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Australian Protective Service Amendment Bill 2003

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 15 2003–04

Australian Protective Service Amendment Bill 2003

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14 August 2003

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Australian Protective Service Amendment Bill 2003

Date Introduced: 26 June 2003

House: Senate

Portfolio: Justice and Customs

Commencement: The substantive provisions commence 28 days after the date of Royal Assent

Purpose

To amend the *Australian Protective Service Act 1987* (the Principal Act) to increase the powers of protective service officers (or ‘PSOs’) undertaking protective security functions.

Background

History of the Australian Protective Service

Information about the history of the Australian Protective Service (Protective Service) can be found in [Bills Digest No. 152](#), 2001-2002 (dealing with the Australian Protective Service Amendment Bill 2002).

The *Australian Protective Service Amendment Act 2002* transferred responsibility for the Protective Service from the Secretary of the Attorney-General’s Department to the Australian Federal Police Commissioner. It is intended that the Protective Service will become an ‘operating division’ of the Australian Federal Police (or ‘AFP’). Further legislation is expected to be introduced into Federal Parliament later in 2003.¹

Current role of the Australian Protective Service

The Protective Service has been described as ‘the Commonwealth Government’s specialist protective security provider’.² It provides security services at Parliament House, the office of the Prime Minister, the residences of the Prime Minister, the Governor-General and other office holders, sensitive defence establishments, foreign embassies and the Australian Nuclear Science and Technology Organisation.

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It has provided counter-terrorism first response (CTFR) at security designated airports³ in Australia and also provides Air Security Officers (commonly referred to as ‘air marshalls’) for commercial aircraft. CTFR capabilities at designated airports have recently been upgraded to Advanced First Response level. This means that:

APS personnel will receive self-loading pistols (instead of the current use of revolvers), upgraded bomb appraisal equipment, and chemical, biological and radiological protective equipment. The officers will also be required to achieve higher levels of tactical training, skills and fitness.⁴ The Air Security Officer Program was established in December 2001.⁵

Apart from the protective security services mentioned above, the Protective Service operates competitively with the private sector to provide such things as training, security risk management surveys, secure Internet firewalls and other services to government.⁶ Where it has spare capacity, its services can be contracted to the private sector. In addition to its counter-terrorist role at major airports, a recent article reports that the Protective Service provides a ‘community policing service’ involving ‘directing disoriented passengers and public, maintaining civil [order], removing intoxicated persons from aircraft, bars and public areas and intervening in domestic disputes’.⁷

The statutory scheme

Under the Principal Act, the functions of the Protective Service are to provide ‘protective and custodial services for and on behalf of the Commonwealth’.⁸ These functions include:

- protecting Commonwealth property or the property of a foreign country or international organisation
- protecting certain Commonwealth officers⁹ and their families
- protecting internationally protected persons¹⁰, and
- keeping persons in migration detention.

As stated above, the Principal Act makes the Australian Federal Police Commissioner the head of the Australian Protective Service.¹¹ The Director of the Protective Service is responsible, under the AFP Commissioner, for the administration and operations of the Protective Service.¹² General Orders dealing with administrative and operational matters can be issued by the Director with the written approval of the AFP Commissioner and must be complied with by PSOs.¹³

Powers conferred by the Principal Act¹⁴ on PSOs include power to arrest without warrant. Such an arrest can be carried out if a PSO has reasonable grounds for believing that certain offences have been or are being committed in relation to persons, places or things where

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the Protective Service is performing its functions. Further, an arrest can only be made if the PSO believes on reasonable grounds that it is necessary to:

- ensure the person's appearance in court
- prevent the offence continuing or another offence being committed
- prevent the destruction or loss of evidence, or
- preserve the person's safety or welfare

and that proceeding by way of summons would be ineffective in achieving these goals.

The relevant offences in relation to which the arrest without warrant powers can be exercised when a PSO is performing protective security duties include:

- certain *Crimes Act 1914* offences including sabotage, escaping from custody, and trespassing on Commonwealth land¹⁵
- offences under the *Crimes (Internationally Protected Persons) Act 1976*¹⁶
- offences under the *Crimes (Aviation) Act 1991*¹⁷—such as hijacking, acts of violence committed on board aircraft, or other offences affecting aircraft
- certain offences under the *Defence (Special Undertakings) Act 1952*¹⁸
- certain offences under the *Public Order (Protection of Persons and Property) Act 1971*¹⁹—such as participating in ‘assemblies’²⁰ involving violence or an apprehension of violence or property damage in a Territory²¹ or on Commonwealth premises²²
- certain offences under the *Nuclear Non-Proliferation (Safeguards) Act 1987*²³—such as interfering with a device used to contain nuclear material or possessing nuclear material
- ancillary offences (such as being an accessory, attempt or incitement in relation to the above offences)²⁴
- terrorist bombing offences under the Commonwealth Criminal Code²⁵
- terrorist act offences under the Commonwealth Criminal Code²⁶
- certain Commonwealth Criminal Code offences such as theft of Commonwealth property, bribing Commonwealth public officials, and harming or obstructing Commonwealth public officials.²⁷

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These offences are important in the context of the Bill and, for convenience, they are referred to in the ‘Main Provisions’ section of this Digest as ‘section 13 offences’.

A person arrested by a PSO must be informed why they have been arrested. If the PSO believes that the arrested person has a disability or is not fluent in English then reasonable steps must be taken ‘forthwith’ to ensure that the person is provided with an explanation of their arrest.²⁸

Once a lawful arrest is made, protective service officers can, in certain circumstances, search the person, their clothing and any vessel, vehicle or property in their immediate control and seize weapons and evidentiary material.²⁹ If a search is made of the person or their clothing then it must be conducted by a PSO of the same sex as the arrested person unless a PSO of the same sex is not available. In the latter case any other person who is of the same sex as the arrested person can be asked by the PSO to conduct the search.

If a person is arrested by a PSO then he or she must be handed over to a police officer ‘forthwith’ to be dealt with according to law.³⁰ However, an arrested person who is in the custody of a PSO must be released if there are no longer reasonable grounds for believing that they have committed an offence.³¹ In general, a PSO must wear a uniform and identification number and produce an identity card if he or she is not in uniform but is carrying out an arrest.³²

Powers are also conferred on PSOs under other Commonwealth laws. For instance, under the *Crimes Act 1914*, a protective service officer can require a person found on prohibited Commonwealth land to provide his or her name and address. Failure to do so is an offence.³³

The Bill empowers PSOs to intervene earlier in relation to potential security incidents when exercising their protective service functions.

Main Provisions

Power to require a person’s name, address and other information

Item 1 inserts **proposed section 18A** into the Principal Act.

If:

- a PSO ‘suspects on reasonable grounds’ a person has ‘just’ committed, might be committing or might be about to commit a ‘section 13 offence’³⁴, and
- the person is ‘in a place, or in the vicinity of a place, person or thing’ where the PSO is performing functions under the Principal Act

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then the protective service officer can request the person to provide their name, residential address, their reason for being where they are and evidence of their identity [**proposed subsection 18A(1)**].

In the circumstances set out in **proposed subsection 18A(2)** it will be an offence not to comply with the request or to give a name or address that is false in a material particular. Before an offence can occur, certain substantive and procedural requirements must be met by the PSO. These are that the PSO:

- makes the request under subsection (1)
- informs the person of their authority to make the request
- tells the person that it may be an offence not to comply, and
- is wearing their identity number (if in uniform) or, if not in uniform, produces their identity card [new subsection 18A(2)].

The penalty for the offence is 20 penalty units (\$2200).

A defence of reasonable excuse is available [**proposed subsection 18A(3)**].

Power to stop, detain and search

Proposed section 18B empowers PSOs to stop, detain (for the purpose of searching) and search if the officer suspects on reasonable grounds that a person has something that is likely to cause or likely to be used to cause:

- substantial damage to a place or thing in respect of which the Protective Service is performing functions under the Principal Act, or
- death or serious harm to a person in respect of whom the Protective Service is performing functions under the Principal Act

in circumstances likely to involve the commission of a section 13 offence.

A PSO can conduct ordinary searches and frisk searches of people under **proposed section 18B**. An ‘ordinary search’ is a search of a person or articles in their possession that includes requiring the person to remove their coat, gloves, shoes and hat and examining those items [**proposed subsection 18B(8)**]. A ‘frisk search’ is defined as a quickly running the hands over a person’s outer garments and examining anything worn or carried by the person that can be ‘conveniently and voluntarily’ removed [**proposed subsection 18B(8)**].

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Proposed subsection 18B(3) deals with what happens if the PSO who detains a person in order to search them is not the same sex as the detainee:

- if another PSO of the same sex as the detainee is reasonably available—that PSO conducts the search
- if another PSO of the same sex as the detainee is not reasonably available—a police officer or Customs officer (if such a person is reasonably available) conducts the search
- otherwise—another person of the same sex as the detainee who is asked by the PSO to conduct the search.

When searching a person, a PSO cannot use more force or subject to a person to more indignity than is ‘reasonable and necessary’ [**proposed subsection 18B(5)**]. When searching a ‘thing’ a PSO must not damage the thing by forcing it open unless the detainee has been given a reasonable opportunity to open it or it is not possible to give the person that opportunity [**proposed subsection 18B(7)**].

Power of seizure

Proposed section 18C empowers PSOs to seize things found as a result of their search. Such things can only be seized if they are likely to cause or be used to cause harm or damage involving the commission of a section 13 offence. Further, seized items must be given to a police officer as soon as practicable.

Within seven days after receiving the seized item the police officer must give a seizure notice to the item’s owner or to the person from whom it was seized [**proposed subsection 18D(1)**]. A seizure notice must:

- identify what was seized
- the date of the seizure
- the grounds on which it was seized, and
- state that the item will be forfeited to the Commonwealth if the owner does not request its return within 90 days of the date of the seizure notice [**proposed subsection 18D(3)**].

A seizure notice need not be issued if:

- the owner of the thing cannot be identified and the item was not seized from a person,
or

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- it is not possible to serve the owner or the person from whom the item was seized [**proposed subsection 18D(2)**].

If the owner requests the return of the thing, the police officer must return it unless he or she has reasonable grounds for suspecting that it is likely to cause or be used to cause substantial damage to a place or thing or death or serious harm to a person where the Protective Service is performing its functions under the Principal Act in circumstances likely to involve the commission of a 'section 13 offence' [**proposed subsection 18D(5)**].

The thing is forfeited to the Commonwealth if its owner does not request its return:

- within 90 days of the date of the seizure notice, or
- if a seizure notice could not be served, within 90 days of the date on which it was handed into police custody [**proposed subsection 18D(6)**].

If the owner of the thing seized requests its return in accordance with the statutory regime but the police officer does not return it within 90 days, then within a further 5 days, the police officer must either return the item or ask a magistrate for a section 18E order.

Magistrates orders

A magistrate conducting a hearing under **proposed section 18E** must allow the owner of the item to appear and be heard. If the magistrate is satisfied on reasonable grounds that, if the thing is returned, it might cause substantial damage to a place or death or serious harm to a person where the Protective Service is performing its functions then the magistrate can make an order:

- enabling the police to retain the thing for a specified period
- forfeiting the thing to the Commonwealth
- for the sale of the thing and the return of the proceeds to the owner
- for the sale or disposal of the thing [**proposed subsection 18E(3)**].

If not so satisfied, the magistrate must order that the thing be returned to its owner [**proposed subsection 18E(4)**].

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Concluding Comments

The Australian Federal Police, the Australian Federal Police Association and the Community and Public Sector Union³⁵ support amendments contained in the Bill. The AFP submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Bill commented:

The Bill improves and supports the capacities of PSOs to deliver a quality security response that is commensurate with the variety of suspicious circumstances that arise at the critical infrastructure, installations and diplomatic premises where they function. It reflects the rising national security demands faced by the APS [Australian Protective Service] and the Australian Federal Police (AFP) since 11 September 2001.

PSOs have the power to arrest without warrant in relation to certain Commonwealth offences, however, before that point is reached, they do not enjoy clear legislative authority to act in suspicious circumstances. If a PSO is unable to negotiate the consent of a person to enable action, then the situation must deteriorate until the conditions for the exercise of their arrest power is met. That is undesirable in the heightened security environment since the terrorist attacks in the USA on 11 September 2001 and Bali on 12 October 2002.

...

The proposed additional powers ... will allow the APS to be proactive in preventing security incidents. Importantly, they recognise that the early discovery and interception of suspicious behaviours or things, significantly increases the effectiveness of the AFP/APS to disrupt serious threats (including terrorist threats) of harm to the public and damage to critical Commonwealth infrastructure and installations.³⁶

And the Government explains in the Bill's Second Reading Speech that:

The enhanced powers will permit a graduated response by protective service officers in circumstances that may arise when performing protective service functions.

The powers will provide protective service officers with the flexibility to act quickly in suspicious circumstances that may arise when performing protective service functions.

The powers are proactive, rather than reactive or investigative.

Consistent with the proactive aim of the enhanced powers, they are not as intrusive as the existing arrest power.³⁷

While perhaps not as intrusive as the existing arrest power, the new powers given to PSOs can be exercised after satisfying lower threshold tests. For instance, the test is 'reasonable suspicion' rather than 'reasonable belief'. Further, the existing power of arrest without warrant can only be exercised if:

- the person has just committed or is committing the offence, and

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- the arrest is necessary to ensure the person's appearance before a court or to stop the offence occurring etc, and
- proceeding by way of summons is not indicated.³⁸

In contrast, new powers to require a person to provide their name, address, their reason for being where they are and evidence of their identity can be exercised in relation to section 13 offences that 'a person might have just committed, might be committing or might be about to commit'.³⁹

Further, the amendments abrogate a person's right to silence and in certain circumstances enable a person to be detained (so that a search can be conducted) and provide new powers of search and seizure.

The right to silence

The right to silence is a fundamental common law rule which operates both when people are questioned by the police and when they are on trial. Pre-trial, the right has primary and secondary aspects, as indicated by the High Court in *Petty v. The Queen* (1991) 173 CLR 95. In that case, the High Court said:

A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right to silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or provide information. To draw such an adverse inference would be to erode the right to silence or to render it valueless ...⁴⁰

There may be practical as well as 'in-principle' reasons for supporting a general right to silence. As one writer has observed:

The purpose of the right to silence is not to deprive the state from gathering incriminating evidence or useful intelligence, but rather to prevent abuses of state power. It is a mark of a free society and an essential guarantee of human dignity that individuals should have a meaningful choice whether or not to speak to authorities. ...

... there is a wealth of research suggesting that due process safeguards may produce more efficient outcomes for law enforcement. For example, the statutory requirement to tape interviews protects suspects from the risk of fabricated confessions ("verbals"), but also protects officers from the risk of false accusations of brutality or impropriety in the course of questioning that might lead to the exclusion of critical evidence.⁴¹

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The right to silence is also an integral aspect of the presumption of innocence, ensuring that the prosecution must, in general, prove a person's guilt.

Abrogating the right to silence

In *Petty*, the High Court referred to exceptions to the general right to silence under criminal and regulatory statutes. Some of these exceptions are found in Commonwealth law. For instance, under section 3V of the *Crimes Act 1914* (Cwlth) a constable who believes on reasonable grounds that a person may be able to help in inquiries related to an indictable offence can ask that person to provide his or her name or address, or both. If a constable makes such a request, informs the person why the request is being made and, if asked, identifies himself or herself then a person cannot refuse to provide the information without a reasonable excuse. Under section 89 of the *Crimes Act 1914*, after producing an authorisation, certain persons, including PSOs can request a person who is found on 'prohibited Commonwealth land' to supply their name and address.⁴² Failure to comply is an offence punishable on conviction by a maximum fine of 10 penalty units (\$1100).

The right to silence has been removed in relation to some investigations by other authorised officers and investigative agencies. For example, under the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth) an 'authorised officer' can direct a person to answer questions in order to find out whether the statute is being complied with. It is an offence to fail to comply with such a direction, without reasonable excuse. Bankruptcy investigations⁴³, Royal Commission hearings⁴⁴ and investigations by bodies such as the Australian Securities and Investments Commission⁴⁵ and the Australian Crime Commission may involve compelled evidence.⁴⁶ Most recently, the Australian Security Intelligence Organisation has been empowered, under administrative warrant, to compel suspects and non-suspects who may have information about terrorism to provide answers to questions.⁴⁷

The right to silence is abrogated in a number of respects by the Bill. Not only may a person be required to disclose their name and address but also their reason for being where they are and evidence of their identity. Statutory regimes which compel answers to questioning often provide that information obtained directly from this process cannot be used in legal proceedings. However, the Australian Protective Service Amendment Bill 2003 places no restrictions on the use that might be made of compelled information in legal proceedings.

Other criminal justice issues

Next, while the Second Reading Speech states that the new powers for PSOs are proactive not investigative, the lines between police investigation and new PSO powers under which a person may be required to provide information about why they are where they are seem blurred.⁴⁸ At present, AFP officers do not possess the powers proposed for the Protective

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Service by the Bill. However, it appears that equivalent powers are contemplated as part of a legislative package designed to integrate and AFP and the Protective Service.⁴⁹

Additionally, it is noteworthy that a person subject to the proposed legislative regime may have fewer rights than a person who has been arrested by police—an arrestee’s rights include a right of silence, a right to contact a lawyer, a right to seek bail and limits on the time that they may be detained. A person subject to the new regime may also have fewer rights than a person arrested without warrant under the Principal Act. For instance, under the Principal Act an arrested person must be told why they have been arrested and released in specified circumstances. While the Bill provides where a person is detained it is for the purposes of search, there are no express limits on such detention. Nor, at least at present, are PSOs subject to a statutory complaints regime like the one that exists for Australian Federal Police officers under the *Complaints (Australian Federal Police) Act 1981*.

Political protest

Under the Principal Act, PSOs have powers relating to a range of very serious offences such as terrorist acts, terrorist bombings and aircraft hijackings. The Principal Act also gives them powers in relation to ‘public order’ offences of the sort that authorities are concerned may occur when people exercise their ‘right to protest’.⁵⁰ Foreign embassies, Parliament House, and other places at or in the vicinity of which the Protective Service provides protective security may be sites of public protest action.

There is a range of possible ‘section 13 offences’ that a protective service officer, performing protective security duties, may suspect that a person might have just committed, might be committing or might be about to commit when protest action is occurring. Some of these offences are relatively minor, others more serious. For instance, the *Public Order (Protection of Persons and Property) Act 1971* creates offences of:

- participating in assemblies involving an apprehension of violence or unlawful property damage in a Territory or on Commonwealth premises⁵¹
- intentional acts of violence or property damage while participating in an assembly in a Territory or on Commonwealth premises⁵²
- intentionally causing personal injury or property damage while participating in an assembly in a territory or on Commonwealth premises⁵³
- causing unreasonable obstruction while participating in an assembly in a Territory or on Commonwealth premises⁵⁴
- using weapons, missiles or ‘destructive, noxious or repulsive objects or substances’ in such an assembly⁵⁵

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- trespassing on Commonwealth premises⁵⁶, and
- causing unreasonable obstruction of, or behaving in an offensive or disorderly manner on, Commonwealth premises.⁵⁷

Under the Criminal Code, relevant offences might include obstructing Commonwealth public officials.⁵⁸

Questions may arise about how the powers to require a person to give information and, in appropriate circumstances, to detain, search and seize might be used and what effect they might have on political protests.

Implied freedom of political communication

An implied constitutional freedom of political communication has been recognised by the High Court. The Court has indicated that various forms of political communication, including expressive conduct, may be protected by the implied freedom.⁵⁹ In *Lange v. Australian Broadcasting Corporation*⁶⁰, it set out a two-part test to be applied to laws or actions which may infringe the constitutional guarantee:

- does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- if it does, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of representative and responsible government as set out in the Constitution?

A law will only be unconstitutional if the answers to these questions are ‘yes’ and ‘no’ respectively.⁶¹ Clearly, the freedom is not an absolute one.⁶² Laws prohibiting or restricting political communication which serve some legitimate end, such as the protection of life or the public interest. In *Levy v. Victoria*, Chief Justice Brennan stated:

... while the speaking of words is not inherently dangerous or productive of a tangible effect that might warrant prohibition or control in the public interest, non-verbal conduct may, according to its nature and effect, demand legislative or executive prohibition or control even though it conveys a political message. Bonfires may have to be banned to prevent the outbreak of bushfires, and the lighting of a bonfire does not escape such a ban by the hoisting of a political effigy as its centrepiece. A law which prohibits non-verbal conduct for a legitimate purpose other than the suppressing of its political message is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose. Such a law prohibiting or controlling the non-verbal conduct, if it be reasonable in extent, does not offend the constitutional implication.⁶³

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Attempts to overturn laws using freedom of political communication arguments have so far been relatively unsuccessful, as have attempts to argue constitutional protection for freedom of movement and association.⁶⁴

Endnotes

- 1 See, for example, evidence before the Senate Legal and Constitutional Legislation Committee inquiry into the Australian Protective Service Amendment Bill 2003, 23 July 2003, *Committee Hansard*, pp. L&C 15-16. In evidence before the Committee, Federal Agent Fagan foreshadowed that legislation being drafted to effect APS/AFP integration would give equivalent powers to police.
- 2 House of Representatives, *Parliamentary Debates (Hansard)*, Second Reading Speech, Australian Protective Service Amendment Bill 2002.
- 3 Security designated airports are: Canberra, Sydney, Melbourne, Hobart, Brisbane, Coolangatta, Cairns, Darwin, Alice Springs, Perth and Adelaide. Australian Federal Police. *Submission* to the Senate Legal and Constitutional Legislation Committee Inquiry into the Australian Protective Service Amendment Bill 2003.
- 4 The Attorney-General's Portfolio, 'Counter-terrorism measures', *Budget 2002-2003, Fact Sheet 2*, p. 1.
- 5 Minister for Justice and Customs, 'Increased commitment to air security', *Media Release, Budget 2002-2003*, 14 May 2002.
- 6 See <http://www.aps.gov.au> (accessed 12 August 2003).
- 7 Chris Chatterton, 'A history of the Australian Protective Service 1917-2000', *AUSPOL: the Official Publication of the Australian Federal Police Association and the ALAJA*, 2001, pp. 15-18.
- 8 Section 6, Principal Act.
- 9 Such as the Governor-General, a Minister, Senator or Member of the House of Representatives, or a High Court judge. See the definition of 'office under the Commonwealth' in section 6 of the Principal Act.
- 10 An expression defined with reference to the *Crimes (Internationally Protected Persons) Act 1976*.
- 11 Section 5, Principal Act.
- 12 Section 11, Principal Act.
- 13 Section 12, Principal Act.
- 14 These statutory powers and duties are additional to any powers or duties conferred by other Commonwealth, State or Territory laws—see section 21 of the Principal Act.

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- 15 See subparagraph 13(2)(a)(i), Principal Act.
- 16 See subparagraph 13(2)(a)(ii), Principal Act.
- 17 See subparagraph 13(2)(a)(ii), Principal Act.
- 18 See subparagraph 13(2)(a)(iii), Principal Act.
- 19 See subparagraph 13(2)(a)(iv), Principal Act. Offences under section 11 of the *Public Order (Protection of Persons and Property) Act 1971* are excluded. These offences relate to trespass on or unreasonable obstruction of premises in a Territory.
- 20 An ‘assembly’ consists of not less than three persons assembled for a common purpose and ‘includes the conduct in connexion with that common purpose of all or any of the persons in the assembly’ [subsection 4(1)].
- 21 In general, the word ‘Territory’ is defined in the Act as the ACT, Jervis Bay Territory, Christmas Island or Cocos (Keeling) Islands [subsection 4(1)].
- 22 See subsection 6(1), *Public Order (Protection of Persons and Property) Act 1971*. ‘Commonwealth premises’ are premises in a State or Territory which are occupied by the Commonwealth or a Commonwealth public authority [subsection 4(1)].
- 23 See subparagraph 13(2)(a)(v), Principal Act.
- 24 See paragraph 13(2)(b), Principal Act.
- 25 See paragraph 13(2)(ba), Principal Act.
- 26 See paragraph 13(2)(bb), Principal Act.
- 27 See paragraph 13(2)(c), Principal Act.
- 28 Section 15, Principal Act.
- 29 Section 16, Principal Act.
- 30 Section 17, Principal Act.
- 31 Section 18, Principal Act.
- 32 Section 20, Principal Act.
- 33 Section 89, *Crimes Act 1914*.
- 34 See the description of these offences in the ‘Background’ section of this Digest.
- 35 The registered union for PSOs.
- 36 Australian Federal Police, [Submission](#) on the Australian Protective Service Amendment Bill 2003, 21 July 2003, pp. 1–2.
- 37 Senator Ian Campbell, Second Reading Speech, Australian Protective Service Amendment Bill 2003, House of Representatives, *Hansard*, 26 June 2003, p. 12649.
- 38 See subsection 13(1), Principal Act.
- 39 See proposed paragraph 18A(1)(a).

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- 40 (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey & McHugh JJ.
- 41 Simon Bronitt, ‘Constitutional rhetoric v criminal justice realities: unbalanced responses to terrorism?’ (2003) 14 *Public Law Review*, pp. 76–80.
- 42 Section 89, *Crimes Act 1914*.
- 43 Subsections 81(11), 81(11A) and 81(17), *Bankruptcy Act 1966*.
- 44 For example, sections 6 and 6A, *Royal Commissions Act 1902*.
- 45 Subsections 63(1) and 68(3), *Australian Securities Investment Commission Act 1989*.
- 46 New South Wales Law Reform Commission, *The Right to Silence*, Report No. 95, July 2000.
- 47 *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003*.
- 48 For a discussion of similar issues in the context of recent amendments to the *Australian Security Intelligence Organisation Act 1979*, see Bronitt, *op. cit.*
- 49 See endnote 1.
- 50 In 1997, the Joint Standing Committee on the National Capital and External Territories reported on *A Right to Protest* on national land and in the parliamentary zone. The Committee said:
- In the Committee’s view, the combination of Australian democratic traditions, implied constitutional guarantees and international obligations provides a basis for accepting that such a right exists.
- Once it is established that a right to protest is a basic tenet of Australian society, it follows that the Australian people must be able to exercise that right on national land. The Committee agrees with those who, in submissions to the inquiry, suggested that there is no more appropriate place to voice their opinions than in the nation’s capital.
- In accepting that Australians have a right to protest on national land, it also must be accepted that such a right carries with it certain obligations. Democracy recognises the rights of individuals but does not elevate the interests of the individual above all others. Instead, it seeks to balance those interests with the interests of the community as a whole.
- A paramount obligation is to ensure that the right to protest on national land is exercised with due regard to public safety and public order. This necessitates appropriate legislative and administrative arrangements which facilitate protest activity but do not allow the rights of other users of national land to be infringed. (p. xv).
- 51 Subsection 6(1), *Public Order (Protection of Persons and Property) Act 1971*. Maximum penalty—20 penalty units. As a result of section 11 of the *Parliamentary Precincts Act 1988*, the *Public Order (Protection of Persons and Property) Act 1971* applies to the parliamentary precincts as if they were ‘Commonwealth premises’ within the meaning of the latter. However, there appears to be some doubt about whether land which is within the parliamentary zone but outside the precincts is ‘Commonwealth premises’ for the purposes of the *Public Order (Protection of Persons and Property) Act 1971*. See Attorney-General’s Department, Submission to the Joint Standing Committee on the National Capital and External Territories Inquiry into *The Right to Protest or Demonstrate on National Land*, 28 June 1995.

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- 52 Subsection 6(2), *Public Order (Protection of Persons and Property) Act 1971*. Maximum penalty—12 months imprisonment.
- 53 Subsections 6(2) & 7(1), *Public Order (Protection of Persons and Property) Act 1971*. Maximum penalties—5 years imprisonment in the case of actual bodily harm; 3 years imprisonment for property damage.
- 54 Subsection 9(1), *Public Order (Protection of Persons and Property) Act 1971*. Maximum penalty—20 penalty units.
- 55 Section 10, *Public Order (Protection of Persons and Property) Act 1971*. Penalties ranging between 20 penalty units and 6 months imprisonment.
- 56 Subsection 12(1) *Public Order (Protection of Persons and Property) Act 1971*. Maximum penalty—10 penalty units.
- 57 Subsection 12(2) *Public Order (Protection of Persons and Property) Act 1971*. Maximum penalty—20 penalty units.
- 58 Section 149.1, Criminal Code. Maximum penalty—imprisonment for 2 years. The expression ‘Commonwealth public official’ is defined in the Criminal Code and includes the Governor-General, Ministers and Parliamentary Secretaries, Members and Senators, Commonwealth judges, Commonwealth public servants, and Australian Federal Police Officers.
- 59 *Levy v. Victoria* (1997) 189 CLR 579 at 594 per Brennan CJ.
- 60 (1997) 189 CLR 520.
- 61 N. Hancock, ‘Terrorism and the Law in Australia: Legislation, Commentary and Constraints’, Department of the Parliamentary Library, *Research Paper No. 12 2001-2002*, p. 48.
- 62 For further details see Max Spry, ‘What is political speech? *Levy v. Victoria*’, [Research Note No. 2](#), 1997/98, Department of the Parliamentary Library.
- 63 (1997) 189 CLR 579 at 595.
- 64 See Tony Blackshield & George Williams, *Australian Constitutional Law & Theory. Commentary & Materials*, 3rd ed, Federation Press, 2002.

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