only if the period during which the person was so detained relates to an arrest effected on or after the commencement of this section.
