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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES LEGISLATION AMENDMENT (POWERS AND OFFENCES) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,
the Honourable Brendan O'Connor MP)

CRIMES LEGISLATION AMENDMENT (POWERS AND OFFENCES) BILL 2011

GENERAL OUTLINE

This Bill amends the *Crimes Act 1914* (Crimes Act), the *Australian Crime Commission Act 2002* (ACC Act), the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act), the *Privacy Act 1988*, the *Surveillance Devices Act 2004*, the *Criminal Code Act 1995* (Criminal Code), the *Proceeds of Crime Act 2002*, the *Director of Public Prosecutions Act 1983* (DPP Act) and the *Customs Act 1901* (Customs Act).

The Bill contains a range of important amendments to key Commonwealth law enforcement legislation that will provide further tools to assist in the effective investigation and enforcement of Commonwealth laws. The Bill also incorporates a range of additional safeguards applicable in those investigations.

PURPOSE

The purpose of **Schedule 1** is to implement recommendations from the *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Review (the DNA Review), to increase transparency and reduce complexity contained in provisions governing the collection and use of DNA forensic material in Part 1D of the Crimes Act.

The purpose of **Schedule 2** is to amend the ACC Act to improve how the Australian Crime Commission (ACC) can share and disclose information and material in its possession to combat serious and organised crime.

Schedule 3 also makes amendments to the ACC Act that introduce rules that are required to better govern the use, sharing and retention of things seized under the ACC Act.

The purpose of **Schedule 4** is to amend the LEIC Act to enhance the ability of the Australian Commission for Law Enforcement Integrity (ACLEI) to investigate corruption. Other amendments to the LEIC Act will improve the operation of provisions relating to arrest warrants, search warrants, and notices to produce and summon, and provide consistency between non-disclosure regimes in the *Privacy Act 1988* and the LEIC Act.

The purpose of **Schedule 5** is to help combat the emergence and importation of illicit substances. Amendments to Part 9.1 of the Criminal Code will ensure substances and quantities that are temporarily prescribed in the *Criminal Code Regulations 2002* will remain subject to Commonwealth serious drug offences in the longer term.

Amendments to the Customs Act will ensure the Australian Customs and Border Protection Service is provided with the legislative tools to enable it to consistently and efficiently undertake its role in seizing illicit substances unlawfully entering Australia.

Schedule 6 amends the *Proceeds of Crime Act 2002* and the DPP Act to allow a court to restrict publication of certain matters to prevent prejudice to the administration of justice and enable Australian Federal Police (AFP) employees and secondees to become ‘authorised officers’.

The purpose of **Schedule 7** is to amend Part 1B of the Crimes Act to implement recommendations arising out of the *Australian Law Reform Commissions 2006 Report: Same Crime, Same Time: Sentencing of Federal Offenders*. The amendments will ensure that all parole decisions are able to be made at the Attorney-General's discretion and that adequate parole, licence and supervision periods are applied to federal offenders as required.

Schedule 8 amends section 15A of the Crimes Act to enable State and Territory fine enforcement agencies to take non-judicial enforcement action to enforce Commonwealth fines without first obtaining a court order, and to make related amendments to the Crimes Act

FINANCIAL IMPACT STATEMENT

The amendments in this Bill have little or no financial impact on Government revenue.

NOTES ON CLAUSES

Clause 1: Short title

This clause provides that when the Bill is enacted, it is to be cited as the *Crimes Legislation Amendment (Powers and Offences) Act 2011*.

Clause 2: Commencement

This clause sets out when various parts of the Act are to commence.

Clause 3: Schedule(s)

This is a formal clause that enables the Schedules to amend Acts by including amendments under the title of the relevant Act.

Schedule 1 – Forensic procedures

The purpose of Schedule 1 is to implement recommendations from the *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Review (the DNA Review). These amendments will address deficiencies identified in Part 1D of the *Crimes Act 1914* (Cth) (the Crimes Act) and will promote the effectiveness of DNA forensic procedures as a law enforcement tool, whilst increasing civil liberty and privacy safeguards.

The DNA Review examined the collection and use of DNA material for law enforcement purposes under Part 1D of the Crimes Act. Part 1D is primarily based on model provisions developed in 1995 by the then Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General. The model provisions have been implemented to varying degrees by all jurisdictions. The Commonwealth implemented the provisions through passage of the *Crimes Amendment (Forensic Procedures) Act 2000 (Cth).*

Part 1D of the Crimes Act allows for the collection and use of DNA material by Commonwealth law enforcement agencies for law enforcement purposes and establishes a scheme for the matching and inter-jurisdictional exchange of DNA profiles between Commonwealth, State and Territory law enforcement agencies.

The National Criminal Investigation DNA Database (NCIDD) is established under Part 1D. This database contains a series of numbers that are representative of a DNA profile. These numerical profiles are categorised by index. There are numerous indices on the NCIDD – including for example a 'crime scene index', 'suspect index', 'volunteer index' 'a serious offenders index' 'a unknown deceased persons index' and 'a missing persons index'.

Commonwealth, State and Territory law enforcement agencies provide the DNA profiles that are uploaded onto an index that corresponds to the purposes for which the profile was collected and analysed. Once uploaded, a profile can be matched with other uploaded profiles in accordance with the matching rules that have been agreed to between jurisdictions, which are also outlined in the legislation. These rules create safeguards to prevent, for instance, a DNA profile obtained to identify a body from being matched against DNA profiles found at unrelated crime scenes.

The NCIDD does not contain any personal information that would identify a person to whom a particular DNA profile relates. When a match is made between two profiles on the NCIDD, both the law enforcement agency that uploaded the profile to be matched, and the law enforcement agency that uploaded the profile against which the match was made, are informed. These agencies can then decide whether it is appropriate to exchange and disclose relevant case file information, including information identifying the individual to whom the matched profile relates.

The Minister for Home Affairs and Justice initiated the DNA Review in October 2009 in accordance with section 23YUD of the Crimes Act. The DNA Review was tasked with assessing Part 1D of the Crimes Act and examining issues identified by a 2003 review of Part 1D.[1] The Review committee (Review committee) was headed by an independent

[1] *The Report of the Independent Review of Part 1D of the Crimes Act 1914.* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportofindependentreviewofPart1DoftheCrimesAct1914-Forensicprocedures-March2003>

consultant and included the Australian Privacy Commissioner, Chief Executive Officer of CrimTrac, Coordinator of AFP Criminalistics & Identification Sciences Forensic and Data Centres, Deputy Director from the Office of the Commonwealth Director of Public Prosecutions (CDPP) and a Senior Assistant Ombudsman from the Commonwealth Ombudsman's Office.

The DNA Review conducted extensive consultation with Commonwealth, State and Territory law enforcement agencies, government departments and civil liberty and privacy advocates. Twenty-one written submissions were received by the Review committee. The DNA Review identified the need to amend Part 1D to ensure the ongoing development of a principled and balanced regime for the carrying out of forensic procedures during the investigation of Commonwealth offences and for the use, storage and destruction of material derived from those procedures.

Schedule 1 will implement in full or in part DNA Review recommendations 1(a), 5, 6(a), (b), (c), (e) & (g), 7, 8(a) & (d), 9, 11, 12, 13, 14(a), 16, 17 and 18.[2] The amendments will:

- reduce the legislative complexity of the consent, collection and destruction procedures in Part 1D of the Crimes Act
- reduce inconsistency between the Crimes Act and corresponding State and Territory legislation governing the use of forensic procedures for law enforcement purposes
- remove inadequacies in legislative provisions aimed at facilitating the collection and exchange of forensic information with State, Territory and international law enforcement agencies, and
- impose accreditation requirements on laboratories that deal with DNA samples taken under the Crimes Act.

Schedule 1 also corrects minor drafting errors in Part 1D of the Crimes Act.

Part 1 – Amendments commencing on day after Royal Assent

Crimes Act 1914

Item 1 – Subsection 23WA(1)

This item inserts a definition of 'accredited laboratory' into subsection 23WA(1) to mean a forensic laboratory accredited by the National Association of Testing Authorities, Australia (NATA), or of a kind prescribed by regulation.

This definition, along with amendments being made at items 27 and 32 of Schedule 1, will create a legislative safeguard by requiring that where a forensic sample has been taken under Part 1D, the forensic laboratory analysing the sample be accredited either by NATA, or in a laboratory prescribed in accordance with regulations. This requirement will apply to all DNA analysis carried out under Part 1D, whether it be testing for Commonwealth law enforcement agencies or re-testing of a sample on behalf of suspects and offenders.

[2] *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Report < http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285+>

Item 1 implements recommendation 16 of the DNA Review, which recommended that forensic analysis of genetic standards must occur in laboratories accredited by NATA, or an equivalent body. It is understood this was to address concerns about risks relating to the contamination of samples during testing processes. A similar recommendation was made by a previous Commonwealth review of DNA forensic procedures and by the Australian Law Reform Commission/Australian Health Ethics Commission.[3]

The DNA Review identified NATA as a longstanding laboratory accreditation body, which is externally audited and operates consistently with international practice. NATA already accredits laboratories in all Australian jurisdictions. The ability to prescribe alternative accreditation bodies will address the situation where testing in laboratories accredited by another body should be appropriately facilitated. For example, where the testing occurs in a laboratory with an equivalent foreign accreditation.

Item 2 – Subsection 23WA(1) (definition of *Commissioner)*

Subsection 23WA(1) currently provides that for the purposes of Part 1D 'Commissioner' means Commissioner of the AFP and includes a constable or staff member to whom the Commissioner has delegated the functions and powers conferred or imposed on the Commissioner under the Act. Section 23YQ provides that the Commissioner may delegate all or part of his or her functions under Part 1D to a constable or staff member. Subsection 23YQ(2) provides that 'staff member' has the same meaning as it has in the *Australian Federal Police Act 1979* (the AFP Act). The reference to 'staff member' in the AFP Act was repealed by the *Australian Federal Police Legislation Amendment Act 2000.*

Item 2 omits the term 'staff member' and inserts a replacement term, 'AFP appointee (within the meaning of the *Australian Federal Police Act 1979*)'. Item 69 of Schedule 1 provides that the term 'AFP appointee' has the same meaning as in the AFP Act where it means:

- a Deputy Commissioner
- an AFP employee
- a special member, a special protective service officer
- a person engaged overseas under section 69A of the AFP Act to perform duties overseas as an employee of the Australian Federal Police; or
- a person who is determined by the Commissioner under the Act to be an AFP appointee, or is performing certain functions for the AFP under section 69D of the AFP Act.

The consequential change made by item 2 to replace the term 'staff member' is necessary to ensure that the AFP Commissioner can continue to make valid delegations under section 23YQ. The replacement term 'AFP appointee' ensures an appropriate class of AFP personnel are able to exercise functions and powers under Part 1D.

[3] Recommendation 7 of *The Report of the Independent Review of Part 1D of the Crimes Act 1914.* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportofindependentreviewofPart1DoftheCrimesAct1914-Forensicprocedures-March2003> ; Recommendation 11-1 ALRC/ AHEC *Protection of Human Genetic Information Report 'Essentially Yours'* < http://www.alrc.gov.au/publications/11-regulating-access-genetic-testing/laboratory-accreditation>

Item 3 – Subsection 23WA(1) (definition of *informed consent)*

Item 3 corrects a drafting error in the definition of 'informed consent' contained in subsection 23WA(1). The definition currently refers only to section 23WF. Item 3 will ensure that the definition of 'informed consent' includes a reference to all relevant informed consent provisions under Part 1D, that is, 'sections 23WF, 23WG, 23XWG and 23XWR'.

Item 4 – Subsection 23WA(1) (paragraph (b) of the definition of *intimate forensic procedure)*

Item 4 updates the definition of 'intimate forensic procedure' to mean - the taking of a sample of blood by methods other than by a finger prick. This item is required as a result of the changes proposed in item 6, Schedule 1, which re-classify the method of taking a sample of blood via a prick to the finger as a non-intimate forensic procedure.

Under Part 1D, methods used to collect forensic samples are classified as either 'intimate forensic procedures' or 'non-intimate forensic procedures'. This classification determines who can authorise the procedure, the circumstances in which the procedure can take place, and the safeguards that apply when the sample is taken.

The definition of intimate forensic procedure in subsection 23WA(1) currently includes all methods of taking samples of blood, among other procedures. Removing the taking of blood samples via a finger prick from the definition of intimate forensic procedure changes the circumstances under which that procedure can be authorised. Currently under sections 23WR and 23XWD, the collection of a blood sample, including via finger prick, cannot occur unless a suspect or offender has consented to the procedure, or a magistrate or judge has ordered the procedure to be conducted.

Item 4 will amend subsection 23WA(1) with the effect that a senior constable will also be able to order the procedure to be conducted. When making such an order the senior constable will be required to consider the matters set out at section 23WO including;

- whether there is a less intrusive but reasonably practicable way of obtaining evidence to confirm or disprove the suspect committed the relevant offence
- the seriousness of the circumstances surrounding the commission of the relevant offence, and
- whether carrying out the forensic procedure is justified in all the circumstances.

Items 4 and 6 of Schedule 1 implement recommendation 18 of the DNA Review which recommended that finger prick samples be included in the definition of 'non intimate forensic procedure'. The DNA Review concluded that a finger prick is a minor matter that can be routinely and easily administered, and as such, recommended that this method be included in the definition of 'non-intimate forensic procedure'. Gathering a forensic sample of blood via a finger prick is not considered painful and does not require the person conducting the procedure to have specialised expertise. The DNA Review considered that other methods of collecting a sample of blood remain properly classified as intimate forensic procedures.

Item 5 – Subsection 23WA(1) (paragraph (c) of the definition of *intimate forensic procedure)*

Item 5 omits the taking of a sample of saliva, or a sample by buccal swab from the definition of 'intimate forensic procedure' in subsection 23WA(1). Item 6 of Schedule 1 inserts them into the definition of 'non-intimate forensic procedure'.

Items 5 and 6 combined implement recommendation 11 of the DNA Review with some modification. Recommendation 11 suggested that the taking of a sample by buccal swab, where self-administered or administered at the request of the person providing the sample, should be reclassified as non-intimate forensic procedures. The DNA Review noted that collection of a forensic sample via a self-administered buccal swab is the most common means of collecting a forensic sample. The DNA Review also noted that the use of a buccal swab was a relatively non-invasive sampling method and the Commonwealth's approach of classifying the taking of a sample by buccal swab was different to the approach taken in legislation in most States and Territories where equivalent provisions classified this method as a non-intimate forensic procedure.

Following consultation with Commonwealth law enforcement agencies, it was considered appropriate to reclassify the collection of all samples of saliva as well as samples taken by buccal swab, whether self administered or administered by certain other persons, as non-intimate forensic procedures. This reclassification is considered appropriate on grounds that:

- it would be impossible to obtain a DNA sample by buccal swab without incidentally collecting a sample of saliva
- the process of collecting a sample of saliva is rarely utilised, relatively painless and non-invasive, and
- the method of collecting a sample via buccal swab or of saliva requires less technical expertise and may be less painful than other forensic procedures such as the collection of hair samples that are currently classified as non-intimate methods.

Reclassifying the taking of a sample of saliva or by buccal swab as a non-intimate forensic procedure changes the circumstances in which these procedures can be performed. Currently under sections 23WR and 23XWD, the procedures can only occur where a suspect or offender has consented to the procedure, or where a judge or magistrate has ordered the procedure to be conducted.

The amendments being made by item 5 will also allow a senior constable to order the procedure to be conducted. When making such an order the senior constable will be required to consider a series of matters set out at section 23WO including;

- whether there is a less intrusive but reasonably practicable way of obtaining evidence to confirm or disprove the suspect committed the relevant offence
- the seriousness of the circumstances surrounding the commission of the relevant offence, and
- whether carrying out the forensic procedure is justified in all the circumstances.

The revised definition would align the Commonwealth categorisation of the taking of a sample by buccal swab with the approach taken in Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory. In these jurisdictions, the taking of a sample by buccal swab is given a 'non-intimate' classification and can be performed in most circumstances without seeking a court order.

Item 6 – Subsection 23WA(1) (after paragraph (a) of the definition of *non-intimate forensic procedure)*

Item 6 inserts into the definition of 'non-intimate forensic procedure' contained in subsection 23WA(1), the 'taking of a sample of blood by a finger prick' and the 'taking of a sample of saliva, or a sample by buccal swab'.

Item 6 implements recommendations 11 and 18 of the DNA Review. As recognised in the DNA Review, the taking of a sample by buccal swab and the taking of a sample of blood by a finger prick are relatively less invasive than other intimate forensic procedures, and unlike other intimate forensic procedures, can be performed by non-medical specialists without specific technical expertise. The taking of a sample of saliva is of a substantially similar nature to the process required to take a sample by buccal swab and it would be impossible not to collect some saliva when taking a sample by buccal swab.

Currently under sections 23WR and 23XWD, the collection of a blood sample via finger prick, a sample by buccal swab and a sample of saliva cannot occur unless a suspect or offender has consented to the procedure, or a magistrate or judge has ordered the procedure to be conducted. As a consequence, where individuals do not consent to these methods, the options available under the legislation to law enforcement authorities for the collection of a DNA sample are to use a non-intimate forensic procedure which can be authorised by a senior constable, or to seek an order from a judge or magistrate. The most suitable non-intimate method enabling the extraction of DNA that can currently be authorised by a senior constable is the collection of a hair sample. This is a process which requires greater technical expertise and may be more painful than the collection of a sample of blood via a finger prick, or a sample of saliva or via buccal swab. Item 6 will overcome this difficulty and provide additional and less invasive collection options to a senior constable when authorising a non-intimate forensic procedure to be carried out.

Item 7 – Subsection 23WA(1) (definition of *senior constable*)

Part 1D provides authority to 'senior constables' to authorise or carry out procedures to collect forensic samples. 'Senior constable' is defined by subsection 23WA(1) to mean 'a constable of the rank of sergeant or higher'. Item 7 repeals the term 'senior constable' and item 8, Schedule 1 inserts a replacement term, 'senior police officer'.

The term senior constable does not appear in the AFP Act, and is not utilised by the AFP except in the context of Australian Capital Territory Policing, where it has a different meaning to 'constable of the rank of sergeant or higher'. Item 7 implements recommendation 6(a) of the DNA Review to ensure that the terminology contained in Part 1D reflects the terminology used by the AFP under other Commonwealth legislation and in practice.

Item 8 – Section 23WA(1)

Item 8 inserts into subsection 23WA(1) the new definition of 'senior police officer' to mean a reference to 'a constable of the rank of sergeant or higher'. This definition replaces the term 'senior constable', which is removed by item 7 above.

This is a technical amendment to ensure terminology contained in Part 1D reflects the terminology used by the AFP. It does not widen the class of persons qualified to exercise the

authority currently exercised by senior constables under Part 1D. Consequential amendments are made by items 9, 10, 12-20 to replace references to 'senior constable' in Part 1D with references to 'senior police officer'.

Item 9 – Section 23WC (table item 2)

Section 23WC sets out a table that summarises the circumstances in which a forensic procedure may be carried out on a suspect and shows the provisions of Part 1D that authorise the carrying out of those procedures. Table item 2 includes a reference to a 'senior constable' authorising a non-intimate forensic procedure on an adult suspect who is in custody.

Consequential to the amendments made by items 7 and 8, item 9 substitutes a reference to 'senior constable' with a reference to 'senior police officer' in table item 2 of section 23WC. This amendment does not change the class of persons qualified to authorise a non-intimate forensic procedure on an adult suspect who is in custody.

Item 10 – Paragraph 23WG(3)(c)

Paragraph 23WG(3)(c) sets out how informed consent to a forensic procedure is to be sought from a suspect who is an Aboriginal person or Torres Strait Islander. Under current paragraph 23WG(3)(c), a constable must not ask the suspect to consent to the forensic procedure unless the constable making the request is a senior constable, and he or she believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in relation to the request to consent by comparison with members of the Australian community generally.

Consequential to the amendments made by items 7 and 8, this item substitutes a reference to 'senior constable' with a reference to 'senior police officer'. This amendment does not change the class of person qualified to seek informed consent from a suspect who is an Aboriginal person or Torres Strait Islander.

Item 11 – Paragraph 23WJ(3)(a)

Subsection 23WJ(3) sets out information that must be given to a suspect who is in custody, where that suspect has refused to consent to a non-intimate forensic procedure. Paragraph 23WJ(3)(a) requires the suspect to be informed that, if the suspect does not consent, a constable may order the carrying out of the procedure in certain circumstances.

Item 11 replaces the reference to a 'constable' ordering the carrying out of the procedure, with a reference to a 'senior police officer' ordering the carrying out of the procedure to resolve a drafting error.

Under Part 1D it was not intended to allow constables to be able to order the carrying out of a forensic procedure on a suspect in custody. This is reflected in section 23WM, which provides that only a senior police constable can order a non-intimate forensic procedure be carried out on a suspect. The replacement of the reference to 'constable' with a reference to 'senior police officer' will ensure that the information given to a suspect accurately reflects who can order a non-intimate forensic procedure on a suspect in custody, where that suspect has refused consent to the forensic procedure.

Item 12 – Division 4 of Part 1D (heading)

The heading of Division 4 specifies that Division 4 relates to the carrying out of non-intimate forensic procedures on suspects by order of a senior constable. Consequential to the amendments made by items 7 and 8 of Schedule 1, item 12 replaces a reference to 'senior constable' in the heading of Division 4 with a reference to 'senior police officer'. The replacement of the term senior constable does not change the class of person qualified to authorise a non-intimate forensic procedure on a suspect who is in custody but reflects the change in terminology made by item 8 of Schedule 1.

Item 13 – Section 23WM (heading)

The heading of section 23WM specifies that section 23WM relates to the carrying out of non-intimate forensic procedures on suspects by order of a senior constable. Consequential to the amendments made by items 7 and 8 of Schedule 1, item 13 replaces a reference to 'senior constable' with a reference to 'senior police officer'. The replacement of the term senior constable does not change the class of person qualified to authorise a non-intimate forensic procedure on a suspect who is in custody but reflects the change in terminology made by item 8 of Schedule 1.

Item 14 – Subsection 23WM(1)

Subsection 23WM(1) provides that a person is authorised to carry out a non-intimate forensic procedure by order of a senior constable under section 23WN. Consequential to the amendments made by items 7 and 8 of Schedule 1, item 14 replaces the reference to 'senior constable' in subsection 23WM(1) with a reference to 'senior police officer'. The replacement of the term senior constable does not change the class of person qualified to authorise a non-intimate forensic procedure on a suspect who is in custody, but reflects the change in terminology made by item 8 of Schedule 1.

Item 15 – Section 23WN (heading)

Section 23WN specifies the circumstances in which a senior constable may order a non-intimate forensic procedure. The heading of the section contains a reference to 'senior constable'. Consequential to amendments made by items 7 and 8, this item replaces a reference to 'senior constable' with a reference to 'senior police officer' in this heading. The replacement of the term senior constable does not change the class of person qualified to authorise a non-intimate forensic procedure on a suspect who is in custody, but reflects the change in terminology made by item 8 of Schedule 1.

Item 16 – Section 23WN

Section 23WN sets out the circumstances in which a senior constable may order the carrying out of a non-intimate forensic procedure on a suspect who is in custody. Consequential to the amendments made by items 7 and 8, this item replaces references to 'senior constable' in subsection 23WN with references to 'senior police officer'. The replacement of the term of senior constable in this section does not change the class of person qualified to authorise a non-intimate forensic procedure on a suspect who is in custody, but reflects the change in terminology made by item 8 of Schedule 1.

Item 17 – Section 23WO (heading)

Section 23WO relates to the matters that a senior constable must consider when ordering a forensic procedure. The heading contains a reference to 'senior constable'. Consequential to amendments made by items 7 and 8, this item replaces a reference to 'senior constable' in this heading with a reference to senior police officer. The replacement of the term senior constable does not change the class of person who must be satisfied of the matters set out in section 23WO prior to ordering a forensic procedure, but reflects the change in terminology made by item 8 of Schedule 1.

Item 18 – Section 23WO

Subsection 23WO sets out the matters that need to be considered by a senior constable before ordering a forensic procedure on a suspect. Consequential to the amendments made by items 7 and 8, this item replaces references to 'senior constable' in subsection 23WO with references to 'senior police officer'. The replacement of the use of senior constable in this section does not change the class of person required to consider the matters set out in subsection 23WO before ordering a forensic procedure on a suspect, but reflects the change in terminology made by item 8 of Schedule 1.

Item 19 – Section 23WP (heading)

The heading set out at section 23WP specifies that section 23WP relates to how a senior constable must record an order to carry out a forensic procedure. Consequential to amendments made by items 7 and 8, this item replaces a reference to 'senior constable' with a reference to 'senior police officer' in this heading. The replacement of the term senior constable does not change the class of person to make and record an order in accordance with section 23WP, but reflects the change in terminology made by item 8 of Schedule 1.

Item 20 – Subsections 23WP(1) and (2)

Subsections 23WP(1) and (2) require a senior constable to make a record of an order made under section 23WN for the carrying out of a forensic procedure on a suspect. Consequential to the amendments made by items 7 and 8, this item replaces references to 'senior constable' in subsections 23WP(1) and (2) with references to 'senior police officer'. This amendment does not change the class of person who must conform to the requirements set out in subsections 23WP(1) and (2), when giving an order for the carrying out of a forensic procedure.

Item 21 – Paragraph 23WR(a) and (b)

Section 23WR sets out the circumstances in which a magistrate may order a forensic procedure on a suspect. Paragraph 23WR(a) provides that such an order can be made when the suspect is not in custody and has not consented to the forensic procedure. Paragraph 23WR(b) provides that an order can be made when the suspect is in custody and has not consented to the forensic procedure. Both paragraphs, therefore, make reference to such orders being made where a suspect has 'not consented' to a procedure.

A similar provision to 23WR exists within Part 1D in relation to offenders (section 23XWO). Recommendation 6(c) of the DNA Review proposed a technical amendment to this provision

to make it clear that consent is not necessary prior to an order being sought under that section in relation to *offenders*. In relation to section 23XWO, the DNA Review noted the CDPP's suggestion that it would be preferable if the legislation could be amended to make it clear that consent is not necessary prior to an order being sought under section 23XWO. The DNA Review accepted this proposal stating it would simplify and clarify current procedural requirements.

Item 21 makes a change similar to that suggested by Recommendation 6(c) of the DNA Review to provisions dealing with *suspects*, to ensure consistency in the Act. Item 21 inserts the phrase '(whether or not consent has been sought)' into both paragraphs 23WR(a) and (b) to make it clear that a magistrate need not consider whether a request for consent from the suspect has been sought prior to an applicant seeking an order from the court for that procedure to be carried out. Item 41 makes similar amendments to section 23XWNA in relation to judges or magistrates' orders being sought to carry out forensic procedures on offenders.

Item 22 – Paragraph 23XL(b)

Paragraph 23XL(b) currently requires hair samples for DNA testing to be taken one hair at a time. Item 22 repeals this requirement and provides that where a sample of hair is being taken from a suspect, the sample is to be extracted based on the least painful mechanism known and available to the person authorised to take the sample. This item implements recommendation 12 of the DNA Review.

The DNA Review when considering the method of taking hair samples noted that the 'single hair' extraction process may be slower and create more discomfort than the alternative process of extracting multiple hairs on a single occasion. Recommendation 12 of the DNA Review reflects this consideration and provides that an amendment to paragraph 23XL(b) would be a marked improvement.[4]

Item 23 – Section 23XM (table item 2)

Section 23XM sets out in a table who may carry out different types of intimate and non-intimate forensic procedures under Part 1D, and in some cases, creates an entitlement for a suspect to request the presence of a medical practitioner or dentist when the procedures are carried out. Items 1 to 8 of the table in section 23XM set out the process for carrying out intimate forensic procedures and items 9 to 15 set out the process for carrying out non-intimate forensic procedures.

Table item 2 sets out who may carry out the taking of a sample of blood and provides that a suspect is entitled to request that a medical practitioner be present when the sample is taken. Currently, any method of taking a sample of blood under Part 1D is an intimate forensic procedure and the persons able to carry out this procedure are restricted to medical practitioners, nurses and other appropriately qualified persons.

[4] *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Report, paragraph 3.8.6

Item 6 of Schedule 1 re-classifies the taking of a sample of blood via a prick to the finger from an intimate to a non-intimate forensic procedure. Item 4 of Schedule 1 amends the definition of 'intimate forensic procedure' to mean the taking of a sample of blood by any other method as an intimate forensic procedure, to take account of this change. Consequential to those amendments, item 23 amends table item 2 of section 23XM to ensure that the intimate forensic procedure of taking a sample of blood does not include the taking of a sample of blood via a prick to the finger.

This will permit blood samples by finger prick to be taken by a medical practitioner, nurse, constable or appropriately qualified person. It will also ensure that when taking a sample of blood other than by finger prick, the suspect remains entitled to request a medical practitioner be present and that the procedure only be carried out by a medical practitioner, nurse or another appropriately qualified person.

Item 24 – Section 23XM (table item 3)

Section 23XM sets out in a table who may carry out different types of intimate and non-intimate forensic procedures under Part 1D. Table item 3 sets out who may carry out the taking of a sample of saliva, or a sample by buccal swab and provides that a suspect is entitled to request that a medical practitioner be present when the sample is taken. Currently, the taking of a sample of saliva, or a sample by buccal swab is classified as an intimate forensic procedure and the persons able to carry out this procedure are restricted to medical practitioners, dentists, dental technicians, nurses and appropriately qualified persons.

Items 4 and 5 of Schedule 1 combined, reclassify the taking of a sample of saliva and a sample by buccal swab as non-intimate forensic procedures. Consequential to those amendments, item 24 amends the table in section 23XM by repealing table item 3. A new table item will be inserted by item 25 of Schedule 1 to re-insert details on who may carry out these forensic procedures.

Item 25 – Section 23XM (after table item 9)

Section 23XM sets out in a table who may carry out different types of intimate and non-intimate forensic procedures under Part 1D, and in some cases, creates an entitlement for a suspect to request the presence of a medical practitioner or dentist when the procedures are carried out.

Item 25 inserts a new table item 9A relating to the taking of a sample of blood by a finger prick and provides that this procedure can be carried out by a medical practitioner, nurse, *constable* or appropriately qualified person.

Item 25 also inserts new table item 9B to provide that the taking of a sample of saliva or the taking of a sample by buccal swab can be carried out by medical practitioners, dentists, dental technicians, nurses, *constables* and other appropriately qualified persons.

These table items expand the classes of persons currently able to undertake the collection of these DNA forensic samples to include constables, based on the reclassification of these procedures as non-intimate forensic procedures pursuant to items 4, 5 and 6 of Schedule 1. This expansion was considered appropriate based on the conclusions of the DNA Review and the submissions of law enforcement agencies that no specialist medical expertise is necessary

to perform the relevant procedures and to ensure that these procedures are aligned with other non-intimate forensic procedures.

Item 26 – Subsection 23XN(1)

Subsection 23XN(1) currently provides that an intimate forensic procedure *other than* the taking of a sample of blood, a sample of saliva, a buccal swab or a dental impression, is to be carried out, where practicable, by a person of the same sex as the suspect.

Item 26 amends subsection 23XN(1) to remove a reference to the taking of a sample of saliva, and sample by buccal swab, as intimate forensic procedures. This is to ensure consistency with amendments made by items 5 and 6 of Schedule 1, which re-classify these sampling methods as non-intimate forensic procedures. This is a technical amendment and does not change the current processes applicable to intimate forensic procedures under subsection 23XN(1).

Item 27 – Section 23XU

Section 23XU currently sets out a scheme for sharing part of a DNA sample with the suspect from whom it was taken in circumstances where there is sufficient material to share. It provides that, where a sample is taken from a suspect under Part 1D and there is sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect, an investigating constable must ensure that part of the sample is provided to the suspect as soon as practicable.

Recommendations 13(a) and 14 of the DNA Review suggested modifications to the existing scheme to share samples, or parts of samples, with suspects established by this section. The recommendations propose that a right be conferred on the person who provided the sample to have part of any matching crime scene sample provided to an accredited laboratory at their request, and that copies of related test analysis and results related to these matched samples be provided to convicted persons. Consultation with law enforcement agencies also highlighted some concerns about the uncertainty in section 23XU regarding timeframes for providing samples to suspects and around the contamination and security risks that result from the provision of a sample directly to a suspect.

Item 27 repeals section 23XU and inserts a new provision which takes account of the DNA Review and issues raised by law enforcement agencies in relation to the current sharing arrangements.

New section 23XU provides that where a sample is taken from a suspect under Part 1D, the suspect can request that the AFP provide material from the sample to an accredited laboratory, nominated by the suspect, for the purposes of re-testing (new subsections 23XU(1) and (2) refer). An investigating constable will then be required to provide the nominated laboratory with part of the material taken from the suspect within 28 days (new paragraph 23XU(3)(a)).

This item retains an existing safeguard in section 23XU that requires the constable to ensure reasonable care is taken to preserve this sample until it is provided to the nominated laboratory (new paragraph 23XU(3)(b)). New subsection 23XU(4) also makes it clear that

that suspects will bear the costs in relation to any analysis of that part of the material provided to the laboratory.

The provision of the sample directly to an accredited laboratory will ensure the integrity of the sample is maintained whilst still allowing the suspect an avenue to test the evidence against them. The four week timeframe for provision of material from samples will ensure that they are still provided to suspects within a reasonable time without creating an undue administrative burden on forensic laboratories, and is supported by the DNA Review (Recommendation 13(a)).

Items 28, 29, 31 and 32 of Schedule 1 create a scheme through which a suspect will have access to their personal information other than material from their sample in circumstances where there is insufficient sample material to share.

Item 28 – Subsection 23XUA(2)

Section 23XUA provides a suspect with the right to request that a representative of his or her choice be present during testing of a sample taken from them where there is insufficient material to be shared with accredited laboratories nominated by them under proposed new section 23XU (proposed in item 17 of Schedule 1), and where the material is being analysed in the investigation of an offence.

In its submission to the DNA Review, the AFP noted that the presence of an independent person during forensic analysis in a laboratory, as currently provided for under section 23XUA, has implications for the contamination and security of samples and could undermine the accreditation process for testing laboratories as they are required to impose controls on who can access testing premises.

The DNA Review considered these concerns. Recommendation 13(b) of the DNA Review recommended that subsection 23XUA(2) be amended to require that a person who is present in the laboratory pursuant to a request by a suspect must comply with all instructions relating to the analysis of a sample with a sanction of removal for non-compliance. Items 28, 29, 31 and 32 of Schedule 1 implement that recommendation by modifying the conditions under which a person nominated by the suspect (the 'attendee') can attend and be present during the testing of a suspect's sample. These amendments aim to ensure that persons present during testing comply with instructions aimed at preventing the loss, obstruction or contamination of testing and samples.

Item 28 amends subsection 23XUA(2) to provide that a suspect can make a request to an investigating constable that a person of their choice be present when the material is analysed in the investigation of the offence.

Item 28 also amends subsection 23XUA(2) to insert the term 'attendee' to mean a person of the suspect's choosing to be present when a sample is being analysed in the investigation of an offence. Use of the term 'attendee' aims to simplify the language used in the provisions relating to the sharing of samples and does not affect who the suspect can nominate to attend the laboratory during the analysis of the forensic material.

Item 29 – After subsection 23XUA(2)

Item 29 inserts a new subsection into section 23XUA relating to the suspect's entitlement to request that a representative be present during the testing of a sample taken from that suspect under Part 1D.

Subsection 23XUA currently provides that a suspect is able to request the presence of a person of his or her choice during testing of his or her sample. Item 28 of Schedule 1 clarifies that this request must be made to the investigating constable.

Amendments made by item 29 will require the investigating constable to inform the suspect that the attendee may be directed by the forensic analyst to leave the premises at which the analysis is being conducted if the attendee does not comply with instructions given by the analyst in relation to the analysis of the material. This new requirement will give analysts the ability to give instructions in relation to the analysing of material and ensure that the suspect is fully informed of their attendee's obligations to obey instructions when attending the laboratory during the analysis of the material.

Item 29 also inserts a reference to an 'analyst', meaning a person responsible for analysing the material. Currently section 23XUA refers to 'the persons responsible for analysing the material'. The insertion of the shorter term 'analyst' does not change the type of person currently responsible for analysing material under the Crimes Act. The new term is inserted to achieve greater clarity and simplify the language used in new provisions relating to analysing material.

These amendments accord with a modification of Recommendation 13(b) of the DNA Review which suggested that subsection 23XUA(2) be amended to require a person who is present in a laboratory pursuant to a request by a suspect must comply with all instructions relating to the analysis of the sample with a sanction of removal for non-compliance. The amendments also address AFP concerns about the contamination and security risks created by the presence of an independent person in a laboratory in which forensic analysis is taking place. Item 32 of Schedule 1 sets out how such instructions are to be given to the attendee and other conditions relating to the attendee's presence in the laboratory. These conditions include a penalty for non-compliance with certain directions given by an analyst.

Item 30 – Subsection 23XUA (3)

Item 30 amends subsection 23XUA(3) to replace a reference to 'the person chosen' with a reference to 'subject to this section, the attendee'. This amendment is made for clarity and for consistency with the language of item 28 of Schedule 1, which renames the person chosen to attend a forensic laboratory at the request of a suspect during the forensic analysis of material from the suspect's sample as the 'attendee'.

Use of the term 'attendee' does not affect who the suspect can nominate to attend the laboratory during the analysis of the forensic material.

Item 31 – Subsection 23XUA(3)

Item 31 amends subsection 23XUA(3) to replace a reference to 'a person responsible for analysing the material' with a reference to an 'analyst'. The insertion of this term is a minor

amendment to align this provision with new provisions in section 23XUA inserted by item 29, which define 'analyst' as the person responsible for analysing the material.

Use of the term 'analyst' does not affect who the suspect can nominate to attend the laboratory during the analysis of the forensic material.

Item 32 – At the end of section 23XUA

Item 32 amends the scheme under which a suspect has the right to request that a representative ('the attendee') be present during the analysis of a sample taken from that suspect under Part 1D.

Section 23XUA currently provides that where material has been taken from a suspect under Part 1D for the investigation of an offence, that suspect is entitled to request the presence of a person of his or her choice during testing of a sample taken from them where there is insufficient material to be shared with an accredited laboratory nominated by them under proposed new section 23XU (item 27, Schedule 1 relates) and where the material is being analysed in the investigation of an offence. Subsection 23XUA(1) provides that such a request can only be made where there is not sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect, and where the analysis does not need to occur immediately.

Amendments made by items 28, 29 and 32 of Schedule 1 modify this entitlement. Item 28 clarifies that this request must be made to the investigating constable and defines the person chosen to attend the testing of the sample as the 'attendee'. Item 29 inserts a reference to the person who is responsible for analysing the material as the 'analyst', and creates a requirement on the investigating constable to inform the suspect that the attendee may be directed by the analyst to leave the premises at which analysis is being conducted if the attendee does not comply with instructions given by the analyst in relation to the analysis of the material.

Item 32 inserts provisions to give effect to the scheme for an analyst to provide instructions and a direction to leave the premises to an attendee. These amendments provide that:

- the analyst may give instructions to the attendee in relation to the analysis of the material (new subsection 23XUA(4))
- the analyst may give a direction to the attendee to leave the premises at which the analysis is being conducted if the attendee fails to comply with an instruction (new subsection 23XUA(5)), and
- when the analyst gives a direction, the analyst must inform the attendee that a failure to comply with the direction is an offence (new subsection 23XUA(6)).

New subsection 23XUA(7) contains an offence provision and carries a penalty of 30 penalty units. Proposed new subsection 23XUA(8) explains that the offence in subsection 23XUA(7) is an offence of strict liability.

The creation of conditions on an attendee's access to a laboratory implements recommendations 13 and 14 of the DNA Review. The DNA Review concluded that maintaining the opportunity for a suspect's representative to observe testing in situations where there was insufficient material to be shared with that suspect, was important to maintain confidence in the DNA testing system. However, the DNA Review also

acknowledged the validity of concerns expressed by law enforcement agencies that the provision of unfettered access of unvetted individuals to forensic DNA testing facilities created real security and contamination risks, and could undermine the accreditation of such facilities. Law enforcement agencies expressed specific concerns about the absence of any conditions in section 23XUA on the attendee's access to the laboratories and the potential for such an attendee to accidently or deliberately interfere with testing processes that were being undertaken in the attendee's presence.

Item 32 maintains a suspect's ability to have a representative present when their sample is being tested whilst addressing law enforcement's concerns regarding contamination and security. The offence for non-compliance with an analyst's direction will apply only where access has been granted to the attendee in accordance with section 23XUA and where instructions given to the attendee in relation to the analysis of the material have not been complied with. Prior to giving a direction, the analyst must provide instructions to the attendee. There is no penalty for non-compliance with these instructions. However, non-compliance may result in the analyst giving a direction that the attendee leave the premises.

There are legitimate grounds for penalising the attendee without requiring proof of fault in relation to this offence. Once forensic samples have been tampered with or contaminated, there is a real possibility the sample will not be able to be used in the investigation of the specific offence or in future prosecutions. This would undermine steps being taken to improve confidence in the DNA testing system and promote mechanisms for suspects or convicted persons to test their innocence.

Item 32 includes additional safeguards to ensure that the attendee is fully aware of the consequences of non-compliance with a direction to leave the premises:

- a direction can only be issued where the attendee has already failed to comply with an instruction given by the analyst in relation to the analysis of the material
- when giving a direction under section 23XUA, the analyst is required to inform the attendee that a failure to comply with a direction is an offence. This requirement aims to place the attendee on guard against the possibility of any contravention of the offence, by giving clear notice of the effect of non-compliance, and
- the investigating constable is to inform the suspect that if a nominated attendee is to be provided with access to the premises, that right of access may be removed if the attendee does not comply with instructions given by the analyst.

Item 33 - Section 23XW

The DNA Review noted the view amongst stakeholders that individuals should have access to information held about them in agency records and should be given the opportunity to correct information that is inaccurate, or out of date. In recommendations 13 and 14, the DNA Review suggested that access be provided to relevant person samples and crime scene samples (and copies of related test analysis and results) by convicted persons who wished to establish their innocence.

Section 23XW currently provides access to suspects to results of any analysis made of DNA samples taken from them. Item 33 proposes that this provision be enhanced in light of recommendations 13 and 14 to enable suspects to be informed of a match between their profile and one contained on a crime scene index, where the suspect's profile has been matched as part of the investigation of the offence.

This item also provides clarity in relation to the timeframes for providing the results of the analysis to the suspect. Currently, results of analysis of a sample taken from a suspect must be made available to the suspect within seven days after the material comes into existence, or within seven days of a request made by the suspect (current section 23YG relates). This process for providing copies is confusing and problematic for law enforcement as the analysis of the material may take place more than seven days after the sample has been taken from the suspect.

Item 33 seeks to address these concerns and replaces the current section 23XW. Pursuant to proposed section 23XW an investigating constable must provide copies of analysis within 14 days of a request from a suspect, provided that it has been 14 days since the analysis of the material was undertaken. There is no obligation imposed on the investigating constable to make this material available in the absence of a request from a suspect. This accords with the view of the DNA Review, which stated that access to samples (and related records) should be granted upon application.[5]

The insertion of these requirements ensures a suspect has timely and appropriate access to documents. It also clarifies the process for providing that access for law enforcement.

Item 34 – Subsection 23XWB(1)

Division 6A of Part 1D provides for the carrying out of certain forensic procedures after the conviction of serious and prescribed offenders. Section 23XWB currently classifies certain procedures as intimate or non-intimate forensic procedures in relation to these offenders. The classification of these procedures is identical to the classification of these procedures under Division 6, which provides for the carrying out of forensic procedures on suspects. Under both Division 6 and Division 6A the authorisation requirements and safeguards that apply to the method of forensic procedure are dependent on whether the relevant method is listed as an intimate or non-intimate forensic procedure.

Items 4, 5 and 6 of Schedule 1 reclassify certain methods of collecting material from suspects from intimate to non-intimate forensic procedures. These amendments were made to ensure that the authorisation requirements and safeguards that applied to taking a forensic sample by a particular method, took better account of the relative invasiveness and skills that have to be applied when taking a sample by each particular method. Items 34 and 35 of Schedule 1 make an equivalent change in relation to certain methods of collecting forensic material from offenders.

Item 34 amends subsection 23XWB(1) to clarify that the taking of a sample of blood (other than by a finger prick) is an intimate forensic procedure in relation to offenders.

Item 35 – At the end of 23XWB(2)

Subsection 23XWB(2) currently lists the non-intimate forensic procedures to which Division 6A applies. Item 35 amends subsection 23XWB(2) so that the taking of a sample of saliva and the taking of a sample by buccal swab are listed as non-intimate forensic procedures. These procedures are currently classified as intimate forensic procedures. The classification

[5] *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Report, page 14.

of these procedures is identical to the classification of these procedures under Division 6, which provides for the carrying out of forensic procedures on suspects. Under both Division 6 and Division 6A the authorisation requirements and safeguards that apply to the method of forensic procedure are dependent on whether the relevant method is listed as an intimate or non-intimate forensic procedure.

Items 4, 5 and 6 of Schedule 1 reclassify certain methods of collecting material from suspects from intimate to non-intimate forensic procedures. These amendments were made to ensure that the authorisation requirements and safeguards that applied to taking a forensic sample by a particular method, took better account of the relative invasiveness and skills that had to be applied when taking a sample by each particular method. Items 34 and 35 make an equivalent change in relation to certain methods of collecting material from offenders.

Item 35 amends subsection 23XWB(2) to provide that the taking of a sample of saliva, a sample by buccal swab and the taking of a sample of blood by a finger prick are non-intimate forensic procedures.

Item 36 – At the end of subsection 23XWC(1)

Section 23XWC sets out the circumstances in which a non-intimate forensic procedure can be carried out on an offender under Division 6A. Under subsection 23XWC(1), a person is authorised to carry out a non-intimate forensic procedure on a person (other than a child or an incapable person) with the informed consent of the serious offender or by order of a constable under section 23XWK.

Item 36 amends subsection 23XWC(1) by adding an additional paragraph to provide that a non-intimate forensic procedure can also be authorised by a judge or magistrate under section 23XWO.

Subsection 23XWO(1) currently provides that an authorised applicant may apply to a judge or a magistrate for an order directing a serious offender to consent to an intimate forensic procedure only. Amendments made by item 42 of Schedule 1 will provide that an order may be sought for the carrying out of either an intimate or a non-intimate forensic procedure.

Providing that an order may be sought from a judge or magistrate to carry out either non-intimate or intimate forensic procedures allows a wider variety of collection methods to be considered when an application is made for an order to take a DNA sample from an offender. Currently section 23XWO only allows such orders to be sought in relation to more serious and more invasive ‘intimate’ collection methods. For example, the removal of samples from the genital area of an offender. The amendments made by items 34 and 35 of Schedule 1 to reclassify less invasive intimate forensic procedures as non-intimate forensic procedures would further restrict the possible ways that a forensic sample could be collected from an offender when authorised by a judge or magistrate.

Item 36 resolves this issue by providing that orders to conduct forensic procedures may also be sought for forensic procedures that are less invasive, such as the taking of a sample by buccal swab, and the taking of a sample of hair.

Item 37 – Subsection 23XWC(3)

Section 23XWC sets out the circumstances in which a non-intimate forensic procedure can be carried out on an offender under Division 6A. Under subsection 23XWC(3), a person is authorised to carry out a non-intimate forensic procedure on a child or incapable person who is a serious offender, or take the fingerprints of a child or incapable person who is a prescribed offender, by order of a *magistrate* under section 23XWO. Section 23XWO, dealing with orders directing an offender to consent to a forensic procedure, however, refers to a *judge* or a magistrate making such an order.

Item 37 inserts a reference into subsection 23XWC(3) to a judge also being able to make the order under section 23XWO. This is a minor amendment to correct a drafting error and to reflect that either a judge or a magistrate may make an order for a non-intimate forensic procedure under section 23XWC, pursuant to 23XWO.

Item 38 – Paragraph 23XWD(b)

Paragraph 23XWD(b) sets out the circumstances in which an intimate forensic procedure can be carried out on an offender under Division 6A. Under paragraph 23XWD(b) a person is authorised to carry out an intimate forensic procedure on a person (other than a child or incapable person) who is a serious offender by order of a *magistrate* under section 23XWO. Section 23XWO, dealing with orders directing an offender to consent to a forensic procedure, however, refers to a *judge* or a magistrate making such an order.

Item 38 inserts a reference into subsection 23XWD(b) to a judge also being able to make the order under section 23XWO.

This is a minor amendment to correct a drafting error and to - reflect that either a judge or a magistrate may make an order for an intimate forensic procedure under section 23XWD, pursuant to 23XWO.

Item 39 – Subsection 23XWE(1)

Subsection 23XWE(1) currently provides that the procedures set out in Division 6 of Part 1D in relation to the carrying out of forensic procedures on suspects can be used to carry out forensic procedures on offenders. In particular, subsection 23XWE(1) states that Division 6 is to apply as if references in that Division to a 'suspect' are references to an 'offender'.

During consultations with Commonwealth stakeholders in relation to subsection 23XWE(1) concerns were raised about the clarity of subsection 23XWE(1), and whether *all* the procedures set out in Division 6 could be applied to offenders as they are applied to suspects.

Subdivision F of Division 6 sets out procedures that apply following the taking of a DNA sample from a suspect. Sections 23XU, 23XV and 23XW require an investigating constable to make available to the suspect material from the suspect's DNA sample, copies of photos where these were taken as part of a forensic procedure under Part 1D, and copies of the results of DNA analysis respectively. In relation to the application of these sections to an offender, there is no 'investigating constable' from whom an offender is able to make a request that these items be provided.

Item 39 inserts a new subparagraph 23XWE(1)(b) to provide that for the purposes of subdivision F, a reference to the 'investigating constable' is to be taken as a reference to the 'AFP Commissioner'. This amendment will provide offenders with a process for applying to access material and samples that have been taken from them via a forensic procedure authorised under Part 1D.

In their submission to the Part 1D Review, the AFP expressed concerns about the application of section 23XJ to offenders. Section 23XJ provides that a person authorised to carry out a forensic procedure on a person or a constable, may use reasonable force to enable the forensic procedure to be carried out and to prevent the loss, destruction or contamination of any samples. A related section, section 23XK, provides that forensic procedures must not be carried out in a cruel, inhuman or degrading manner. The AFP have indicated a preference for making it clear on the face of subsection 23XWE(1) that use of force is authorised when carrying out a forensic procedure on an offender in certain circumstances.

Item 39 adds a statutory note to subsection 23XWE(1) to explicitly provide that in applying Division 6 to offenders, sections 23XJ and 23XK apply to the carrying out a forensic procedure on offenders.

Listing these two sections is not exhaustive and does not preclude the application of all other remaining sections within Division 6 to the carrying out of forensic procedures on offenders.

Item 40 – Paragraph 23XWL(c)

Part 1D provides that in certain circumstances law enforcement officers of a certain rank may order the carrying out of non-intimate forensic procedures on serious offenders. Section 23XWK permits a constable to order a non-intimate forensic procedure on a serious offender, where the offender's consent has been sought, the offender has not consented, and the constable has taken into account the matters set out in section 23XWL. One of the matters the constable must consider under paragraph 23XWL(c) is 'whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or other otherwise'.

It is unclear what type of evidence is necessary to satisfy this requirement and under what circumstances, if any, the potential for the carrying out of a forensic procedure would not be viewed as being of assistance to law enforcement.

Item 40 repeals paragraph 23XWL(c) to remove this requirement as it is considered unnecessary. The remaining requirements, including that the officer be satisfied that the carrying out of the procedure 'is justified in all the circumstances' (paragraph 23XWl(d)) are considered sufficient protection against the possibility of forensic procedures being carried out for improper or frivolous purposes.

Item 41 – After section 23XWN

Under section 23WR in Division 5 of Part 1D, a magistrate may, under sections 23WS and 23XA, order the carrying out of a forensic procedure on a suspect in three circumstances:

- where the suspect is not in custody and has not consented to the forensic procedure; or
- the suspect is in custody and has not consented to the forensic procedure; or
- the suspect cannot consent to the procedure.

Section 23XWO sets out the procedure for making an application for an equivalent order for the carrying out of an intimate forensic procedure on an offender. Unlike the provisions relating to suspects, section 23XWO contains no reference to circumstances where the offender has not consented. Law enforcement agencies have argued that it is unclear whether informed consent must be sought and rejected prior to orders being sought under that section.

Item 41 inserts new section 23XWNA into Division 6A of Part 1D to provide the circumstances in which a judge or magistrate may order a forensic procedure under section 23XWO, including where an offender has not consented to a forensic procedure (whether or not consent has been sought). The purpose of this amendment is to clarify that an attempt to obtain consent is not necessary prior to an order being sought under section 23XWO.

This amendment aligns the procedures relating to offenders with those relating to suspects and will avoid potential challenges that would require separate court hearings to determine whether consent was sought.

This item implements recommendation 6(c) of the DNA Review, which recommended that amendments be made to Part 1D to make it clear that consent is not necessary prior to an order being sought under section 23XWO.

Item 42 – Subsection 23XWO(1)

Under section 23XWO a judge or a magistrate is currently able to order an *intimate* forensic procedure be carried out on a serious Commonwealth offender.

It was noted during the drafting of the amendments that judges or magistrates are unable to order a non-intimate forensic procedure, as opposed to an intimate forensic procedure on a serious offender.

Item 42 makes an amendment that would allow judges or magistrates to order either an intimate forensic procedure *or* a non-intimate forensic procedure. This amendment will allow judges and magistrates to consider the most appropriate forensic procedure in the specific circumstances of the case, whether it is an intimate forensic procedure (such as a blood sample – other than a blood sample by finger prick) or a less invasive non-intimate forensic procedure (such as a hair sample).

Item 42 also amends subsection 23XWO(1) to remove inappropriate phraseology. Section 23XWO(1) currently refers to an order being made by any judge or magistrate to direct a serious offender to consent to an intimate forensic procedure. Language referring to the order 'directing' the serious offender to 'consent' does not accord with the voluntary nature of consent. This amendment removes the reference to directing a serious offender to consent to an intimate forensic procedure to which this Division applies being carried out on a serious offender and replaces it with an order 'for the carrying out of an intimate forensic procedure, or a non-intimate forensic procedure, to which this Division applies on a serious offender (other than a child or an incapable person)'.

This is a minor technical amendment and would not change the circumstances in which an application can be made for the carrying out of the procedure under subsection 23XWO(1) or the matters that the judge or magistrate is required to take into account when determining whether to make an order under section 23XWO.

Item 43 – Paragraph 23XWO(7)(c)

Part 1D provides that law enforcement officers must seek a court order to carry out an intimate forensic procedure on a serious offender. Section 23XWO provides that a judge or magistrate may order the carrying out of a forensic procedure on a serious offender following such an application. In considering these applications, the judge or magistrate is required to determine under paragraph 23XWO(7)(c), 'whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or other otherwise'.

It is unclear what type of evidence is necessary to satisfy this requirement and under what circumstances, if any, the potential for the carrying out of a forensic procedure would not be viewed by the courts as being of assistance to law enforcement.

Item 43 repeals paragraph 23XWO(7)(c) to remove this requirement as it is considered unnecessary. The remaining requirements, including that the judge or magistrate be satisfied that the carrying out of the procedure 'is justified in all circumstances' (paragraph 23XWO(7)(d)) is sufficient protection against orders being sought for improper or frivolous purposes.

This item implements recommendation 6(b) of the DNA Review which recommended the requirement for the judge or the magistrate to consider whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or other otherwise' in subsection 23XWO(7)(d) be repealed.

Item 44 – After section 23XWO

Sections 23WV, 23WW and 23XGD govern the procedure for securing the presence of suspects (whether they are in custody or not) in court for the purpose of hearing an application for a judge's or magistrate's order to carry out a forensic procedure. As there is no such provision in Part 1D in relation to offenders, recommendation 6(d) of the DNA Review suggested the insertion of new provisions to govern how offenders should be dealt with in relation to equivalent hearings.

Item 44 inserts new sections 23XWOA and 23XWOB to create a similar set of procedures for securing the attendance of an offender where a judge or a magistrate's order to conduct a forensic procedure is sought (for example, if the offender is a minor or the procedure is an intimate forensic procedure). These provisions are modelled on the current requirements relating to securing the presence of suspects for testing. However, there are some minor points of difference between existing provisions relating to suspects and the new provisions relating to offenders, to ensure the processes of removing and returning an offender from detention for a court hearing and subsequent testing is as streamlined as possible.

New section 23XWOA deals with securing the presence of the offender where he or she is in custody. If a court refuses the application for a forensic procedure, the constable in temporary custody of the offender must return them to the place of original custody without delay (new subsection 23XWOA(2)). Where an application is made under section 23XWO to a judge or a magistrate for an order under that section for the carrying out of a forensic procedure on an offender who is in custody or otherwise detained under a Commonwealth, State or Territory law, the judge or magistrate may, on application of a constable, issue a warrant directing the person holding the offender to deliver the offender into the custody of

the constable for the hearing of the application (new subsection 23XWOA(1)). Following such a procedure the offender would need to be returned without delay to the place of original detention (new subsection 23XWOA(3)).

New section 23XWOB deals with securing the presence of the offender where he or she is not in custody. These provisions mirror existing provisions set out in section 23WW relating to securing the presence of suspects. Where an application is made under section 23XWO to a judge or a magistrate for an order under that section for the carrying out of a forensic procedure on an offender who is neither in custody or detained under Commonwealth, State or Territory law, the judge may on application of a constable issue a summons for the appearance of the offender at the hearing of the application of the application (new paragraph 23XWOB(1)(c)). The judge or the magistrate may only issue a summons if satisfied it is necessary to ensure the appearance of the offender at the hearing, and that it is otherwise justified (new subsection 23XWOB(3)). A judge or a magistrate may also on application of a constable issue a warrant for the arrest of the offender for the purposes of the hearing of the application (new paragraph 23XWOB(1)(d)). Such an application must be made by information on oath or affirmation, accompanied by an affidavit that sets out either:

- why arrest is necessary to ensure the appearance at the hearing and why a summons would not ensure the appearance of the offender, or
- that the offender might destroy evidence that might be obtained by carrying out the forensic procedure, or
- that the issue of the warrant is otherwise justified.

Item 45 – Paragraph 23XWP(1)(b)

Section 23XWP provides for the carrying out of forensic procedures on offenders where they are in prison or another place of detention in certain circumstances. Paragraph 23XWP(1)(b) provides that where an offender is in prison or another place of detention and a judge or a magistrate orders the offender to 'permit a forensic procedure to be carried out', the judge or magistrate may order that the constable or a person who is authorised under Division 6 to carry out a particular forensic procedure, be permitted to attend on the offender in the prison or place of detention to allow the procedure to be carried out.

The reference in paragraph 23XWP(1)(b) to an offender 'permitting' a procedure does not accord with the fact that a judge or a magistrate has ordered it occur. The word 'permit' suggests that the offender undertakes the procedure voluntarily, which may not be the case.

Item 45 makes a technical amendment to substitute the reference to the court ordering an offender to 'permit' a procedure with a reference to the court ordering the 'carrying out of a forensic procedure under this Division on the offender'. This is a minor amendment and does not does not change the circumstances in which a judge or magistrate can make such an order, or the circumstances in which a constable can attend the prison or place of detention for the forensic procedure to be carried out.

Item 46 – Subsection 23XWP(3)

Section 23XWP provides for the carrying out of forensic procedures on an offender, who is not in prison or another place of detention, in certain circumstances. Subsection 23XWP(3) provides a judge or a magistrate may order the offender to attend a police station, or other specified place, within a specified period to 'permit a forensic procedure to be carried out'.

The reference in paragraph 23XWP(3) to a judge or magistrate making an order for an offender to 'permit' a forensic procedure does not accord with the fact that a judge or a magistrate has ordered it occur. The word permit suggests that the offender undertakes the procedure voluntarily, which may not be the case.

Item 46 makes a technical amendment to substitute the reference to the court ordering the offender to 'permit' a procedure with a reference to the court ordering the 'carrying out of a forensic procedure under this Division on an offender who is not in prison or another place of detention'. This is a minor amendment and does not does not change the circumstances in which a judge or magistrate can make such an order, or the circumstances in which a constable can attend the prison or place of detention for the forensic procedure to be carried out.

Item 47 – Subsection 23XWP(4)

Subsection 23XWP(4) provides that where an offender has been ordered to permit a forensic procedure be carried out, he or she will be guilty of an offence if they fail to permit the procedure to be undertaken. Proposed amendments to paragraph 23XWP(1)(b) and subsection 23XWP(3) (in items 45 and 46, Schedule 1 above) replace references to 'permitting' a procedure with references to the court ordering a forensic procedure take place. The reference to an offender being ordered to permit a procedure does not accord with the fact that a judge or a magistrate has ordered it occur, and does not accord with the new language inserted into paragraph 23XWP(1)(b) and subsection 23WXP(3) where references to an offender 'permitting' a procedure take place have been replaced with references to a court ordering a forensic procedure take place.

This item makes a technical amendment to substitute the reference to 'an offender being ordered to permit the carrying out of a forensic procedure' with a reference 'if a judge or magistrate orders the carrying out of a forensic procedure under this Division on an offender' to clarify that judges and magistrates order the procedures under Division 6A.
This is a minor amendment and does not does not change the circumstances in which a judge or magistrate can make such an order, or the circumstances in which a constable can attend the prison or place of detention for the forensic procedure to be carried out.

Item 48 – Subsection 23XWQ(2)

Subsection 23XWQ(2) sets out the circumstances in which a person is authorised to carry out a forensic procedure on a volunteer. Where the volunteer is not a child or an incapable person, a forensic procedure can be carried out with the informed consent of the volunteer, provided it is given in accordance with the requirements set out in section 23XWR.
Where the volunteer is a child or incapable person, the forensic procedure can only be carried out if informed consent is obtained from the parent or guardian of the volunteer in accordance with the requirements set out in section 23XWR, or by an order of a magistrate under section 23XWU. The person who is authorised to carry out the forensic procedure on the child or incapable person must inform the volunteer that, even though consent has been given or an order made, the procedure will not be carried out if he or she objects to the procedure.

Item 48 amends subsection 23XWQ(2) by inserting the phrase '(the ***authorised person***)' after 'A person' at the start of that subsection to clarify that the person referred to in that

subsection is in fact the person authorised to carry out the forensic procedure on the volunteer. This amendment is a minor, technical amendment that is consequential to the amendment being made by item 49 of Schedule 1.

Item 49 – After subparagraph 23XWQ(2)(b)(i)

Currently, there is no requirement that consent be sought from children or incapable persons when a forensic procedure has been authorised under Part 1D. Instead the informed consent of the parent or guardian is sought. Section 23XWR sets out the procedure for seeking the informed consent of the parent or guardian of a child or incapable person. Subparagraph 23XWQ(2)(b)(ii) requires children to be informed that, even though their parent or guardian has already given consent, or an order has been made by a magistrate, a forensic procedure will not be carried out if they object.

The Office of the Privacy Commissioner submitted to the DNA Review that changes should be made to the Crimes Act to provide greater control over decision-making processes for children and incapable persons in relation to the Part 1D procedures.[6] In response to this suggestion, the DNA Review, whilst noting the practical difficulties in gauging the decision-making capacity of a child, recommended that, in some circumstances both the consent of a parent or guardian and the consent of the child be required to undertake a forensic procedure authorised by Part 1D.[7] A similar issue applies in relation to the capacity of a person who is incapable of providing consent.

Following consultation with law enforcement agencies, the Office of the Privacy Commissioner and the Office of the Commonwealth Ombudsman, a modified scheme was proposed for seeking informed consent to perform a forensic procedure on a child, or incapable person, to provide such persons with a greater control over the consent process. This modified scheme would not require a constable or person undertaking the forensic procedure to ascertain the consent of a child or incapable person to the procedure, as this would place a constable or the person performing the procedure in a position of having to determine the capacity of the child or incapable person to understand information about complex forensic procedures. Rather, the new scheme strengthens existing safeguards that prevent a forensic procedure being carried out on a child or incapable person who objects to the process and ensures certain information is provided to that child or incapable person, in accordance with good privacy practice.

Item 49 inserts new subparagraph 23XWQ(2)(b)(ia) into paragraph 23XWQ(2)(b) to place an obligation on constables involved in obtaining informed consent from the parent or guardian of the volunteer who is a child or incapable person, to inform the child or incapable person that, if he or she objects to or resists the carrying out of the forensic procedure it will not be carried out. In conjunction with existing subparagraph 23XWQ(2)(b)(ii) this new process provides the child or incapable person with the opportunity to resist or object to the carrying out of the procedure both at the time that the consent of their parent or guardian is sought (new subparagraph 23XWQ(2)(b)(ia)), and also at the time where the procedure is being conducted (existing subparagraph 23XWQ(2)(b)(ii)).

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[6] *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Report, paragraph 3.5.2.

[7] See above. Paragraph 3.5.5

Item 49 is aimed at ensuring children and incapable persons have more than one opportunity to object to the carrying out of forensic procedure and are aware of this right in advance of the procedure. The provision of an additional objection opportunity also gives children or incapable persons more time to consider the procedure and to make a decision without the potential stress of being faced with the question for the first time immediately prior to the procedure taking place.

Item 50 – Subparagraph 23XWQ(2)(b)(ii)

Item 50 amends subparagraph 23XWQ(2)(b)(ii) by removing a reference to 'after the person' and substituting a reference to 'after the authorised person' to clarify that the person referred to in that subparagraph is the person authorised to carry out the forensic procedure on the volunteer. This amendment is a minor, technical amendment that is consequential to the amendment being made by item 49 (above).

Item 51 – Paragraph 23XWR(2)(b)

Currently a DNA profile is uploaded onto one of several NCIDD indices depending on the purpose for which the sample was taken. Section 23YDAC of Division 8A outlines the different indices of DNA profiles on the system, including the volunteers (limited purposes) index. Division 8A also specifies what type of profiles can be uploaded onto each index, and creates rules that govern how profiles contained on each index can be used.

Under Division 8A, the volunteers (limited purpose) index includes the DNA profiles of individuals who have voluntarily provided DNA samples to assist in a specific investigation, in accordance with Division 6B or under the corresponding law of a participating jurisdiction. For example, a voluntary sample may be taken from a person who has a missing relative to assist in identifying a body. Placement of a DNA profile on the limited purpose volunteer index creates strict restrictions on how the profile is used and when it is destroyed. For example, subsection 23XWR(2) requires that this information can only be used for the specific limited purpose for which it was taken, and allows the volunteer to make a request that the sample and related profile be destroyed at any time.

During the DNA Review, stakeholders raised concerns that volunteers are not fully cognisant of the option to provide a DNA profile only for limited purposes and may be placed on an index that can be matched in relation to other criminal investigations, rather than the specific investigation for which the sample was provided. Currently, section 23XWR sets out the information that must be given to the volunteer, or the parent or guardian of a volunteer when a constable is seeking the volunteer's consent for a forensic procedure to be carried out on the volunteer. Subsection 23XWR(2)(b) provides that the constable must inform the volunteer, or the parent or guardian of the volunteer, that the volunteer has a choice as to whether the information is stored on the volunteers (limited purpose) index or the volunteers (unlimited purpose) index.

Item 51 amends paragraph 23XWR(2)(b) to create a presumption that all volunteer profiles are for limited purposes and that all volunteers must be informed of this presumption. However, amended paragraph 23XWR(2)(b) would not prevent a volunteer from requesting that their DNA profile be placed on an index other than the volunteers (limited purpose) index. This amendment implements recommendation 7 of the DNA Review, that Division 6B be amended to create a presumption that DNA profiles are to be placed on the 'limited

purposes' index. It is aimed at providing greater protection for individuals voluntarily providing a DNA sample and may also lead to greater willingness on the part of volunteers to provide assistance in law enforcement investigations.

Item 52 – Section 23YDAC

This item makes a minor amendment to resolve a drafting error by renumbering a subsection in section 23YDAC. It inserts a '(1)' before 'In this' at the outset of the provision to provide subsection references to which paragraphs and subparagraphs referred to in the section may be linked.

Item 53 – Section 23YDAC (definition of *Commonwealth DNA database system*)

The Commonwealth DNA database system is defined in section 23YDAC to mean a database containing: a series of seven indices of DNA profiles (crime scene index, missing persons index, unknown deceased persons index, serious offenders index, volunteers (unlimited purpose) index, volunteers (limited purpose) index, and suspects index); a statistical index; and any other index prescribed by regulations.

Item 53 amends that definition to clarify that the Commonwealth DNA database system is managed by the Commonwealth. This clarification will ensure that the Commonwealth DNA database system is distinguished from any other database that may contain similarly named DNA indices, for example the DNA databases of foreign law enforcement agencies with similar indices.

Item 54 – Section 23YDAC (paragraph (a) of the definition of *Commonwealth DNA database system*)

Item 54 amends the definition of 'Commonwealth DNA database system' to ensure that in relation to a crime scene index, the database can contain material taken or obtained by a foreign law enforcement agency.

Subsection 23YDAC(a) describes the various indices of DNA profiles that form part of the Commonwealth DNA database system. These indices are described as indices of DNA profiles that relate to 'material taken or obtained by a Commonwealth agency'. Item 54 inserts a reference that clarifies that this material can include, in relation to the crime scene index, material that has been taken or obtained by a foreign law enforcement agency.

When foreign police find forensic material at a crime scene from which they can extract a DNA profile, they may in certain circumstances make a request to the AFP that this profile be matched on profiles held on NCIDD. Paragraph 23YDAE(d) provides that information on the Commonwealth DNA database system and information on the NCIDD, can be used for the purpose of and in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988.* However, Part 1D currently makes no express provision for DNA profiles obtained by foreign law enforcement agencies to be uploaded onto the various NCIDD indices. For the purposes of checking whether or not a DNA profile has a match with a profile contained on the NCIDD, the jurisdiction that holds a DNA profile and wants to search for possible matches must load the profile onto a relevant index on the NCIDD. If there is no index on which the profile can be accommodated under the rules set out in Part 1D, or in corresponding State or Territory legislation, the profile cannot be matched.

The definitions set out in Part 1D of 'the Commonwealth DNA Database system', 'the NCIDD' and the descriptions of the indices of DNA profiles on NCIDD pertain only to DNA profiles that have been 'taken or obtained' by a Commonwealth law enforcement agency. Furthermore, there is currently no free standing search engine onto which data may be loaded to be checked against profiles held on other NCIDD indices. These definitions create uncertainty about the circumstances in which the AFP can match DNA profiles sourced from forensic samples obtained by foreign law enforcement agencies with profiles on the NCIDD in response to actual or anticipated mutual assistance requests.

The DNA Review, in recommendation 5(a), recommended that express statutory authority be provided for the AFP to provide a response to an inquiry from a foreign law enforcement agency as to whether or not there is a match with a profile held by the foreign law enforcement agency on NCIDD. The DNA Review noted that it would be necessary to enter the foreign profile onto the NCIDD to facilitate such matching, and suggested that the most appropriate index on which to enter the profile would be the crime scene index.
Items 55, 56, 59 and 66, implement recommendation 5 of the DNA Review.

Item 55 – Section 23YDAC (after paragraph (a) of the definition of *crime scene index*)

When foreign police find forensic material at a crime scene from which they can extract a DNA profile, they may in certain circumstances make a request to the AFP that this profile be matched on profiles held on NCIDD. Paragraph 23YDAE(d) provides that information on the Commonwealth DNA database system and information on the NCIDD, can be used for the purpose of and in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988.* However, Part 1D currently makes no express provision for DNA profiles obtained by foreign law enforcement agencies to be uploaded onto the various NCIDD indices. For the purposes of checking whether or not a DNA profile has a match with a profile contained on the NCIDD, the jurisdiction that holds a DNA profile and wants to search for possible matches must load the profile onto relevant index on the NCIDD. If there is no index on which the profile can be accommodated under the rules set out in Part 1D, or in corresponding State or Territory legislation, the profile cannot be matched.

The definitions set out in Part 1D of 'the Commonwealth DNA Database system', 'the NCIDD' and the descriptions of the indices of DNA profiles on NCIDD pertain only to DNA profiles that have been 'taken or obtained' by a Commonwealth law enforcement agency. Furthermore, there is currently no free standing search engine onto which data may be loaded to be checked against profiles held on other NCIDD indices. These definitions create uncertainty about the circumstances in which the AFP can match DNA profiles sourced from forensic samples obtained by foreign law enforcement agencies with profiles on the NCIDD in response to actual or anticipated mutual assistance requests.

The DNA Review, in recommendation 5(a), recommended that express statutory authority be provided for the AFP to provide a response to an inquiry from a foreign law enforcement agency as to whether or not there is a match with a profile held by the foreign law enforcement agency on NCIDD. The DNA Review noted that it would be necessary to enter the foreign profile onto the NCIDD to facilitate such matching, and suggested that the most appropriate index on which to enter the profile would be the crime scene index.
Items 55, 56, 59 and 66, implement recommendation 5 of the DNA Review.

Item 55 inserts a new paragraph 23YDAC(aa) into the definition of 'crime scene index' to remove uncertainty as to when a foreign profile, temporarily uploaded onto a NCIDD index, would become 'part' of that index, and to ensure that there is clear statutory support for the placement of foreign DNA profiles that have been provided to the AFP for the purposes of an actual or anticipated mutual assistance request, onto the Commonwealth DNA database system (and thus onto NCIDD).

This amendment provides that DNA profiles derived from forensic material found at any place outside Australia where an offence under the law of a foreign country was, or is reasonably suspected of having been committed, can form part of the crime scene index of the Commonwealth DNA database system. These profiles, like other profiles held on the crime scene index, will be matched in accordance with the rules set out in section 23DAF, and information relating to such matching will only be disclosed in accordance with the proposed amended subsection 23YDAE(2) in item 59, Schedule 1, detailed below. Likewise, any destruction or de-identification requirements set out in Part 1D applying to profiles held on the 'crime scene index' would apply to the foreign profiles.

Specifically, the amendment made by this item provides that the crime scene index, as defined by section 23YDAC, can accommodate DNA profiles derived from forensic material 'found at any place outside Australia where an offence under the law of a foreign country was, or is reasonably suspected of having been committed'.

Item 56 – Section 23YDAC (at the end of the definition of *State/Territory DNA database system*)

Item 56 adds a statutory note at the end of the definition of 'State/Territory DNA database system' in section 23YDAC to 'see also subsection (2)', which is a new subsection inserted by Item 57 of Schedule 1.

Item 57 – Section 23YDAC (definition of *'volunteers (limited purposes) index')*

Section 23YDAC contains a number of definitions relevant to Division 8A in relation to Commonwealth and State/Territory DNA database systems including descriptions of the indices contained on those database systems. The descriptions of the indices outline the sort of DNA profile that can be uploaded, and limit how the profiles placed on each index can be used. For example, under 23YDAC profiles placed on the 'unknown deceased persons index' can only relate to DNA material taken or obtained by a Commonwealth agency from a deceased person whose identify is unknown.

The definition of 'volunteers (limited purposes) index' provides that this is an index of DNA profiles derived from forensic material taken in accordance with Division 6B or under a corresponding law of a participating jurisdiction from volunteers who (or whose parents or guardians) have been informed that information obtained will be used only for a purpose specified to them under paragraph 23XWR(2)(b).

Item 57 amends the definition of 'volunteers (limited purposes) index' by renumbering existing paragraph 23XWR(2)(b) to paragraph 23XWR(2)(ba). This amendment is consequential to the amendment made by item 51, Schedule 1, which inserts a new paragraph into subsection 23XWR(2).

Item 58 – At the end of section 23YDAC

Section 23YDAC contains a number of definitions relevant to Division 8A in relation to Commonwealth and State/Territory DNA database systems including descriptions of the indices contained on those database systems. Section 23YDAC contains a definition of 'State/Territory DNA database systems' meaning a database held by, or on behalf of, a participating jurisdiction for the purposes of a corresponding law.

Item 58 further refines this definition to specify that, for a participating jurisdiction, the database referred to in the definition of 'State/Territory DNA database system' can be taken to include parts of the NCIDD that relate to that participating jurisdiction.

This measure implements recommendation 1(a) of the DNA Review, which suggested that Part 1D be amended to make it clear that States and Territories may utilise the NCIDD as their sole database if they choose to do so. There are a range of advantages to jurisdictions utilising the NCIDD as their sole database, including the promotion of efficiency and consistent national privacy protections. Item 58 removes any ambiguity in the existing language of Part 1D that may be seen by the States and Territories to prevent them using NCIDD as their sole database.

Item 59 – After paragraph 23YDAE(2)(d)

Section 23YDAE deals with the use of information on the Commonwealth DNA Database system or NCIDD. Subsection 23YDAE(1) makes it an offence if a person accesses information stored on the Commonwealth DNA database system or NCIDD, unless that access is done in accordance with one of the purposes set out in subsections 23YDAE(2), (2A) or (3). Under paragraph 23YDAE(2)(e), the NCIDD can be accessed for the purposes of and in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988*.

Item 59 inserts new paragraph 23YDAE(2)(da) to provide that one purpose for which a person may access the NCIDD is for the purpose of assisting a foreign country to decide whether to make a request under the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988*. The information intended to be allowed to be disclosed under this paragraph is preliminary advice in the form of a 'yes' or 'no' response to assist the foreign law enforcement agencies' consideration of whether to proceed with a formal mutual assistance request. The AFP will develop internal policies to reflect the limited information that will be disclosed in response to these preliminary requests.

This amendment, in conjunction with items 54, 55, 56 and 66 of Schedule 1, implements recommendation 5 of the DNA Review, which recommended that express statutory authority be provided for the AFP to respond to requests from foreign law enforcement agencies to facilitate the use of the NCIDD to assist foreign law enforcement agencies for the purpose of and in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988.*

Item 60 – Paragraph 23YDA(1)(b)

Under section 23YDA, interpreter services may be provided to a suspect where a constable believes on reasonable grounds that the suspect has an inadequate knowledge of the English

language, or physical disability that prevents oral communication in the English language and the constable proposes to take certain action, listed in subsection 23YDA(2).

Item 60 amends paragraph 23YDA(1)(b) to extend interpreter services to offenders and volunteers.

This item implements recommendation 8(d) of the DNA Review, which recommended that the interpretation facility provided for in section 23YDA should be extended to cover offenders and volunteers.

Item 61 – Paragraph 23YDA(2)(a)

Under section 23YDA, interpreter services may be provided to a suspect where a constable believes on reasonable grounds that the suspect has an inadequate knowledge of the English language, or physical disability that prevents oral communication in the English language and the constable proposes to take certain action, listed in subsection 23YDA(2).

Item 61 amends paragraph 23YDA(2)(a) to extend interpreter services currently available when a constable is asking a suspect to consent to a forensic procedure, also to offenders and volunteers.

This item implements recommendation 8(d) of the DNA Review, which recommended that the interpretation facility provided for in section 23YDA should be extended to cover offenders and volunteers.

Item 62 – Paragraph 23YDA(2)(b)

Under section 23YDA, interpreter services may be provided to a suspect where a constable believes on reasonable grounds that the suspect has an inadequate knowledge of the English language, or physical disability that prevents oral communication in the English language and the constable proposes to take certain action, listed in subsection 23YDA(2).

Item 62 amends paragraph 23YDA(2)(b) to extend interpreter services to an offender in custody where they are available to a suspect in custody, when a constable is ordering the carrying out of a non-intimate forensic procedure.

This item implements recommendation 8(d) of the DNA Review, which recommended that the interpretation facility provided for in section 23YDA should be extended to cover offenders and volunteers.

Item 63 – Paragraph 23YDA(2)(c)

Under section 23YDA, interpreter services may be provided to a suspect where a constable believes on reasonable grounds that the suspect has an inadequate knowledge of the English language, or physical disability that prevents oral communication in the English language and the constable proposes to take certain action, listed in subsection 23YDA(2).

Item 63 amends paragraph 23YDA(2)(c) to extend interpreter services currently available when a constable is applying to a magistrate for a final or interim order for the carrying out of a forensic procedure on a suspect, also to offenders, children or incapable persons.

This item implements recommendation 8(d) of the DNA Review, which recommended that the interpretation facility provided for in section 23YDA should be extended to cover offenders and volunteers.

Item 64 – Paragraphs 23YDA(2)(d), (e) and (f)

Under section 23YDA, interpreter services may be provided to a suspect where a constable believes on reasonable grounds that the suspect has an inadequate knowledge of the English language, or physical disability that prevents oral communication in the English language and the constable proposes to take certain action, listed in subsection 23YDA(2).

Item 64 amends paragraphs 23YDA(2)(d), (e) and (f) to extend interpreter services currently available to suspects to volunteers and offenders where a constable proposes to:

- caution an offender or volunteer (paragraph 23YDA(2)(d))
- carry out, or arrange for the carrying out of, of a forensic procedure on an offender or volunteer ((paragraph 23YDA(2)(e)), or
- give an offender or volunteer an opportunity to view a video recording made under Part 1D (paragraph 23YDA(2)(f)).

This item implements recommendation 8(d) of the DNA Review, which recommended that the interpretation facility provided for in section 23YDA should be extended to cover offenders and volunteers.

Item 65 – Subsection 23YG(2)

Where material must be made available to suspects, offenders and volunteers under Part 1D, that material must be made available in accordance with the procedures and time limits set out in section 23YG. Paragraphs 23YG(2)(a) and (b) currently specify that the relevant time limit for that material to be made available is within seven days of that material coming into existence or a request for the material being made.

Item 65 amends paragraphs 23YG(2)(a) and (b) to extend that time limit to 14 days. This item implements recommendation 13 of the DNA Review and is in response to concerns raised by the AFP about the practicality of meeting the seven day timeframe.

Item 66 – After paragraph 23YO(2)(d)

Section 23YO sets out the purposes for which information stored on the NCIDD or the Commonwealth DNA database system may be disclosed. Subsection 23YO(1) makes it an offence for a person to disclose information stored on the Commonwealth DNA database system or NCIDD for purposes other than those set out in subsections 23YDAE(2) and (3). Paragraph 23YO(2)(e) provides that one of those purposes includes the purposes of, and in accordance with, the *Mutual Assistance in Criminal Matters 1987* or the *Extradition Act 1988*.

The DNA Review, in recommendation 5(a), recommended that express statutory authority be provided for the AFP to provide a response to an inquiry from a foreign law enforcement agency as to whether or not there is a match with a profile held by the foreign law enforcement agency on NCIDD. The Review noted that when foreign police find forensic material at a crime scene from which they can extract a DNA profile, they may ask Australia

whether there is a match for that profile on the NCIDD.[8] The Review also noted that a clear statutory charter should be provided to govern the exchange of information between Australia and the foreign law enforcement agency.[9] The Review suggested that legislation be put in place to enable the AFP to provide a 'yes' or 'no' response to an enquiry from foreign police as to whether there is a match between their profile and the profile on NCIDD. Once this initial match is established, the foreign police would then be placed in a position to consider whether or not to submit a formal request for mutual assistance to obtain from Australia any further information about the matched profile.[10]

Item 66 inserts new paragraph 23YO(2)(da) to ensure there are no restrictions in relation to the disclosure of information contained on the Commonwealth DNA database system or NCIDD in response to requests from foreign law enforcement agencies. In conjunction with items 54, 55, 56 and 59 of Schedule 1, item 66 implements recommendation 5 of the DNA Review. It will enable the AFP to respond to requests from foreign law enforcement agencies to match profiles on NCIDD with profiles obtained as part of criminal investigations by foreign agencies. New paragraph 23YO(2)(da) provides that one purpose for which a person may disclose information stored on NCIDD is for the purpose of assisting a foreign country to decide whether to make a request under the *Mutual Assistance in Criminal Matters Act 1986*.

The information intended to be allowed to be disclosed under this paragraph is preliminary advice in the form of a 'yes' or 'no' response to a request for mutual assistance. If a match is made, this item will enable the AFP to notify the foreign law enforcement agency of such a match to assist the foreign law enforcement agency to decide whether to undertake mutual assistance processes for the provision of further information about the DNA profile, including identifying information about the person to whom the profile relates.

Item 67 – After section 23YP

Item 67 inserts into Part 1D new section 23YPA to provide that all Commonwealth forensic analysis must be carried out in an accredited laboratory. Read in conjunction with the amendments made by item 1, Schedule 1, all Commonwealth forensic analysis must be carried out by either a forensic laboratory accredited with the National Association of Testing Authorities Australia, or a laboratory that is prescribed by the regulations.

The accreditation requirement applies regardless of whether testing is occurring on behalf of Commonwealth law enforcement agencies, on behalf of suspects accused of committing a Commonwealth offence, or on behalf of offenders.

The accreditation requirement seeks to address public concerns about the accuracy of test results provided by some forensic laboratories.

[8] *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Report, paragraph 3.2.2

[9] Ibid. Paragraph 3.2.4

[10] Ibid. Paragraph 3.2.5

This item also implements recommendation 16 of the DNA Review, which considered the auditing regimes related to accreditation processes an important mechanism to reducing potential contamination of samples.

Item 68 – Subsection 23YQ(1)

Section 23YQ provides that the AFP Commissioner may delegate all or any of his or her functions under Part 1D. Subsection 23YQ(1) currently provides that the Commissioner of the AFP may delegate all or any of his or her functions and powers under Part 1D to a 'constable' or 'staff member'.

Item 68 repeals the term 'staff member' in subsection 23YQ (1) and inserts a replacement term 'AFP appointee'. The repeal of the term staff member is necessary as subsection 23YQ(2) provides that 'staff member' has the same meaning as it has in the AFP Act. The reference to 'staff member' in the AFP Act was repealed by the *Australian Federal Police Legislation Amendment Act 2000.*

Item 69, Schedule 1 (below) provides that the term 'AFP appointee' has the same meaning as the term has in AFP Act. Item 68 and 69 of Schedule 1 together are required to ensure that the AFP Commissioner can continue to make valid delegations under section 23YQ.

Item 69 – Subsection 23YQ(2)

Section 23YQ currently provides that the Commissioner of the AFP may delegate all or any of his or her functions and powers under Part 1D to a constable or staff member. Subsection 23YQ(2) provides that 'staff member' has the same meaning as it has in the AFP Act. The reference to 'staff member' in the AFP Act was repealed by the *Australian Federal Police Legislation Amendment Act 2000.*

Item 68 repeals the term 'staff member' in subsection 23YQ (1) and inserts a replacement term 'AFP appointee'. Item 69 provides that the term AFP appointee has the same meaning as the term has in AFP Act where it means:

- a Deputy Commissioner
- an AFP employee
- a special member, a special protective service officer
- a person engaged overseas under section 69A of the AFP Act to perform duties overseas as an employee of the Australian Federal Police, or
- a person who is determined by the Commissioner under the Act to be an AFP appointee, or is performing certain functions for the AFP under section 69D of the AFP Act.

The replacement of the term staff member is necessary to ensure that the AFP Commissioner can continue to make valid delegations under section 23YQ.

Item 70 – Subsection 23YUC(1)

Section 23YUB provides that the Minister may enter into arrangements with participating jurisdictions to create a register of orders for the carrying out of forensic procedures under Part 1D, or under the corresponding laws of participating jurisdictions. These arrangements facilitate Commonwealth, State and Territory law enforcement agencies being able to inform

and authorise, via the register, a counterpart in a different jurisdiction to perform a forensic procedure on behalf of the agency who has registered the order.

Section 23YUC provides that a person is authorised to carry out the forensic procedure authorised by an order that is registered in accordance with an agreement referred to in subsection 23YUB(1) anywhere in the Commonwealth. The scheme established under section 23YUC aims to ensure that forensic procedures can be effectively carried out where a Commonwealth law enforcement agency identifies the need and is authorised under Part 1D, to carry out a forensic procedure on a person who may be located in one of the participating jurisdictions. For example, the Commonwealth may register an order for a forensic procedure to be undertaken on a person suspected of a Commonwealth offence where this person is located in New South Wales, and where the New South Wales Police Force may be in a better position to locate this person and facilitate the undertaking of the forensic procedure. Under section 23YUC, the New South Wales Police Force may undertake and carry out the relevant procedure in accordance with Division 6 of Part 1D.

Section 23YUC (1) currently requires the person carrying out a forensic procedure (both intimate and non-intimate), authorised by a registered order, to carry out the forensic procedure in accordance with Division 6, and not otherwise. State and Territory law enforcement agencies are therefore required to comply with collection processes under Part 1D rather than the equivalent, but not identical, collection processes established under State and Territory legislation ('the corresponding law of the participating jurisdiction'). As such, this requirement has created an unnecessary administrative burden and has impeded inter-jurisdictional cooperation in serious criminal investigations. The amendments being made by items 70 and 72 of Schedule 1 introduce measures to resolve this issue, where orders relate to non-intimate forensic procedures under Part 1D.

Item 70 amends subsection 23YUC(1) to provide that this subsection will now only refer to intimate forensic procedures by omitting the words 'the forensic procedure' and substituting 'an intimate forensic procedure'. In this situation, intimate forensic procedures, when carried out by a participating jurisdiction in accordance with a registered order, are to be carried out in accordance with Part 1D (as is already the case), given the relative seriousness and intrusiveness of such procedures.

This item implements recommendation 6(e) of the DNA Review to allow a senior police officer or equivalent of another jurisdiction to authorise the carrying out of a non-intimate forensic procedure on a suspect for a Commonwealth offence where the suspect is arrested in that jurisdiction.

Item 71 – Subsection 23YUC(1)

Section 23YUC provides that a person is authorised to carry out the forensic procedure authorised by an order that is registered in accordance with an agreement referred to in subsection 23YUB(1) anywhere in the Commonwealth. Under Part 1D, and equivalent legislation in participating jurisdictions, Commonwealth, State and Territory law enforcement agencies can register orders that authorise a forensic procedure to be carried out by their counterparts.

Item 71 inserts the words 'under this Part' after the words 'an order' in subsection 23YUC(1). Insertion of the reference to Part 1D makes it clear that the reference to 'an order' in

subsection 23YUC(1) only relates to Commonwealth orders made under Part 1D. The reference to an order 'made under this Part' does not alter the interpretation of section 23YUC but makes it clear, on the face of the provision, that constitutionally the Commonwealth can only enable a person to carry out the forensic procedure authorised by an order registered by the Commonwealth

Item 72 – After subsection 23YUC(1)

Section 23YUC provides that a person is authorised to carry out the forensic procedure authorised by an order that is registered in accordance with an agreement referred to in subsection 23YUB(1) anywhere in the Commonwealth. Section 23YUC (1) currently requires the person carrying out a forensic procedure (both intimate and non-intimate), authorised by a registered order, to carry out the forensic procedure in accordance with Division 6 and not otherwise. State and Territory law enforcement agencies are therefore required to comply with collection processes under Part 1D rather than the equivalent, but not identical, collection processes established under State and Territory legislation ('the corresponding law of the participating jurisdiction'). As such, this requirement has created an unnecessary administrative burden and has impeded inter-jurisdictional cooperation in serious criminal investigations.

Recommendation 6(e) of the DNA Review recommended that amendments be made to Part 1D to allow a senior police officer or equivalent of another jurisdiction to authorise the carrying out of a non-intimate forensic procedure on a suspect for a Commonwealth offence where the suspect is arrested in that jurisdiction.[11] The amendments being made by items 70 and 72 of Schedule 1 introduce measures to resolve this issue where orders relate to non-intimate forensic procedures under Part 1D.

Item 72 inserts new subsection 23YUC(1A) to provide that where it is a 'non-intimate procedure' that procedure is to be carried out in accordance with either Part 1D or the law of the participating jurisdiction. This will give law enforcement officers from participating jurisdictions the freedom to choose whether they wish to use law enforcement powers set out in legislation from the Commonwealth, or their jurisdiction.

Item 73 – At the end of Division 11 of Part 1D

Division 6A of Part 1D provides that DNA forensic samples can be collected from persons who are under sentence for a serious or prescribed offence and sets out the relevant procedures for the collection of such samples. These offenders include those who have been convicted of a serious or prescribed offence under a law of the Commonwealth, or a serious or prescribed State offence that has a federal aspect. Such offences are generally punishable by a maximum penalty of imprisonment for life or 2 or more years.

Commonwealth offenders may be imprisoned in State and Territory correctional facilities. Generally, this means that where the DNA of such offenders can be collected under Part 1D, the AFP must negotiate with State and Territory correctional authorities for access to such

[11] *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Report, Recommendation 6(e)

prisoners. In some circumstances, the AFP has been unable to enter correctional facilities because of an absence of any agreement between the AFP and the relevant State or Territory authority as to the conditions of entry. The DNA Review considered that a legislative amendment be made to remove any doubt as to the AFP's ability to enter into arrangement's with State and Territory authorities, and to encourage the provision of access to prisons by the AFP to collect the DNA of certain Commonwealth offenders.

Item 73 would implement recommendation 16(a) of the DNA Review by inserting a new section 23YUDA that provides that the AFP Commissioner may, on behalf of the Commonwealth, enter into an arrangement with the head of a prison or other place of detention in a State or Territory in relation to the carrying out of forensic procedures under Part 1D on offenders who are in that prison, or place of detention. This section would not preclude the AFP from entering relevant facilities under different arrangements in order to conduct the collection procedures.

Item 74 – Saving – orders by senior constable

Item 74 is a savings provision to ensure that amendments made by item 16, Schedule 1, dealing with the replacement of the term 'senior constable' with the term 'senior police officer' do not affect the validity of an order that is already in force under section 23WN of the Crimes Act.

Section 23WN sets out the circumstances in which a senior constable may order the carrying out of a non-intimate forensic procedure on a suspect in custody. Item 16, Schedule 1, replaces references in section 23WN to 'senior constable' with references to a 'senior police officer'. The replacement of this term is a technical amendment and item 74 ensures that orders given prior to the replacement are not affected by the substitution of titles.

Item 75 – Application provision

This item makes it clear that the changes to the procedures being amended by the items set out in Part 1 of Schedule 1 are to commence on or after the commencement of the Schedule.

Measures set out in item 75(1) clarify and amend how certain procedures authorised under Part 1D are to take place. These measures:

- provide that a hair sample is to be taken in the least painful manner known and available (items 22 and 35)
- classify the taking of a sample of blood (other than by a finger prick) as an 'intimate forensic procedure' (items 23 and 34)
- classify the taking of a sample of blood via a finger prick as a 'non-intimate forensic procedure (items 24, 25 and 35)
- classify the taking of a sample of saliva, a buccal swab as a non-intimate forensic procedure (items 26 and 35)
- clarify how Division 6 procedures are to apply in the case of an offender (item 39), and
- clarify the procedure for seeking the informed consent from a parent or guardian of a child or incapable person who is a volunteer (items 48 and 49).

Item 75 applies to ensure that these changes to how forensic procedures are undertaken do not retrospectively affect the validity of procedures carried out prior to the commencement of the Bill.

Measures set out in item 75(2) relate to changes made to the process for sharing samples, collected in accordance with Part 1D, with suspects and offenders. These amendments are set out in items 27, 28, 29, 30, 31, 32 and 33 of Schedule 1. Item 75 applies to ensure that these changes will not retrospectively impose obligations on the AFP to share samples taken prior to the commencement of the Bill. Samples taken prior to the commencement of this Schedule will continue to be shared under current arrangements.

Measures set out in item 75(3) relate to the circumstances in which constables, magistrates and judges may order forensic procedures be carried out on an offender or suspect under Part 1D. Measures set out in item 75(3):

- clarify the circumstances in which applications can be made to obtain orders from a judge or magistrate for a forensic procedure to be carried out pursuant to section 23WR, (items 21 and item 41)
- change the circumstances in which a senior police officer can make an order for a forensic procedure to be carried out pursuant to section 23XWL and section 23XWK (item 40)
- change the circumstances in which a judge or magistrate can make an order for a forensic procedure to be carried out on a offender pursuant to section 23XWO (item 43), and
- make minor technical amendments to the language used to describe how a magistrate or judge is to make an order when authorising for forensic procedures on suspects or offenders (items 45 to 47).

Item 75 applies to ensure that the amendments made to these processes will not invalidate orders made prior to the commencement of this Schedule.

Item 75(4) relates to measures set out in items 42 and 44. These items insert a new section 23XWOA, which creates a scheme for securing the presence of an offender at a hearing at which a judge or a magistrate is to consider an application made under section 23XWO for a forensic procedure to be undertaken on that offender. Item 75 applies to ensure the new process applies from the commencement of this Schedule, and does not invalidate the processes currently used to secure the presence of an offender at hearings of orders made under section 23XWO.

Item 75(5) relates to measures set out at item 51. Item 51 inserts additional requirements in relation to the information that must be given to a volunteer, whose consent is sought to a forensic procedure under Division 6B. Item 75 applies to ensure the new requirements apply from the commencement of this Schedule.

Item 75(6) relates to changes made to the definitions of ‘Commonwealth DNA database system’ and ‘crime scene index’ that are set out at items 53 to 55. These amendments aim to facilitate the AFP responding to requests from foreign law enforcement agencies that DNA profiles, taken or obtained by those foreign law enforcement agencies be matched on NCIDD, and on the Commonwealth DNA database system. Item 75 applies to ensure that the amendments made by items 53 to 55 do not affect the continuity of the Commonwealth DNA database system or the crime scene index.

Item 75(7) relates to measures set out in items 59 and 66. These items, which insert new subparagraph 23YDAE(2)(da) and new subparagraph 23YO(2)(d) that clarify that information can be shared, and the NCIDD or Commonwealth DNA database utilised for the purposes of assisting a foreign country to decide whether to make a request under the *Mutual Assistance in Criminal Matters Act 1987.* Item 75 ensures that the effect of these new subparagraph apply from the commencement of this Schedule.

Measures set out in item 75(8) relate to the extension of a constable's obligation to provide an interpretation facility to suspects under 23YDA, to offenders and volunteers. Items 60 to 64 make amendments to section 23YDA to enhance the availability of interpreters for an offender and volunteer, where the consent of the offender or volunteer is sought to a procedure under Part 1D. Item 75 ensures that these new obligations are not retrospectively imposed on a constable, and does not invalidate consent provided by offenders or volunteers prior to the commencement of this Schedule.

Item 75 (9) relates to amendments made by item 65 which are consequential to the new schemes for sharing of certain samples and materials with offenders and suspects under Part 1D, and which clarify an existing procedure for sharing of material under Part 1D. The amendments set out at item 65 change certain obligations on particular persons to share samples and materials under Part 1D. Item 75 ensures that the new obligations are not retrospectively imposed but apply from the commencement of this Schedule.

Part 2 – Amendments commencing on day to be fixed by Proclamation

Crimes Act 1914

Item 76 – Paragraphs 23WF(2)(b) and (c)

To ensure that persons are fully informed about the process for giving DNA samples, section 23WF sets out the general procedure for seeking informed consent from a suspect to a forensic procedure. Paragraphs 23WF(2)(b) and (c) currently refer to providing a suspect with a written statement setting out either the information or the nature of the matters set out at paragraph 23WJ(1)(a) to (j) including:

- issues related to how consent is to be recorded
- the offence in relation to which the constable wants the procedure carried out
- issues about how the procedure will be carried out, and
- a person's rights in relation to the way in which the procedure is carried out.

Subsections 23WJ(2) to (5) also refer to additional information that must be given when informed consent is sought that is dependent on the particular circumstances of the suspect, that is, whether or not the suspect is in custody.

The DNA Review concluded that the amount of information required to be conveyed in accordance with sections 23WF and 23WJ was considerable, and confusion as to how to convey this information added complexity to the process of seeking consent from persons to a forensic procedure. To reduce this complexity the DNA Review outlined a reformed approach for providing this essential information to individuals.

Recommendation 8(a) of the DNA Review suggested that the matters set out in paragraphs 23WJ(1)(a) to (j) and in subsections 23WJ(2) to (5) could be prescribed in a set of written and oral notifications that aimed to more easily convey the relevant information. The DNA Review also noted that prescribing these forms under regulation would ensure that the information provided was public and easily accessible which would improve transparency around the process of seeking consent.

Item 76 inserts new paragraph 23WF(2)(b) into section 23WF to provide that when seeking informed consent from a suspect, that suspect must be informed of matters set out in section 23WJ in accordance with the regulations and that section. This item does not lessen the current number of matters of which a suspect must be informed prior to consent being sought, but provides for a more appropriate and more streamlined method of conveying these matters to the suspect.

Consultation will be undertaken with the AFP, the Office of the Information Commissioner and other relevant stakeholders, for an appropriate set of procedures to be formulated under the proposed regulations. These procedures will create a set of written and oral notifications to ensure that suspects are able to gain a better understanding of what they are consenting to. Once settled, these notifications will be prescribed in regulations and become public documents.

Item 76 will not commence until regulations have been made prescribing the manner in which a suspect must be informed of the matters set out in subsections 23WJ(1) to (5).

Item 77 – Paragraph 23WG(2)(b)

Section 23WG sets out the process for seeking informed consent to a forensic procedure from a suspect who is an Aboriginal person or a Torres Strait Islander person.

To ensure that persons are fully informed about the process for giving DNA samples, paragraph 23WG(2)(b) requires that the suspect be informed of matters set out in section 23WJ. Section 23WJ sets out the matters of which a suspect must be informed before giving consent.

Item 76 amends section 23WF to ensure that the information relating to matters set out in paragraph 23WJ(1)(a) to (j) and in subsections 23WJ(2) to (5) is conveyed in the most effective and most appropriate manner possible. The form of how this information is to be conveyed is to be decided via a consultation process with relevant stakeholders, and prescribed in regulation. This change was proposed by the DNA Review in response to the general complexity of the current requirements for informing suspects under section 23WF. The DNA Review concluded that the amount of information required to be conveyed in accordance with section 23WJ was considerable and confusion as to how to convey this information added complexity to the process of seeking consent from persons to a forensic procedure. To reduce this complexity, the DNA Review outlined a reformed approach for providing this essential information to individuals

Item 76 of this Schedule makes a change to amend how a suspect, who is not an Aboriginal person or Torres Strait Islander, is provided with information during the process under which their consent is sought.

Item 77 makes an identical change to section 23WG to ensure that, following a similar consultation process, suspects who are Aboriginal persons or Torres Strait Islanders will be informed of matters set out in section 23WJ in accordance with the regulations and that section.

Like item 76, the measure introduced by item 77 does not reduce the current number of matters of which a suspect must be informed prior to consent being sought, but provides for a more appropriate and more streamlined method of conveying these matters to the suspect. Consultation will be undertaken with the AFP, the Office of the Information Commissioner and other relevant stakeholders, for an appropriate set of procedures to be formulated under the proposed regulations. These procedures will create a set of written and oral notifications to ensure that suspects are able to gain a better understanding of what they are consenting to. Once settled these notifications will be prescribed in regulations and become public documents.

Items 76, 77 and 78 together will implement recommendation 8(a) of the DNA review which recommend that that the matters set out in paragraphs 23WJ(1)(a) to (j) and in subsections 23WJ(2) to (5) could be prescribed in a set of written and oral notifications that aimed to more easily convey the relevant information.

Item 78 –Paragraph 23XWG(1)(b)

Section 23XWG sets out the process for seeking informed consent to a forensic procedure from an offender. Paragraph 23XWG(1)(b) requires that the offender be fully informed about forensic procedures in accordance with section 23XWJ. Paragraphs 23XWJ(a) to (i) set out a series of matters that the offender must be informed of prior to their consent being sought. These paragraphs are modelled on the matters that a suspect must be informed of prior to their consent being sought under section 23WJ.

As noted in relation to item 76, Schedule 1, the DNA Review found the requirements set out at section 23WJ were complex and recommended the manner in which the information to be provided under section 23WJ be prescribed in regulations. The DNA Review considered that prescribing the manner for giving the information would add transparency and would ensure that the process of giving the information would be as efficient and as streamlined as possible.

Item 78 changes the process for seeking informed consent from offenders, to reflect the new processes put in place by items 76 and 77 of Schedule 1 in relation to suspects. As with items 76 and 77, a consultation process will be undertaken with the AFP, the Office of the Information Commissioner and other relevant stakeholders, for an appropriate set of procedures to be formulated. These procedures will create a set of written and oral notifications to ensure that suspects are able to gain a better understanding of what they are consenting to. Once settled these notifications will be prescribed in regulations and become public documents.

The measure introduced by item 78 does not reduce the current number of matters of which a suspect must be informed prior to consent being sought, but provides for a more appropriate and more streamlined method of conveying these matters to the suspect.

Item 79 – subsection 23XWR(1)

Section 23XWR sets out the process for seeking informed consent from a volunteer, or the parent or guardian of a volunteer. Subsection 23XWR(1) requires a constable to inform the volunteer of certain matters. These matters, set out at paragraphs 23XWR(1)(a) to (f) include information about the way in which the procedure is to be carried out, that the volunteer is not compelled to undergo the procedure, and that the volunteer may withdraw consent at any times. The list of matters set out in subsection 23XWR is lengthy and the DNA Review recommended that the information to be provided to individuals for the purpose of seeking their consent to a forensic procedure be provided in a combination of oral and written notifications.[12]

Item 79, similar to items 76, 77 and 78 of Schedule 1, provides a mechanism by which regulations could prescribe the manner in which this information is given. Regulations would aim to ensure that the volunteer is informed in the most appropriate and effective manner possible. The particular procedure to be prescribed would be formulated once consultation with relevant stakeholders, such as the Office of the Information Commissioner, had taken place.

Item 79 does not reduce the current number of matters set out in section 23XWR.

Item 80 – Application provision

This item provides that the items set out in Part 2 of Schedule 1 commence on a day to be fixed by Proclamation. Setting the commencement date by Proclamation will ensure that the new requirements relating to how information is to be provided to suspects, offenders and volunteers when their consent to a forensic procedure is being sought, are not imposed until regulations prescribing these requirements are passed. Existing procedures in Part 1D relating to the information to be provided when informed consent to forensic procedures is sought will continue until this time.

[12] *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* Report, Recommendation 8(a) (modified)

Schedule 2 – Amendments relating to disclosure of Australian Crime Commission (ACC) information

The ACC is established under the *Australian Crime Commission Act 2002* (ACC Act) as a statutory authority. It works collaboratively with Commonwealth, State and Territory agencies to combat serious and organised crime. The ACC is the national body responsible for detecting and investigating serious and organised crime and maintaining a leading capability in national criminal intelligence and information services.

Schedule 2 of this Bill makes a range of amendments to the ACC Act to improve and expand the operation of the ACC's information disclosure arrangements.

Section 59 of the ACC Act sets out a range of circumstances in which the ACC may disclose information that would otherwise be subject to the secrecy provision in section 51 of the ACC Act. These circumstances include disclosure to domestic and foreign law enforcement agencies and to prescribed State and Territory bodies where the information is relevant to the activities of that agency or body. However, section 59 does not allow information to be shared with Commonwealth Ministers other than the Minister administering the ACC Act, members of Parliament or the private sector. Moreover, the provisions for sharing with Commonwealth, State and Territory government agencies are unnecessarily complex.

Currently, the Chair of the ACC Board (the Chair) is the sole conduit for information to be provided by the ACC to the Minister administering the ACC Act, and the Inter-Governmental Committee on the ACC (IGC-ACC).

Part 1 of Schedule 2 will allow the Chief Executive Officer of the ACC (the CEO), in addition to the Chair, to report on matters relating to the ACC's conduct in the performance of its functions. As the head of the ACC, the CEO is expected to deal directly with portfolio Ministers and, in so doing, to provide such information as is necessary to inform Ministers about the functioning of the ACC and to support Ministerial decision making. The CEO is also best placed to report on the ACC's activities as the CEO has more involvement than the Chair in the day-to-day operations of the ACC.

Part 2 of Schedule 2 will amend the ACC Act to clearly set out the Commonwealth, State, Territory and foreign and international bodies with which the ACC will be able to share information and the requirements that must be met before information can be shared, and to provide a clear legislative basis for the ACC to share information with private sector bodies where certain specified requirements are met.

Part 1 – Amendments commencing on day after Royal Assent

Australian Crime Commission Act 2002

Item 1- Section 59 (heading)

This item replaces the heading to section 59 with the heading 'Providing reports and information to members of Parliament' (currently 'Furnishing of reports and information'). This new heading better reflects the content of the amended section 59 proposed in this Schedule.

Item 2– Before subsection 59(1)

This item inserts the subheading 'Information for Minister' before subsection 59(1). This new subheading better reflects the content of the amended subsection 59(1) proposed in this Schedule.

Items 3-5 - Before subsection 59(1), and Subsection 59(1) Current subsection 59(1) requires the Chair to keep the Minister informed about the general conduct of the ACC in the performance of its functions. It also requires the Chair to respond to requests from the Minister for information concerning matters relating to the ACC's conduct in the performance of its functions.

Items 3 to 5 will add the CEO after existing references to 'the Chair of the Board' in subsection 59(1).

These items will require the CEO, as well as the Chair, to keep the Minister informed about the ACC's performance of its functions and they will allow the Minister to require the CEO, as well as the Chair, to provide the above information to the Minister. The CEO has more involvement than the Chair in the day-to-day operations of the ACC and is therefore generally better placed to report on the conduct of the ACC's operations. As the head of an agency, the CEO is expected to deal directly with portfolio Ministers and, in so doing, to provide such information as is necessary to inform Ministers about the functioning of the ACC and to support Ministerial decision making. These amendments will ensure that the CEO has the legislative authority to provide information to portfolio ministers for the purpose of keeping ministers up to date with the ACC's activities.

Item 6 – Before subsection 59(1)(A)

This item inserts the subheading 'Information for Inter-Governmental Committee' before subsection 59(1A). This new subheading better reflects the content of the amended subsection 59(1A) proposed in this Schedule.

Items 7 and 8 - Subsection 59(1)(A)

Current subsection 59(1A) requires the Chair to provide information on a specific matter relating to the ACC's performance of its functions to a member of the IGC-ACC if the ACC has undertaken action in the member's jurisdiction.

Items 7 and 8 of Schedule 2 will add the CEO after existing references to 'the Chair of the Board' in subsection 59(1A). These amendments will ensure that the CEO has the legislative authority to provide information to the IGC-ACC for the purpose of keeping ministers up to date with the ACC's activities.

These items will allow the CEO, as well as the Chair, to provide information to a member of the IGC-ACC about conduct of the ACC in that member's jurisdiction. The CEO has more involvement in the day-to-day operations of the ACC and is therefore better placed to report on particular operational matters of the ACC. Allowing the CEO to be another conduit for information between the ACC and the IGC-ACC will ensure that the IGC-ACC is able to be kept fully aware of the ACC's operations.

Items 9 and 10 - Subsection 59(2)

Current subsection 59(2) requires the Chair not to provide information to a member of the IGC-ACC under subsection 59(1A) if he or she considers that disclosure of the information to the public could prejudice the safety or reputation of a person or an operation of a law enforcement agency.

Item 9 will add the CEO after the first occurring existing reference to 'the Chair of the Board' in subsection 59(2). Item 10 will add 'he or she' after 'the Chair' (second occurring).

These items will ensure that the same protection that currently applies to the Chair applies to the CEO if he or she is requested to provide information to a member of the IGC-ACC. As items 7 and 8 will allow the CEO to report to a member of the IGC-ACC on the ACC's operations under subsection 59(1A), it is important that the CEO is also required to not provide information where doing so could prejudice the safety or reputation of a person or a law enforcement agency's operations.

Items 11 and 12 - Subsection 59(3) and Paragraph 59(3)(b)

Currently, subsection 59(3) requires the Chair:

- when requested by the IGC-ACC to provide information to the IGC-ACC concerning a specific matter relating to an ACC operation/investigation, comply with the request, and

- when requested by the IGC-ACC to do so, and may at such other times as he or she thinks appropriate, inform the IGC-ACC about the general conduct of the operations of the ACC.

The only exception to the duty to provide information is set out in subsection 59(5), which provides that the Chair is not to provide information if the disclosure of that information to the public could prejudice the safety or reputation of a person or an operation of a law enforcement agency.

The difference between this subsection and subsection 59(2), is that whereas subsection 59(2) relates to requests for information from individual members of the IGC-ACC, this subsection relates to requests for information from the IGC-ACC itself.

Items 11 and 12 will add the CEO after existing references to the Chair in subsection 59(3).

These items will ensure that the CEO, as well as the Chair, is able to provide the IGC-ACC with information on a specific matter relating to an ACC operation or investigation, or with information about the general conduct of the operations of the ACC. The CEO will also be able to provide information to the IGC-ACC about the general conduct of the ACC's operations whenever he or she considers it appropriate to do so. As the CEO is generally better placed than the Chair to report on ACC activities, these items will help to ensure that an accurate and complete picture of the ACC's performance of its functions can be provided to the IGC-ACC upon request and that the CEO has the legislative authority to provide information to keep IGC-ACC ministers up to date with the ACC's activities.

Item 13 - Subsection 59(5)

Current subsection 59(5) requires the Chair to not provide information to the IGC-ACC under subsections 59(3) or (4) if the disclosure of that information to the public could prejudice the safety or reputation of a person or an operation of a law enforcement agency. Also, if the findings of an ACC investigation include any prejudicial information, the Chair must prepare a separate report in relation to that matter and provide it to the Minister.

Item 13 will add the CEO (as the case requires) after the first occurring reference to 'the Chair of the Board' in subsection 59(5).

This item will ensure that if the IGC-ACC requests information from the CEO under new subsection 59(3) concerning a specific matter or the general conduct of the operations of the ACC, or if the CEO provides information on his or her own initiative, that the CEO will not be able to disclose information that could prejudice the safety or reputation of a person or an operation of a law enforcement agency. This amendment is important to ensure that the CEO cannot provide information that would be prejudicial to a person's safety or reputation or to a law enforcement agency's operation.

Item 14 - Subsection 60(4)

Section 60 of the ACC Act allows the Board to hold public meetings for the purpose of informing the public about, or receiving submissions in relation to, the performance of the ACC's functions and to publish bulletins for the purpose of informing the public about the performance of the ACC's functions.

Item 14 will amend subsection 60(4) to allow the CEO of the ACC to publish bulletins by inserting 'or the CEO' after 'the Board' in that subsection. Due to the composition of the Board, seeking Board approval for a bulletin is a time-consuming process. There may be occasions where the ACC needs to urgently publish a bulletin, which is often not compatible with the requirement to seek approval from the Board. Allowing the CEO to authorise a bulletin will enable bulletins to be released in a much more timely way. This change is also consistent with other amendments in this Schedule which will allow the CEO to provide information on behalf of the ACC where previously only the Chair of the Board was empowered to do so.

Item 15 - Subsection 60(5)

Subsection 60(5) currently prohibits the Board from including in a public bulletin 'any matter the disclosure of which to members of the public could prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence'. Item 15 will amend subsection 60(5) to ensure that this prohibition also applies to the CEO when authorising a public bulletin under subsection 60(4) as amended by item 14.

Item 16 - Application of this Part

This item will set out the application of amendments made by this Part to section 59 of the ACC Act. The item provides that amendments apply in relation to all information possessed by the ACC, whether the information came into the ACC's possession before or after the commencement of the amendments.

These provisions have a retrospective effect in that they will apply to information that came into the ACC's possession before the commencement of the amendments. This is appropriate because it would be illogical for the CEO to be able to provide to the relevant member of Parliament or body information that was obtained after the commencement of the amendments but not information that was obtained before the commencement of the amendments.

Part 2 – Amendments commencing on Proclamation

Subsections 59(7) to (11) of the ACC Act currently set out the circumstances in which the ACC is able to provide information to Commonwealth, State, Territory and foreign bodies where certain conditions are satisfied. However, the provisions allowing the CEO to disclose ACC information to Commonwealth, State, Territory and foreign government agencies are complex and the ACC Act also makes no express provision for the dissemination of ACC information to the private sector other than through public meetings and bulletins of the Board.

The new provisions inserted by this Part will:

- clearly set out the Commonwealth, State, Territory and foreign and international bodies with which the ACC can share information and the requirements that must be met before information can be shared, and
- provide a clear legislative basis for the ACC to share information with private sector bodies where certain specified requirements are met.

Australian Crime Commission Act 2002

Item 17 - Subsection 4(1)

Subsection 4(1) of the ACC Act sets out the definitions that are relevant to the operation of the ACC Act. This item will insert a definition of 'ACC information' into subsection 4(1) of the ACC Act. It will define ***ACC information*** as 'information that is in the ACC's possession'. This will include all information the ACC has in its possession but will not include a thing seized under a search warrant issued under section 22 or a document or thing produced under section 28 or 29 (see the definition of 'returnable item' which will be inserted by item 2 in Schedule 3). This will ensure there is a clear divide between how the ACC deals with 'ACC information' and how it deals with 'returnable items'.

The term 'ACC information' will be used in new sections 59AA and 59AB which will be inserted by item 27. These new sections will govern the disclosure of ACC information to government bodies and to the private sector.

Item 18 - Subsection 4(1)

Subsection 4(1) of the ACC Act sets out the definitions that are relevant to the operation of the ACC Act. This item will insert a definition of 'permissible purpose' into the ACC Act.

Under new sections 59AA and 59AB, which will be inserted by item 27 of Schedule 2, the ACC will be able to share ACC information with public and private bodies if the ACC CEO considers it is relevant to a 'permissible purpose' (in the case of sharing information with

public bodies) or necessary for a 'permissible purpose' (in the case of sharing information with private sector bodies).

The definition of ***permissible purpose*** will set out the reasons for which the ACC will be able to share information. The definition will include the following purposes:

- pperforming functions under section 7A or 7C: Section 7A of the ACC Act sets out the functions of the ACC which include collecting, correlating, analysing and disseminating criminal information and intelligence and to provide strategic criminal intelligence assessments to the Board. Section 7C sets out the functions of the ACC Board which include determining national criminal intelligence priorities, providing strategic direction to the ACC and disseminating strategic criminal intelligence assessments. It is appropriate that the ACC be able to share any information it has for the purposes of sections 7A and 7C. It is appropriate that any information held by the ACC can be used for any function of the ACC whether or not that was the reason for which the information was originally obtained or generated. This purpose will ensure the ACC is able to use all information in its possession in the performance of its functions whether or not they are covered by another purpose in the definition of permissible purpose
- preventing, detecting, investigating, prosecuting or punishing criminal offences or activity that might constitute criminal offences: This purpose is essential to the functions of the ACC. As the central criminal intelligence body of Australia it is vital that the ACC is able to pass on any ACC information that relates to criminal offences or criminal patterns more generally, to assist in law enforcement. For example, if the ACC were conducting a special intelligence operation into child pornography rings, it is important that the ACC is able to pass on any information obtained or generated during that investigation to prevent or prosecute child exploitation offences. There also does not have to be a specific criminal offence in mind before the information will be able to be passed on. For example, the ACC may provide information about suspicious activity to law enforcement that, when combined with other information held by other agencies, demonstrates criminal activity requiring further investigation. Alternatively, the ACC may pass on information about criminal associates obtained during a special investigation to assist in detecting and breaking up a child pornography ring

  This purpose extends to preventing, detecting, investigating, prosecuting or punishing both domestic and foreign criminal offences. As serious and organised crime does not respect traditional national borders, it is important the ACC continues to be able to share information it obtains with its international counterparts. For example, in the special investigation into a child pornography ring mentioned above, the ACC might obtain information relating to offences being committed overseas. This purpose will enable the ACC to pass that information on to the relevant authorities in a foreign country
- preventing, detecting, investigating, prosecuting or punishing breaches of a law that impose a penalty or sanction: Subsection 59(8) of the ACC Act currently provides that the ACC may furnish any information relevant to the taking of civil remedies to the appropriate authorities. As subsection 59(8) will be repealed by item 26 of this Schedule, this purpose will ensure the ACC will continue to be able to share information for this aspect of the taking of civil remedies

- preventing, detecting, investigating, prosecuting or punishing seriously improper conduct: If the ACC obtains information which suggests a public official has engaged in serious misconduct, it is important that the ACC is able to pass that information on to the relevant investigating authorities. For example, the ACC may deem it necessary to notify a particular agency if it receives information about corruption or misconduct, or alternatively it may refer information to regulatory bodies who govern the behaviour of professions
- preventing, detecting or investigating threats to national security: For example, if the ACC is conducting a special intelligence operation into armament dealings, it may obtain information that suggests a terrorist attack is imminent. It is essential that any information obtained is able to be shared with relevant authorities to prevent, analyse or investigate that threat or related threats further
- preventing serious threats to an individual's life, health or safety or to public health or public safety: For example, if the ACC is carrying out a special investigation into child abuse and obtains information suggesting a particular child, or particular class of children are at risk, it is important that the ACC is able to share that information with the relevant authorities. Similarly, if the ACC is aware of an imminent threat to someone's life on the basis of intelligence it has gathered, it is important that there is a clear legislative basis for the ACC to share that information with the relevant authorities to prevent the threatened activity from occurring
- enforcing laws (including laws of a foreign country) relating to proceeds of crime and unexplained wealth: For example, if the ACC is conducting a special intelligence operation relating to drug offences, it is appropriate that any information obtained or generated during that operation is able to be used in confiscation proceedings under the *Proceeds of Crime Act 2002*, to seek an order to restrain the property of the suspect. Similarly, if the ACC is conducting an operation into money laundering, it is important that any information obtained is able to be used in applying for an unexplained wealth order against an individual
- protecting public revenue: For example, if the ACC become aware a person is avoiding tax liability or illegitimately claiming government benefits, it is important that the ACC is able to disclose the information to a government agency responsible for collecting revenue or providing benefits
- developing government policy: ACC information can play an important role in shaping government responses to serious and organised crime. For example, information obtained during an ACC special intelligence operation may be used by government in developing better policy responses to prevent certain crime types such as infiltrating and breaking up child pornography rings or developing better ways of preventing the laundering of funds used in crime
- researching criminology: ACC information can be used to better inform criminological research, which in turn can better inform the development of government policy
- any other purpose prescribed by the regulations: While the purposes set out in this definition aim to capture all the purposes for which the ACC may need to share information, it is not possible to do so definitively. This is because the ACC may not be in a position to know the full range of purposes for which it may need to share information until it has the information. Therefore, this purpose will ensure that if there is some other reason to share information, the ACC is able to seek prescription

of the proposed new purpose in the regulations. The requirement to prescribe purposes provides an appropriate level of Parliamentary scrutiny of additional purposes (as regulations are a disallowable instrument).

Item 19 - Subsection 12(1)(note) This item amends 'note' to 'note 1' to allow for the inclusion of a second note (item 21).

Item 20 - Subsection 12(1)(note)

Subsection 12(1) of the ACC Act requires the CEO to provide evidence of an offence obtained in carrying out an ACC operation or investigation to the appropriate Commonwealth, State or Territory law enforcement agency or Attorney-General. The note at the end of the subsection states that the ACC CEO may also disseminate information under section 59 of the ACC Act.

Item 27 of this Schedule will insert new sections 59AA and 59AB which will govern the sharing of ACC information. Item 20 will amend the note at the end of subsection 12(1) to refer to sections 59AA and 59AB.

Items 21-23 - At the end of subsection 12(1) and At the end of Subsection 12(1)(A)

Subsection 25A(9) of the ACC Act allows an examiner to make an order restricting publication of evidence given before the examiner. The examiner must make such an order if 'the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence'. There has previously been uncertainty over whether orders made under subsection 25A(9) operate to prevent disclosure under sections 12 and 59 of the ACC Act. The Federal Court of Australia recently held, in *Australian Crime Commission v OK* [2010] FCAFC 61, that such provisions are subject to orders made under subsection 25A(9).

The ability of the examiner to make orders under subsection 25A(9) is an important safeguard against the disclosure of information that may prejudice an individual's safety or right to a fair trial. Accordingly it is important that the ACC Act now explicitly provide that orders under subsection 25A(9) preclude disclosure under other provision of the ACC Act allowing for dissemination of information.

Item 23 states explicitly that any disclosure under section 12 of the Act is subject to any relevant direction given under subsection 25A(9)(confidentiality in relation to examinations). Items 21 and 22 insert notes at the end of subsections 12(1) and 12(1A) respectively stating that each subsection is subject to any directions made under subsection 25A(9).

Item 24 - Subparagraph 47(A)(1)(b)(ii)

Section 47A of the ACC Act allows the CEO to make a declaration that the employment of a member of the staff of the ACC (employed under the *Public Service Act 1999*) was terminated because he or she believes on reasonable grounds that the staff member's conduct:

- amounts to serious misconduct (as defined in subsection 47A(7)), and

- is having, or is likely to have, a damaging effect on:
    - the professional self-respect or morale of some or all of the members of staff of the ACC, or
    - the reputation of the ACC with the public, or with an Australian or foreign Government or an Australian or foreign law enforcement agency.

Item 27 of this Schedule will amend the ACC Act to insert new section 59AA which specifies a range of bodies with which the ACC will be able to share ACC information. Item 24 will amend subparagraph 47A(1)(b)(ii) to ensure that that new provision refers to all bodies that the ACC will be able to share information with and who therefore have an interest in the reputation of the ACC. It is important that all of these bodies are included as part of the provision setting out those persons and bodies who have an interest in the ACC's reputation.

Item 25 - At the end of subsection 59(1)

Item 27 of this Schedule will insert section 59AC which clarifies that section 59 and the new sections 59AA and 59AB are subject to any direction given under subsection 25A(9).

Item 25 inserts a note at the end of subsection 59(1) regarding this provision, stating that section 59 is subject to any relevant direction given under subsection 25A(9).

Item 26 - At the end of subsection 59(1)

Subsections 59(7) to (11) of the ACC Act currently set out the circumstances in which the ACC is able to provide information to Commonwealth, State, Territory and foreign bodies.

This item repeals subsection 59(7) to 59(11). These subsections will be replaced by new provisions which will clearly set out how the ACC is able to deal with ACC information (item 17 of this Schedule will insert a definition of ACC information). The new provisions will be consistent with the current sharing provisions, but will set them out in a simpler and clearer manner. The new provisions will be inserted by item 27.

This item will insert a new subsection 59(7) which will allow the Chair or the CEO to give information to a member of either House of the Commonwealth Parliament or a member of a State or Territory Parliament, if he or she considers that it is in the public interest to do so. The ACC relies on cooperation between Commonwealth, State and Territory bodies, so it is important that members of Parliament are able to be kept up to date with the ACC's activities. For example, the ACC may need to brief State or Territory Ministers whose responsibilities are relevant to criminal justice or parliamentary committees that are conducting inquiries on a matter that forms part of, or is relevant to, an ACC investigation. This item will ensure that the ACC can share information with Commonwealth, State and Territory members of parliament as required.

Item 27 - After section 59

Subsections 59(7) to (11) of the ACC Act currently set out the circumstances in which the ACC is able to provide information to Commonwealth, State, Territory and foreign bodies where certain conditions are satisfied. However, the provisions allowing the ACC CEO to disclose ACC information to Commonwealth, State, Territory and foreign government agencies are complex.

The ACC Act also makes no express provision for the dissemination of information outside of government other than through public meetings and bulletins of the Board. With the growing recognition of the importance of public-private partnerships in combating organised crime, a more comprehensive approach to sharing ACC information with the private sector is required.

Issues with the current provisions include:

- subsections 59(7) and (9) authorise disclosure of different but overlapping classes of information to differently described, but overlapping, classes of agencies
- subsection 59(8) provides for the ACC to share information for the taking of civil remedies, however, this is arguably also allowed under both subsection 59(7) and (9) making subsection 59(8) redundant, and
- subsection 59(7) does not allow the ACC to disseminate information to many foreign and international agencies when it would sometimes be desirable to do so.

The new provisions inserted by this item will:

- clearly set out the Commonwealth, State, Territory and foreign and international bodies with which the ACC will be able to share information and the requirements that must be met before information can be shared, and
- provide a clear legislative basis for the ACC to share information with private sector bodies where certain specified requirements are met.

Administratively, the ACC will continue to apply appropriate protection to information provided to it under statutory powers or otherwise, for example through the application of appropriate security classifications and other protections to information including personal or commercially sensitive information. The need to protect such information will be an important factor for the CEO to consider in making a decision as to whether to disclose particular information.

<u>Section 59AA – Disclosing information to government bodies</u>

Section 59AA will replace subsections 59(7), (8), (9) and (11), which will be repealed by item 26 of this Schedule. Section 59AA will closely mirror the ability to share information currently available to the ACC in those subsections. New section 59AA will clearly outline all the bodies with which the ACC will be able to share information and will expand the range of bodies with which the ACC can share information to include foreign intelligence bodies and prescribed international bodies. The amended provisions will remove the need for Commonwealth, State and Territory bodies to be prescribed. The proposed amendments will also clearly and explicitly set out the purposes for which information can be shared, compared with the current provision which simply allows sharing where the information is ‘relevant to the activities of the agency or body’.

Subsection 59AA(1)

Subsection 59AA(1) will be the main provision setting out with whom the CEO will be able to share ACC information and the circumstances in which the sharing will be able to take place.

The decision to share information will reside with the ACC CEO. This power will be able to be delegated to any SES level staff of the ACC under the general delegation power in section 59A of the ACC Act. Given the sensitivity of the information held by the ACC, it is appropriate that the decision to share information is limited to more senior employees.

Paragraphs 59AA(1)(a) to (e) will set out the persons and bodies with whom the ACC will be able to share information.

Paragraph 59AA(1)(a) will allow the ACC to give ACC information to a 'body' of the Commonwealth, a State or a Territory. Body will be defined in new subsection 59AA(3). This paragraph will authorise the ACC to share ACC information with any public body (however described) at the Commonwealth, State or Territory level.

Paragraph 59AA(1)(b) will allow information to be shared with a person who holds any office or appointment under a law of the Commonwealth, a State or a Territory. This will ensure that, as well as allowing information sharing with bodies, information will also be able to be shared with statutory office holders. For example, this will allow the ACC to share information containing allegations of child related abuse and violence with the Commissioner for Children and Young People in New South Wales and other similar positions in other States and Territories to ensure the relevant Commissioner is aware of relevant allegations and is able to respond appropriately.

Paragraph 59AA(1)(c) will allow ACC information to be shared with a foreign agency responsible for law enforcement, intelligence gathering or security. As serious and organised crime crosses traditional national borders, it is important the ACC continues to be able to share information with its international counterparts. For example, in investigating a child pornography ring, the ACC may obtain information relevant to foreign offences, or the ACC may have information relating to the illicit movement of funds, commodities or people relevant to a national security context. Given the international nature of organised crime, it is important the ACC is able to share this information with foreign authorities.

Paragraph 59AA(1)(d) will allow the ACC to share information with an international body that has functions relating to law enforcement or gathering intelligence and is prescribed by the regulations. Examples of these international bodies could include INTERPOL and other international policing bodies. The requirement to prescribe agencies provides an added level of scrutiny (as regulations are a disallowable instrument).

Paragraph 59AA(1)(e) will allow the ACC to share ACC information with an international judicial body that is prescribed by the regulations. For example, if the ACC were to discover information that suggests criminals operating in Australia were providing support to, or had knowledge of, the commission of crimes against international law, such as genocide or crimes against humanity, that were under investigation by the International Criminal Court, this will ensure the ACC is able to draw that information to the attention of the Court. The requirement to prescribe agencies provides an added level of scrutiny (as regulations are a disallowable instrument).

Paragraphs 59AA(1)(f) to (h) will set out the circumstances in which ACC information will be able to be shared with the bodies listed in paragraphs (a) to (e).

Paragraph 59AA(1)(f) will state that the ACC CEO will only be able to share information if he or she considers it appropriate to do so. This paragraph replicates current paragraph

59(7)(d) which will be repealed by item 26. This paragraph will require the ACC CEO to specifically turn his or her mind to the need to share the information with that specific body and consider the circumstances in which the sharing will take place.

Paragraph 59AA(1)(g) will state that the ACC CEO will only be able to share information that he or she considers is relevant to a permissible purpose. The definition of permissible purpose will be inserted by item 18. While the definition will include a broad range of purposes, the sharing will still be subject to the limitation in paragraph 59AA(1)(f), that the ACC CEO must consider it appropriate to do so. This will mirror the current position for the ACC.

Paragraph 59AA(1)(h) will replicate current paragraph 59(7)(e) which will be repealed by item 26 and will ensure that, despite the rest of the requirements in subsection 59AA(1), the CEO will only be able to share information if doing so is not contrary to a law of the Commonwealth, a State or a Territory. For example, information provided to the ACC by the ATO could be prevented from further disclosure under the secrecy provision in section 3C of the *Taxation Administration Act 1953*.

Subsection 59AA(2)

Subsection 59(11) currently allows the ACC CEO to furnish to the Australian Security Intelligence Organisation any information that has come into the ACC's possession and that is relevant to security.

Subsection 59AA(2) will replace current subsection 59(11). It will replicate the power currently available to the CEO to share information with ASIO. The ACC will only be able to share information with ASIO under this provision where it is relevant to security as defined in the *Australian Security Intelligence Organisation Act 1979*.

Subsection 59AA(3)

Subsections 59(7) to (9) currently allow the ACC to share information with a number of different entities including agencies, bodies, departments, administrations and instrumentalities. This has created difficulties for the ACC when it has needed to share information with a body that did not fit within the specific descriptions currently used in these subsections. The current provisions also require a body, other than a law enforcement agency, to be prescribed in the regulations before the ACC can share information.

This subsection will set out a definition of 'body' for the purpose of new section 59AA. This definition will include a reference to any body of the Commonwealth, a State or Territory, however it is defined. The definition will also explicitly include a reference to a law enforcement agency to make it clear that the ACC will retain the power to share information with these agencies.

Section 59AB – Disclosing information to private sector bodies

The ACC Act currently makes no express provision for the dissemination of information outside of government other than through public meetings and bulletins of the Board. With the growing recognition of the importance of public-private partnerships in combating organised crime, a better approach to sharing ACC information with the private sector is required.

In 2005, the *Independent Review of Airport Security and Policing for the Government of Australia* (the Wheeler Review) recommended that legislation and regulations governing the sharing of information, both among government agencies and between government and the private sector, be examined to facilitate the flow of information needed to counter crime and terrorism that threatens the aviation sector.

The Parliamentary Joint Committee on the Australian Crime Commission, in their 2005 review of the *Australian Crime Commission Act 2002*, recommended that legislative solutions to reduce barriers to information sharing by the ACC be pursued by Government. This recommendation was accepted by Government.

More recently, the Parliamentary Joint Committee on Law Enforcement, in their *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime* made recommendations to review current information sharing arrangements between law enforcement agencies and private organisations in the aviation and maritime sectors in order to enhance security in these sectors (recommendations 5 and 8). It is also desirable to remove legislative impediments that prevent the ACC from sharing information with other private sector organisations (for example, the telecommunications, financial and insurance sectors) where doing so can help prevent serious and organised crime.

Section 59AB will set out the circumstances in which the ACC can share ACC information with the private sector.

Subsection 59AB(1)

New subsection 59AB(1) will set out the private sector bodies with whom the ACC CEO can share ACC information and the circumstances under which the information can be shared.

The ACC CEO will only be able to share ACC information with a body corporate and not private individuals. The body corporate must also be prescribed in regulations, or within a prescribed class of bodies, before it can receive ACC information. Examples of classes of bodies that will be able to be prescribed will include companies that provide a specified type of service, such as banks, financial institutions, telecommunications companies, internet service providers or insurance companies, or companies conducting business in a specified location or type of location, such as specified categories of airports or ports. For example, either a particular bank or 'banks and financial institutions', as a class of bodies corporate, could be prescribed as bodies with which the ACC can share information. Once a class has been prescribed, so long as the other requirements of new section 59AB are met, then the ACC can share ACC information with any body corporate that falls within the prescribed class.

Subsection 59AB(1) will set out certain prerequisites that the ACC CEO must be satisfied of before he or she will be able to share information. These will be consistent with the prerequisites in new section 59AA for sharing ACC information with public bodies or office holders.

Paragraph 59AB(1)(a) will ensure the ACC CEO can only share information when he or she considers it is appropriate to do so. This paragraph will be the same as paragraph current 59(7)(d), which will be repealed by item 26, and consistent with new paragraph 59AA(1)(f) which applies to the disclosure of information to government bodies. New paragraph 59AB(1)(a) will require the ACC CEO to specifically turn his or her mind to the need to

share the information with that specific body and consider the circumstances in which the sharing will take place.

Paragraph 59AB(1)(b) will ensure the ACC CEO can only share information if the CEO considers that giving the information to that private sector body is necessary for a permissible purpose. A definition of permissible purpose will be inserted by item 18 of this Schedule. It is important that the ACC can share information with the private sector for the each of the permissible purposes set out below:

- performing the functions of the ACC or the ACC Board: An important aspect of partnerships with the private sector is developing intelligence on the extent and seriousness of unreported crime against private sector bodies. As part of the process of gathering information and insights from private sector bodies, and in developing any proposals for the ACC Board, it is likely to be necessary to disclose elements of existing ACC intelligence so as to identify the areas where private sector input will be of most assistance
- preventing, detecting, investigating, prosecuting or punishing criminal offences or activities that might constitute criminal offences: Through an ACC investigation, certain vulnerabilities that exist in a particular sector may come to light. The ACC may seek to inform operators in those sectors of the vulnerabilities in order to allow them to institute mitigation and prevention strategies to avoid exploitation by criminal enterprises
- preventing, detecting or investigating threats to national security: The ACC may pass on information that comes into its possession that is relevant to national security to assist private sector bodies to address security risks and facilitate private sector cooperation with government and law enforcement to mitigate risks
- preventing serious threats to an individual's life, health or safety, or to public health or public safety: The ACC may become aware of threats to individuals, plans to harm criminal opponents or other criminal conduct that poses risks to safety. It will be important that any such intelligence is able to be disseminated as a matter of urgency to all bodies that may need to be involved in preventing or responding to the threat
- enforcing laws relating to proceeds of crime: The ACC may wish to inform entities required to report under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* about developing criminal techniques, or in some cases about particular false identities, in order to help the reporting entities identify suspicious transactions more effectively
- enforcing laws relating to unexplained wealth: For example, the ACC may wish to conduct inquiries designed to eliminate any false claims about legitimate sources of income. Such investigations may require the ACC to provide information to the private sector body alleged to be the source of income in order to test the reliability of the information
- protecting public revenue: If a new type of suspected tax fraud is found to involve the deception of providers of accounting services, it may be necessary for the ACC to provide information to accounting firms to assist them to identify persons or methods likely to be involved in future attempts to engage in similar deceptive conduct

- developing government policy and researching criminology: If development of policy on, or research into, a particular subject matter involves use of external consultants, the ACC may wish to disclose relevant intelligence product to the consultants as well as to the government agencies involved in the process.

Given the sensitivity of much of the information held by the ACC, it is imperative that the ACC retain its overall discretion over whether or not protected information is disclosed to the private sector, and under what conditions the disclosure is made. Paragraphs 59AB(1)(c) and (d) will ensure the ACC CEO retains control over the conditions of any disclosure and the use that is made of the information.

Paragraph 59AB(1)(c) will require the recipient body to undertake not to use or further disclose the information except for a purpose mentioned in subsection (3) or as otherwise required by a law of the Commonwealth, a State or a Territory. Subsection 59AB(3) will require the CEO to specify in writing any purposes for which the information may be used or further disclosed.

Paragraph 59AB(1)(d) will ensure the CEO is not able to share information unless the recipient has undertaken in writing to comply with any conditions imposed by the ACC CEO under subsection 59AB(4), which will allow the ACC CEO to specify any conditions which must be met by the body receiving the ACC information.

Paragraph 59AB(1)(e) will ensure that ACC information will only be able to be shared with a private sector body if doing so will not be contrary to a law of the Commonwealth, a State or a Territory. For example, information provided to the ACC by the ATO may be prevented from further disclosure under the secrecy provision in section 3C of the *Taxation Administration Act 1953*. In such a case, the ACC could not pass that information on to a private sector body.

Subsection 59AB(2)

New subsection 59AB(2) will set out limitations on the CEO's ability to share information with a private sector body. Public officials are subject to accountability regimes (eg code of conduct requirements) to hold them accountable for their actions. As members of the private sector are not subject to such accountability regimes, it is important to place greater restraints on what type of information held by the ACC will be able to be disclosed to the private sector.

Paragraph 59AB(2)(a) will prevent 'personal information' within the meaning of the *Privacy Act 1988* from being shared unless the CEO considers it necessary for:

- preventing criminal offences or activities that might constitute criminal offences (including under a law of a foreign country)
- detecting criminal offences or activities that might constitute criminal offences (including under a law of a foreign country), or
- facilitating the collection of criminal information and intelligence in relation to criminal offences or activities that might constitute criminal offences (including under a law of a foreign country).

Personal information is defined in the Privacy Act as information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether

recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. It is appropriate to allow personal information to be shared to prevent or detect the commission of criminal offences because of the significant public interest in doing so. A specific offence does not have to have been identified when deciding whether or not to share information.

Sharing personal information for these purposes is also consistent with the National Privacy Principles in the Privacy Act, which allow an organisation to use and disclose personal information where that use or disclosure is reasonably necessary for the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty.

Paragraph 59AB(2)(b) will ensure that in any circumstance where the information is confidential commercial information relating to another body or person, the ACC will not, under any circumstances, be able to share any information with the private sector. This is appropriate as the ACC should not be providing an unfair advantage to any private sector body over a competitor through the provision of ACC information.

Subsections 59AB(3), (4) and (5)

New subsections 59AB(3), (4) and (5) will enable the ACC CEO to specify any purposes for which the information may be able to be used or further disclosed and any conditions governing the sharing of the information.

New subsection 59AB(3) will allow the ACC CEO to place tight controls on the use and further disclosure of the information by the private sector body. This is important given the sensitivity of the information the ACC may be disclosing. If the body does not undertake to comply with the specified purposes, then the ACC CEO will not be able to share the information as a result of the operation of paragraph 59AB(1)(c). The purposes for which the ACC CEO will be able to allow the information to be used or further disclosed are limited to permissible purposes. A definition of permissible purposes will be inserted by item 18.

The purposes must be specified in writing. This provides certainty if there is ever a dispute as to the purposes for which the information was disclosed. Using the ACC information for a purpose other than a purpose for which the CEO has specified will be an offence under subsection 59AB(5).

New subsection 59AB(4) will apply when the CEO is sharing 'personal information' (within the meaning of the *Privacy Act 1988*) with a body corporate. The CEO will be required to set conditions which the recipient body must meet before the information is shared and once the information has been shared. Paragraph 59AB(4)(a) will require the CEO to set conditions relating to how the body corporate is to monitor and control further disclosure of the information. Paragraph 59AB(4)(b) will require the CEO to impose a condition prohibiting disclosure of the information by the body corporate to persons outside the body corporate, other than in specified circumstances.

Subsection 59AB(5) will allow the ACC CEO to set any other conditions which he or she considers appropriate in relation to ACC information shared under section 59AB. This will ensure the CEO can specify conditions to ensure that ACC information which is shared with a body corporate will be held securely and will not be inappropriately disclosed within or

outside the receiving organisation. Examples of the conditions which will be able to be imposed under this subsection include:

- requirements for how the information is to be managed, handled, treated, stored, re-published, archived, and destroyed
- requiring any person who may have access to the information to have or obtain a security clearance prior to the provision of information, and
- an obligation to return or destroy the disclosed information.

Subsection 59AB(6)

New subsection 59AB(6) makes clear that conditions specified in writing by the CEO under new subsections 59AB(3), (4) and (5) are not legislative instruments.

Subsection 59AB(7)

Section 51 of the ACC Act makes it an offence to make a record of, or divulge information other than in accordance with the performance of duties under the ACC Act.

As section 51 applies only to the ACC CEO, members of the Board, examiners and members of staff of the ACC, there is no offence that currently applies if private sector recipients of information mishandle ACC information. The inclusion of criminal offences specifically targeted at private sector recipients of information will ensure the proper protection of information that has been disclosed under new subsection 59AB(1).

New subsection 59AB(7) will make it an offence to make a record of the information obtained or to disclose the information to any other person otherwise than in accordance with any purposes specified under subsection 59AB(3) or as required by any other law.

An example of where this offence may apply is where the CEO discloses information to Corporation A for the purposes of investigating the corrupt behaviour of a member of staff of Corporation A, Emma. Another staff member of Corporation A, Sally, who has access to the information provided by the ACC, then discloses the information to Emma to tip her off about the investigation. Sally will be guilty of an offence for using the information other than for the purposes allowed by the CEO.

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence set out in new subsection 59AB(7). Therefore the prosecution will need to prove beyond reasonable doubt that the person:

- was reckless as to the fact that the information was disclosed to the person under new subsection 59AB(1)
- intentionally made a record of the information or disclosed the information to another person, and
- was reckless as to the fact that the further use or disclosure was not for the purpose specified under new subsection 59AB(3) or was not required by any other law.

The offence will apply to both individuals and bodies corporate. Where an employee, director or agent of a body corporate uses information disclosed by the ACC for purposes other than that for which it was disclosed (as described in the example above), then, in

accordance with the general principles of corporate criminal responsibility in Part 2.5 of the Criminal Code, the body corporate may also have committed an offence.

The offence will be punishable by 50 penalty units or imprisonment for 12 months or both. Where a body corporate is convicted of this offence the 'corporate multiplier' in subsection 4B(3) of the *Crimes Act 1914* would apply to allow a maximum pecuniary penalty five times greater.

Subsection 59AB(8)

New subsection 59AB(8*)* makes it an offence to do an act, or omit to do an act, which breaches a condition imposed by the CEO under subsection 59AB(4) or (5).

For example, the ACC CEO may impose a condition that the information which has been shared with the private sector body under new subsection 59AB(1), can only be accessed by persons holding a security clearance. A member of staff, Tara, may disclose the information to another member of staff, Cat, knowing that Cat does not have a security clearance. Tara will have committed an offence under subsection 59AB(8).

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence set out in subsection 59AB(8). To establish this offence, the prosecution will need to prove beyond reasonable doubt that the person:

- was reckless as to the fact that the information was disclosed to the person under subsection 59AB(1)
- was reckless as to the fact that the ACC CEO specified a condition under paragraph 59AB(4)(a) or (b) or subsection 59AB(5) in relation to the information
- the person intentionally did an act or intentionally omitted to do an act in relation to the information, and
- was reckless as to the fact that the act or omission breached the condition.

The offence will apply to both individuals and bodies corporate. Where an employee, director or agent of a body corporate uses information disclosed by the ACC for purposes other than that for which it was disclosed, then, in accordance with the general principles of corporate criminal responsibility in Part 2.5 of the Criminal Code, the body corporate may also have committed an offence.

The offence will be punishable by 50 penalty units or imprisonment for 12 months or both. Where a body corporate is convicted of this offence the 'corporate multiplier' in subsection 4B(3) of the *Crimes Act 1914* would apply to allow a maximum pecuniary penalty five times greater.

Subsection 59AB(9)

The general defences available under Part 2.3 of the Criminal Code will be available to a person accused of an offence under new subsections 59AB(7) or (8).

New subsection 59AB(9) will set out a further defence to the offences in new subsections 59AB(7) and (8). New subsection 59AB(9) will provide that it is a defence if the information

is in the public domain before the person makes the record or disclosure which is the subject of the offence in subsection 59AB(6) or (7).

For the defence to apply, the original disclosure of the information into the public domain (that is the disclosure by the person other than the person subject to the offence) will be required not to have been in contravention of section 51 of the ACC Act or in breach of an undertaking given under paragraph 59AB(1)(a).

The defendant bears the evidential burden of pointing to evidence which supports the defence in subsection 59AB(9). It will generally be much easier for a defendant, rather than the prosecution, to produce evidence showing that the circumstances to which the defence applies do in fact exist because such evidence will be peculiarly within the knowledge of the defendant.

Section 59AC – Confidentiality in relation to examiners

Subsection 25A(9) of the ACC Act allows an examiner to make an order restricting publication of evidence given before the examiner. Under subsection 25A(9), the examiner must make such an order if 'the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence'. There has previously been uncertainty over whether orders made under subsection 25A(9) operate to prevent disclosure under sections 12 and 59 of the ACC Act. The Federal Court of Australia recently held, in *Australian Crime Commission v OK* [2010] FCAFC 61, that such provisions are subject to orders made under subsection 25A(9).

The obligation on the examiner to make orders under subsection 25A(9) is an important safeguard against the disclosure of information that might prejudice an individual's safety or right to a fair trial. Accordingly it is important that it now be made explicit in the legislation that such orders preclude disclosure under existing or new provisions of the ACC Act allowing for disclosure of ACC information.

Section 59AC will state explicitly that any disclosure under sections 59, 59AA and 59AB of the act is subject to any directions made under subsection 25A(9).

Section 59AD – Publication of reports in relation to offences

Subsection 59(10) currently prevents a report under the ACC Act that sets out a finding that an offence has been committed from being made public unless the finding in the report is based on evidence that would be admissible in the prosecution of a person for that offence. Subsection 59(10) will be repealed by item 26 of this Schedule.

New section 59AD will replicate current subsection 59(10) to ensure that the ACC is not able to make a report public where doing so will suggest a person is guilty of an offence based on evidence that would not be admissible in a prosecution of that person.

Item 28 - After paragraph 61(2)(d)

Subsection 61(2) of the ACC Act contains a list of matters which must be included in the annual report prepared by the Chair of the ACC Board. This list currently includes 'the general nature and the extent of any information furnished by the CEO during that year to a law enforcement agency'. Item 28 will amend this section to add to this list a similar

requirement in relation to information shared with private sector bodies under section 59AB. This requirement will provide oversight of the ACC's new ability to share information with the private sector by requiring information on such sharing to be publicly available.

Item 29 - Application of this Part

This item provides that this Part applies to any information that is in the ACC's possession, whether it came into the ACC's possession before or after this Part commences. This will allow the ACC to deal consistently with information that it has lawfully acquired or generated prior to the commencement of the amendments.

Schedule 3 – Amendments relating to returnable items for the Australian Crime Commission (ACC)

The amendments contained in this Schedule will introduce rules governing the use, sharing and retention of things seized under an *Australian Crime Commission Act 2002* (ACC Act) search warrant, and things or documents produced under sections 28 or 29 of the ACC Act, based on equivalent provisions in the Crimes Act.

The ACC Act provides the ACC with several different mechanisms to coercively obtain material that is relevant to a special ACC operation or investigation. Section 22 of the ACC Act allows the ACC to apply for and execute a warrant to search for a thing or things (including a document) of a particular kind that are connected with a special ACC operation or investigation. Section 28 provides examiners with the power to summons witnesses to appear before an examiner at an examination to give evidence and to produce such documents or other things, as outlined in the summons. Section 29 provides examiners with the power to require persons to produce a document or thing to a specified person.

The ACC Act does not currently set out clear rules governing what can be done with material obtained using these coercive powers. For example, subsections 22(8) and (9) and paragraph 12(1)(a) allow the ACC to share a thing seized under a warrant where it is relevant to the investigation of an offence or if it is relevant to the taking of civil remedies. There are no explicit rules governing what can be done with material obtained under sections 28 or 29.

The amendments in this Schedule will ensure there is a clear distinction between how the ACC is to deal with ACC information (Schedule 2 will set out comprehensive rules governing sharing of ACC information (which will be defined by item 17 of Schedule 2)) and a returnable item (which is defined in item 2, Schedule 3).

Australian Crime Commission Act 2002

Item 1 – Subsection 4(1)

Subsection 4(1) of the ACC Act sets out the definitions that are relevant to the operation of the ACC Act. Items 1 to 8 of Schedule 3 will insert new definitions relevant to the changes that will be made by this Schedule.

Item 1 will insert a definition of 'Commonwealth officer' into the ACC Act. 'Commonwealth officer' in the ACC Act will have the same meaning as 'Commonwealth officer' in the Crimes Act.

The Crimes Act defines Commonwealth officer as a person holding office under, or employed by, the Commonwealth (including Commonwealth public servants). The definition of Commonwealth officer in the ACC Act will also include any member of staff of the ACC to ensure that all persons who work for the ACC are subject to the same statutory regime governing the way in which they deal with documents and other things seized or produced under the ACC Act.

Item 2 – Subsection 4(1)

The ACC Act provides the ACC with several different mechanisms to coercively obtain material that is relevant to a special ACC operation or investigation.

Section 22 of the ACC Act allows the ACC to apply for and execute a warrant to search for a thing or things of a particular kind that are connected with a special ACC operation or investigation.

Section 28 provides examiners with the power to summons witnesses to appear before an examiner at an examination to give evidence and to produce such documents or other things, as outlined in the summons. Section 29 provides examiners with the power to require persons to produce a document or thing to a specified person.

The definition of 'returnable item' which will be inserted by item 2 will include a thing seized under a warrant under section 22 or a thing or a document produced under a notice given under section 29 or during an examination conducted under Division 2 of Part II.

The term 'returnable item' will be used in the new provisions governing how the ACC will be able to use, share and retain things and documents that have been obtained under the ACC Act during the course of an ACC special operation or investigation.

Items 3 and 4 – Subsection 4(1) (paragraph (d) of the definition of *serious and organised crime*) and Subsection 4(1) (subparagraph (da)(ii) of the definition of *serious and organised crime*)

Items 3 and 4 will remove references to 'within the meaning of the *Proceeds of Crime Act 2002*' from paragraph (d) and subparagraph (da)(ii) of the definition of serious and organised crime in subsection 4(1) of the ACC Act. These words define what constitutes a 'serious offence' for the purpose of the definition of serious and organised crime.

Item 5 of Schedule 3 will insert a definition of 'serious offence' which will reference the *Proceeds of Crime Act 2002* for the purpose of the definition of serious and organised crime and therefore these words will no longer be necessary in the definition of 'serious and organised crime'.

Item 5 – Subsection 4(1)

Item 5 will insert a definition of 'serious offence' into the ACC Act. 'Serious offence' will, for the purposes of the definition of serious and organised crime, have the meaning given by the *Proceeds of Crime Act 2002*. However, for the rest of the Act, it will have the meaning given by subsection 3(1) of the Crimes Act. A serious offence is defined in subsection 3C(1) of the Crimes Act as any Commonwealth or Territory offence or State offence with a federal aspect that is punishable by two or more years imprisonment that is not a serious terrorism offence (most terrorism offences). This term will be used in new section 24AC which will be inserted by item 10 of Schedule 3.

Item 6 – Subsection 4(1)

This item will insert a definition of 'State or Territory law enforcement agency' into the ACC Act. It will have the same meaning that 'State or Territory law enforcement agency' has under subsection 3ZQU(7) of the Crimes Act. Subsection 3ZQU(7) defines 'State or Territory law enforcement agency' as the police force or police service of a State or Territory, and law enforcement bodies in New South Wales (Crime Commission, Independent Commission Against Corruption and Police Integrity Commission), Victoria (Office of Police Integrity), Queensland (Crime and Misconduct Commission) and Western Australia

(Corruption and Crime Commission). This definition is based on the definition of 'law enforcement agency' in section 6 of the *Surveillance Devices Act 2004*.

Under the new subsection 24AA(8), which will be inserted by item 10 of Schedule 3, the ACC will be able to share a returnable item with a State or Territory law enforcement agency in certain circumstances.

Item 7 – Subsection 4(1)

Item 7 will insert a definition of 'terrorism offence' into the ACC Act. 'Terrorism offence' will have the same meaning as in subsection 3(1) of the Crimes Act. Terrorism offence is defined in subsection 3(1) of the Crimes Act to mean an offence against Subdivision A of Division 72 of the Criminal Code or an offence against Part 5.3 of the Criminal Code. This term will be used in new section 24AC which will be inserted by item 10 of Schedule 3.

Item 8 – Subsection 4(1)

Item 8 will insert a definition of 'terrorist act' into the ACC Act. 'Terrorist act' will have the same meaning as in subsection 100.1(1) of the Criminal Code. This term will be used in new section 24AC which will be inserted by item 10 of Schedule 3.

Item 9 – Subsections 22(8) and (9)

Item 9 will repeal subsections 22(8) and (9) of the ACC Act.

Subsection 22(8) of the ACC Act currently governs what can be done with a thing seized under a section 22 warrant. It states that the head of the special ACC operation or investigation that the thing relates to can retain the thing for as long as is reasonably necessary for the purposes of that operation or investigation. Where the thing is no longer relevant, the thing must be returned to the person entitled to its possession. Subsection 22(8) also allows the thing to be used in taking civil remedies for an offence related to the special investigation or operation.

Subsection 22(9) allows a thing seized under a warrant to be delivered to a Commonwealth, State or Territory Attorney-General for the purpose of assisting in the investigation of criminal offences.

Item 9 will insert detailed rules governing what can be done with a thing seized under a section 22 warrant. Therefore, subsections 22(8) and (9) are no longer necessary.

Item 10 – At the end of Division 1A of Part II

The ACC Act provides the ACC with several different mechanisms to coercively obtain material that is relevant to a special ACC operation or investigation. Section 22 of the ACC Act allows the ACC to apply for and execute a warrant to search for a thing or things (including a document) of a particular kind that are connected with a special ACC operation or investigation. Section 28 provides examiners with the power to summons witnesses to appear before an examiner at an examination to give evidence and to produce such documents or other things, as outlined in the summons. Section 29 provides examiners with the power to require persons to produce a document or thing to a specified person.

The ACC Act does not set out clear rules governing what can be done with material obtained using these coercive powers. For example, subsections 22(8) and (9) and paragraph 12(1)(a) provide a power to share a thing seized under a warrant where it is relevant to the investigation of an offence or if it is relevant to the taking of civil remedies. There are no explicit rules governing what can be done with material obtained under sections 28 or 29.

Schedule 2 of the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* amended the Crimes Act to insert a comprehensive regime for:

- the use and sharing of things that are seized, and documents that are produced, under Part IAA (section 3ZQU), and
- the return of things seized under Part IAA (sections 3ZQX – 3ZQZB).

These provisions were inserted into the Crimes Act to remove uncertainty regarding whether law enforcement agencies could use seized material for purposes other than those for which it was seized. For example, it was not clear whether things seized for the investigation of a particular offence could have been used for the investigation or prosecution of an unrelated offence.

To ensure there is consistency between Commonwealth regimes governing the seizure and production of things and documents, it is desirable that the same rules which govern how things seized under the Crimes Act are used, shared and retained also apply to other seizure and production regimes.

This item will insert new sections, modelled on the Crimes Act provisions, which will govern the use, sharing and retention of documents and other things obtained by the ACC using its coercive powers (returnable items as defined in item 2).

The amendments will also make clear that different rules apply when the ACC is dealing with returnable items compared with when it is dealing with ACC information (which is governed by section 59 and new section 59AA and 59AB (which will be inserted by item 27 of Schedule 2) of the ACC Act).

<u>Section 24AA – Use of and sharing returnable items</u>

Section 24AA will govern the use and sharing of returnable items. It will mirror section 3ZQU of the Crimes Act. A definition of 'returnable item' will be inserted by item 2 and will include things seized under a section 22 warrant and things and documents produced under a notice under section 29 or during an examination conducted under Division 2 or Part II of the ACC Act.

Subsection 24AA(1) will allow the ACC CEO to make a returnable item available to a constable or Commonwealth officer for any of the purposes set out in subsection 3ZQU(1) of the Crimes Act and for the performance of the functions of the ACC under section 7A and the performance of the functions of the ACC Board under section 7C.

'Constable' is defined in subsection 4(1) as a member or special member of the AFP or a member of the police force or police service of a State or Territory. A definition of 'Commonwealth officer' will be inserted by item 1 and will mean 'a person holding office under, or employed by, the Commonwealth (including Commonwealth public servants) as well as a member of the staff of the ACC'. Members of the staff of the ACC (as defined in

subsection 4(1) of the ACC Act) include consultants, legal counsel and seconded State and Territory police officers. It is important to specifically include members of the staff of the ACC because the new provisions will allow a Commonwealth officer to use a returnable item for specified purposes. It is important that all members of the staff of the ACC fall within the scope of these new provisions.

This means that the ACC CEO will be able to share a returnable item with a member (or special member) of the AFP, a member of a State or Territory police force or service, or with a Commonwealth officer. Enabling returnable items to be shared with, and used by, constables is appropriate as both the AFP and a State or Territory police force or service may be involved in the investigation of Commonwealth offences (or Territory offences or State offences with a federal aspect).

The ACC CEO's power to share a returnable item will be able to be delegated to any SES officer under the general delegation power in section 59A of the ACC Act. The power to share a thing under the Crimes Act is given to any constable or Commonwealth officer. However, it is appropriate that the power to share returnable items under the ACC Act is limited to senior ACC officials given the nature of its coercive powers compared to the general warrant powers in the Crimes Act.

Subsection 24AA(2) will allow a constable or Commonwealth officer to use a returnable item for the purposes set out in subsection 24AA(1).

Therefore, subsections 24AA(1) and (2) will provide a direct legislative basis for using or sharing a returnable item for each of the following purposes:

- a purpose referred to in subsection 3ZQU(1) of the Crimes Act. These include:
  - preventing, investigating or prosecuting an offence (offence is defined in subsection 3C(1) of the Crimes Act as an offence against a law of the Commonwealth (other than the *Defence Force Discipline Act 1982*), an offence against a law of a Territory, or a State offence that has a federal aspect (defined in section 3AA of the Crimes Act)): for example, the ACC may execute a search warrant on premises as part of a special investigation into drug operations. In conducting the search, evidence relevant to the suspected drug offences (such as banking records) is seized. It may be discovered at a later part of the investigation that the banking records reveal evidence of an unrelated offence (such as money-laundering). It is appropriate that the bank records can be used as evidence to support a prosecution not only for the drug offences for which they were originally seized, but also for the money-laundering offences
  - proceedings under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002* or a corresponding law within the meaning of either of these Acts: for example, it is appropriate that evidence seized in relation to a Commonwealth serious drug offence is able to be used in confiscation proceedings under a Proceeds of Crime Act for example, to seek an order to restrain the property of the suspect (section 18, Proceeds of Crime Act 2002)
  - proceedings for the forfeiture of the thing under a law of the Commonwealth (for example, section 229 of the *Customs Act 1901*): for example, if drugs are seized in relation to a special operation into drug production, the inclusion of this purpose will allow the drugs, and any other evidence obtained, to be used as evidence in proceedings for the forfeiture of the drugs

- proceedings, applications and requests relating to control orders and preventative detention orders under Part 5.3 of the Criminal Code: for example, if the ACC is conducting a special intelligence operation into armament dealings, it may obtain material that suggests a terrorist attack is imminent. It is appropriate that any evidence obtained is able to be shared with relevant authorities (for example, the AFP) to support an application for, or proceedings related to, control orders and preventative detention orders. This will ensure all evidence is available when taking actions under Part 5.3 of the Criminal Code to prevent terrorist attacks
- investigating or resolving a complaint or an allegation of misconduct relating to an exercise of a power or the performance of a function or duty under Part IAA of the Crimes Act; investigating or resolving an AFP conduct or practices issue (which are dealt with under Part V of the AFP Act); investigating or resolving a complaint under the Ombudsman Act or the Privacy Act; and investigating or inquiring into a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006*. These uses are all necessary to ensure the oversight mechanisms in place to monitor the exercise of ACC powers are able to operate effectively. If the ACC obtains evidence during a special operation that a member of the AFP or ACC is corrupt, this purpose will ensure the ACC is able to provide that material to the relevant authorities to take appropriate action. Similarly, a thing that has been seized during a special operation may also be relevant to the investigation of a complaint made to the Ombudsman
- deciding whether to institute proceedings, to make an application or request, or to take any other action mentioned in any of the preceding paragraphs of this subsection: for example, a document produced during an examination under Division 2 of Part II will be able to be used in deciding whether to make an application for an interim control order under section 104.3 of the Criminal Code
- the performance of the functions of the AFP under section 8 of the AFP Act: the AFP's functions include the provision of police services, the safeguarding of Commonwealth interests and performing the functions conferred by the *Witness Protection Act 1994* and the Proceeds of Crime Acts. This purpose will ensure that the ACC has the legislative authority to share returnable items with the AFP for the performance of the AFP's functions

- performance of the functions of the ACC under section 7A. These functions include collecting, correlating, analysing and disseminating criminal information and intelligence and maintaining a national database of that information and intelligence and undertaking intelligence investigations and special operations. This will ensure the ACC is able to use all returnable items in its possession in the performance of its functions whether or not they are covered by another item in subsection 24AA(1) and whether or not the returnable item was obtained for that purpose

- performance of the functions of the ACC Board under section 7C: the Board's functions include:
  - determining national criminal intelligence priorities
  - authorising the ACC to undertake intelligence operations or to investigate matters relating to federally relevant criminal activity
  - disseminating strategic criminal intelligence assessments, and
  - such other functions as are conferred on the Board by other provisions of the ACC Act.

This will ensure the ACC is able to use all material in its possession in the performance of its functions whether or not they are covered by another item in subsection 24AA(1).

Subsection 24AA(3) will allow the head of a special ACC operation or investigation to which a returnable item relates to make that item available to another member of staff of the ACC for that staff member to use in the performance of any of the functions of the ACC under section 7A or any of the functions of the ACC Board under section 7C. Subsection 24AA(4) will allow a staff member to use a returnable item for either of those two purposes. These provisions will clarify that the rest of section 24AA does not limit the ability of the ACC to share a returnable item as necessary within the organisation and to use that returnable item in the performance of its functions.

Subsection 24AA(5) will allow the ACC CEO to make available to a constable or Commonwealth officer a returnable item for any purpose for which the making available of the thing or document is required or permitted by a law of a State or Territory. Subsection 24AA(6) will allow a constable or Commonwealth officer to use a returnable thing for any other use that is required or authorised by or under a law of a State or a Territory. These provisions will mirror subsections 3ZQU(2) and (3) of the Crimes Act. These provisions are necessary to ensure that the rules governing the use and sharing of returnable items do not override any other provision in State or Territory legislation which allows a returnable item to be used for other purposes.

Subsection 24AA(7) will state that this section will not limit any other law of the Commonwealth that requires or authorises the use of a document or other thing, or requires or authorises the making available (however described) of a document or other thing. This also clarifies that these provisions, while providing direct legislative authority for certain uses, will not override any other uses authorised under another law of the Commonwealth. For example, this section will ensure that section 12 of the ACC Act is not overridden. Section 12 requires the ACC CEO to provide evidence of an offence obtained by the ACC in carrying out an investigation or operation to the Attorney-General of the Commonwealth, State or Territory as the case requires or to the relevant law enforcement agency.

All of these purposes for using and sharing returnable items are important in ensuring that the ACC is able to properly carry out its designated functions as the national body responsible for detecting and investigating serious and organised crime and maintaining a leading capability in national criminal intelligence and information services.

Sharing with State, Territory and foreign law enforcement agencies

It is important that the ACC has in place appropriate mechanisms to allow evidential material it has gathered as part of a special operation or investigation to be used and shared on a national and international level to combat multi-jurisdictional and transnational crime.

Subsection 24AA(8) will provide a clear legislative basis for returnable items to be shared by the ACC CEO with State and Territory law enforcement agencies. This subsection mirrors subsection 3ZQU(5) of the Crimes Act which similarly allows for material obtained under the Crimes Act to be shared with State and Territory law enforcement agencies. Item 6 will insert a definition of State or Territory law enforcement agency into the ACC Act which will refer to the definition of the same term in subsection 3ZQU(7) of the Crimes Act.

Under subsection 24AA(8), a returnable item will be able to be shared with a State or Territory law enforcement agency for any or all of the purposes listed in new subsections 24AA(1), (5) and (6) (described above) as well as any or all of the following additional purposes (but not for any other purpose):

- preventing, investigating or prosecuting an offence against a law of a State or Territory: it is appropriate for returnable items to be shared with State and Territory law enforcement agencies to enable multi-jurisdictional criminal activity to be properly investigated and prosecuted
- proceedings under a corresponding law for a State or Territory offence (within the meaning of the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*): these provisions will enable returnable items to be shared with the appropriate State or Territory law enforcement agency if needed for confiscation proceedings
- proceedings for the forfeiture of things under a law of a State or Territory
- deciding whether to institute proceedings or to take other action mentioned in any of the above.

Subsection 24AA(8), like subsection 3ZQU(5) of the Crimes Act, will provide a framework governing the purposes for which the ACC CEO can share returnable items with State and Territory law enforcement agencies. While this subsection will regulate the decision by the ACC CEO (which will be able to be delegated to an SES member of staff of the ACC under section 59A), it will not govern the process of how such material would be shared, or how the State or Territory law enforcement agency then uses the material. This is because such matters are more appropriately governed by those agencies own secrecy and data protection regimes.

Subsection 24AA(8), like subsection 3ZQU(5) of the Crimes Act, will also allow material to be shared with foreign agencies that have responsibility for law enforcement, intelligence gathering, or security for the purpose in preventing, investigating or prosecuting a Commonwealth, State or Territory offence. These provisions will not enable the item to be shared for the investigation of a foreign offence. This will continue to be governed by the *Mutual Assistance in Criminal Matters Act 1987*.

It is appropriate to allow returnable items to be shared with foreign agencies for the investigation of Commonwealth, State or Territory offences due to the international aspects of many modern offences. For example, child pornography images are often shared by computer users across the globe. Seizure of a hard drive from a computer during the execution of a search warrant in relation to a child pornography special operation can provide evidence of the distribution and origin of images. The data seized from the hard drive (including images) may be required to be shared with foreign law enforcement agencies to determine the origin of images.

Subsection 24AA(9), like subsection 3ZQU(6) of the Crimes Act, will provide that new section 24AA will not prevent the Minister from entering into an arrangement (under his or her Executive power) with a State or Territory Minister to govern the sharing and disposal of returnable items. A Ministerial arrangement could be used to set out the responsibilities and duties of both the sharing and receiving agency, including:

- the process for when something is to be shared
- the relevant record-keeping responsibilities of both jurisdictions, and

- who bears responsibility for the loss of, or damage to, the shared material.

Section 24AB – When returnable items must be returned

Subsection 22(8) currently states that where a thing seized under section 22 is no longer necessary for the purposes of the special operation or investigation, the thing must be returned to the person entitled to its possession. There is currently no obligation under the ACC Act to return material obtained under sections 28 or 29 of the ACC Act.

Section 24AB will be based on section 3ZQX of the Crimes Act. This section will ensure that the ACC must generally return a returnable item (a thing seized under section 22 or a thing or document obtained under section 28 or 29) once it is no longer relevant to the investigation or operation to which it relates or is not being used for one of the purposes for which the returnable item can be used or shared (as provided for in new section 24AA which is described above).

This new section will replace the obligations in current subsection 22(8) (which will be repealed by item 9) relating to the return of things seized under section 22.

Subsection 24AB(1), like subsection 3ZQX(1), will outline when a returnable item needs to be returned to the person from whom it was seized, or to the owner of the thing. This subsection will require the ACC CEO to take reasonable steps to return the thing: when it is not required, or no longer required, for a purpose set out in section 24AA (also inserted by this item) or for administrative or judicial review proceedings.

Section 24AA, inserted by this item, will set out the purposes for which a returnable item can be used or shared. This is described in detail above and includes:

- investigating a Commonwealth, Territory or State offence with a federal aspect
- proceedings under the Proceeds of Crime Act 1987 or Proceeds of Crime Act 2002, and
- proceedings for control orders or preventative detention orders.

The reference to judicial or administrative review proceedings will be necessary as returnable items may be needed for administrative review or judicial proceedings outside the scope of uses that will be listed in new section 24AA. An example of where a thing obtained under a notice to produce under section 29 may be needed for judicial or administrative review proceedings is where a challenge to the notice is brought before a court. In this instance, it may be necessary to produce the thing as evidence in the proceedings as proof that it was properly obtained under the notice.

However, under subsection 24AB(2), the ACC CEO will not have to take reasonable steps to return the returnable item if:

- the item may be retained, sold, destroyed or otherwise disposed of or forfeited because of an order under subsection 24AC(2) (which will be inserted by this item)
- the CEO has applied for such an order and the application has not been determined
- the item may otherwise be retained, destroyed or disposed of under a law or an order of a court or tribunal of the Commonwealth or of a State or Territory, or

- the item is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

The ACC CEO will also not have to take those steps if an order has been applied for under new section 24AC. Section 24AC will allow the ACC CEO to seek an order from an issuing officer to retain, sell, destroy or otherwise dispose of a returnable item if returning the item will result it being used in the commission of a terrorist act, a terrorism offence or a serious offence.

Subsection 24AB(3) will clarify that the ACC will only be under an obligation to return a document of which the ACC actually took possession. The ACC will not be under an obligation to return any copies of that document. For example, if a person is summonsed to attend an examination and bring a copy of their birth certificate, the obligation on the ACC will be as follows:

- if the person brings the original birth certificate and the ACC take possession of the original birth certificate, the ACC will be under an obligation to return the original birth certificate but not any copies the ACC makes of the birth certificate
- if the person brings the original birth certificate, but the ACC copies the certificate at that time and only takes the copy, the ACC will not be under an obligation to return the copy it makes
- if the person brings a certified copy of the birth certificate, and the ACC takes the certified copy, the ACC will be under an obligation to return the certified copy of which it took possession.

Section 24AC – Issuing officer may permit a returnable item to be retained, forfeited etc.

The AFP Commissioner may currently apply to a magistrate for an order in relation to a thing seized under terrorism-related powers in Division 3A, Part IAA of the Crimes Act. If the magistrate is satisfied that there are reasonable grounds to suspect that if the thing is returned to the owner it is likely to be used in the commission of a terrorist act, terrorism offence or serious offence, he or she may make an order that the thing:

- may be retained for the period specified in the order
- is forfeited to the Commonwealth
- is to be sold and the proceeds given to the owner, or
- is to be otherwise sold or disposed of.

There is no equivalent provision for such orders to be made in relation to things seized under Divisions 2, 3 or 4 of Part IAA or produced under Division 4B of Part IAA of the Crimes Act or in relation to returnable items under the ACC Act.

This item will enable the ACC CEO to apply for an order as set out above in relation to any returnable item. Before applying for an order, the ACC CEO will be required to take reasonable steps to discover who has an interest in the thing or document and, if it is practicable to do so, notify each of them of the proposed application. A magistrate will be required to allow a person who has an interest in the thing or document to appear and be heard in determining the application. It is reasonable to apply these obligations to all applications for orders in relation to things or documents obtained under the various powers

to ensure anyone with an interest in the thing or document is given the opportunity to present their case.

Subsection 24AC(1)

This subsection will provide an issuing officer with the power to make an order under subsection 24AC(2) in relation to a returnable item on application by the ACC CEO.

The power of the ACC CEO to make an application will be able to be delegated under section 59A of the ACC Act.

Issuing officer is defined in subsection 4(1) of the ACC Act to mean a Judge of the Federal Court, a Judge of a Court of a State or Territory or a Federal Magistrate.

A definition of returnable item will be inserted by item 2.

Subsection 24AC(2)

This subsection will set out when an issuing officer is able to make an order. The issuing officer will be able to make any of the orders that will be listed in subsection 24AC(3) if there are reasonable grounds to suspect that the returnable item is likely to be used in the commission of a terrorist act, a terrorism offence or a serious offence if it is returned to:

- the owner of item
- the person from who the item was seized, or
- the person who produced the item.

Definitions of serious offence, terrorist act, terrorism offence will be inserted by items 5, 7, 8 respectively.

Subsection 24AC(3)

This subsection will set out the orders that an issuing officer will be able to make. Firstly, the issuing officer will be able to order that the item continue to be retained by the ACC for a specified period. The issuing officer will be able to determine what this period will be. Secondly, the issuing officer will be able to order that the item is forfeited to the Commonwealth. Thirdly, if the returnable item is not a document, the issuing officer can order that the item be sold with the proceeds being given to the owner, or that the item be sold in another way. Finally, the issuing officer will be able to make an order that the item is to be destroyed or otherwise disposed of. This subsection will ensure the issuing officer is able to make the most appropriate order to meet the circumstances of the particular case.

Subsection 24AC(4)

This subsection will set out what the issuing officer is required to do if he or she does not suspect that the returnable item, if returned, is likely to be used in the commission of a terrorist act, a terrorism offence or a serious offence. The subsection will require the issuing officer to order that the item be returned to:

- the owner of the item
- the person from whom the item was seized, or

- the person who produced the item.

Subsection 24AC(5)

This subsection will require the ACC CEO, prior to making an application to an issuing officer for an order, to take reasonable steps to discover and notify each person who has an interest in the retention of the item. This will ensure that everyone with an interest in an item can be made aware of the proposed application. The ACC CEO will only have to notify each person who has an interest in the retention of the item if it is practicable to do so.

Subsection 24AC(6)

This subsection will provide that where an application is made, the issuing officer must allow a person who has an interest in the return of the item to appear and be heard in determining the application. This will ensure that their interest can be taken into account in determining the application.

Subsection 24AC(7)

This subsection clarifies that the functions conferred on an issuing officer under this section are conferred on the officer in his or her personal capacity and not as a member of a court. This will mirror subsection 22(14) and subsection 23(8) which state that other functions conferred on an issuing officer are conferred on the officer in his or her personal capacity.

Subsection 24AC(8)

This subsection ensures that where an issuing officer is performing a function under new section 24AC, the issuing officer will have the same protection and immunity as if he or she were performing that function as a member of the court of which the issuing officer is a member. This is despite the fact that the issuing officer will be exercising the powers under the section in his or her personal capacity. This will mirror subsection 22(16) and subsection 23(10) which also provide the same protections to an issuing officer when performing duties under those sections.

Item 11 – Application of this Schedule

This item is an application provision that states that the amendments in this Schedule will apply in relation to things seized, or documents produced, before, on or after commencement of this Part.

This will allow the ACC to deal consistently with returnable items that they have lawfully acquired prior to the commencement of the amendments.

Schedule 4 – Amendments relating to the Integrity Commissioner's investigative powers

In 2006, the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (the LEIC Act) was enacted to enhance the integrity of Commonwealth law enforcement agencies. The LEIC Act establishes the Australian Commission for Law Enforcement Integrity (ACLEI) and the position of the Integrity Commissioner and provides them with powers to prevent, detect and investigate corrupt conduct within Australian Government law enforcement agencies.

The LEIC Act provides a framework for dealing with allegations of corrupt conduct within Commonwealth law enforcement agencies. The Integrity Commissioner can investigate corrupt conduct, report on corruption issues and refer corruption issues to law enforcement agencies in appropriate circumstances. The Integrity Commissioner can recommend that criminal, civil and/or asset confiscation proceedings be brought for contraventions of Commonwealth laws by staff members of law enforcement agencies.

Schedule 4 amends the LEIC Act, to:

- change terminology and some rules relating to the provision of information, documents or things to the Integrity Commissioner
- allow an arrest warrant issued by the Integrity Commissioner to be executed by a nominated authorised who did not apply for the warrant
- clarify the use of force, and what items can be seized when executing search warrants issued by the Integrity Commissioner
- provide ACLEI with a contempt power in line with that exercisable by the Australian Crime Commission, and
- make minor amendments to fix drafting errors in the LEIC Act.

Law Enforcement Integrity Commission Act 2006

Item 1 – Subsection 5(1)

Item 1 inserts a definition of 'constable' into section 5 of the LEIC Act. 'Constable' will be defined to mean a member or special member of the Australian Federal Police (AFP) or a member of the police force or police service of a State. Under section 5 of the LEIC Act, 'State' includes the Australian Capital Territory and the Northern Territory. The insertion and reference to the definition of 'constable' in the LEIC Act will result in members or special members of the AFP or a member of a police force or police service of a State or Territory being able to use reasonable force against persons and to take part in the search of persons when executing a search warrant under the LEIC Act.

Under section 140 of the LEIC Act, the Integrity Commissioner may provide written authorisation for a person to be an authorised officer. In order to provide the authority, the person must be a member of ACLEI or a member of the Australian Federal Police.

Under section 117 of the LEIC Act, only 'authorised officers' may use reasonable force against persons when executing a search warrant. In executing the search warrant, authorised officers may obtain assistance from 'assisting officers.' Assisting officers, who are not also

'authorised officers', are only able to use reasonable force against things (for example, to open doors). In addition, only authorised officers can take part in searching a person. 'Assisting officers' who are not also authorised officers cannot take part in the search of a person.

Members or special members of the AFP, or members of a State or Territory police force, who are trained to search persons and use force often assist authorised officers during the execution of warrants issued under the LEIC Act. Under section 117, these officers are not currently allowed to use force or take part in the search of persons, even though they would be authorised to use force or search persons when executing warrants under other legislation, including the *Crimes Act 1914* (Cth).

Items 38 and 39 and 40 of this Schedule will address these anomalies, by amending section 117, to refer to 'constables' as well as 'authorised officers'.

Item 2 – Subsection 5(1)

Item 2 inserts a definition of 'Federal Court' into section 5 of the LEIC Act, to clarify that references in the LEIC Act to the Federal Court are references to the Federal Court of Australia.

Item 3 – Subsection 5(1)

Item 3 inserts a definition of 'in contempt of ACLEI' in subsection 5(1) of the LEIC Act, to have the meaning given to it by section 96A (to be inserted by Item 29 of this Schedule). Item 29 will provide ACLEI with the power to refer an uncooperative witness in an examination to a superior court to be dealt with as if the witness were in contempt of that court. Section 96A will list the LEIC Actions that will constitute contempt. The phrase 'in contempt of ACLEI' will be relevant to the new provisions inserted by Item 29.

Item 4 – Subsection 20(1) (note)

Item 4 amends the note after subsection 20(1) to a minor drafting error, replacing the word 'referred' with 'notified'. Paragraph 20(1)(a) of the LEIC Act requires the head of a law enforcement agency who has notified the Integrity Commissioner of a significant corruption issue to give to the Integrity Commissioner information and documents that relate to the corruption issue which are in the agency head's possession or control. Subsection 21(1) of the LEIC Act requires the agency head who has notified the Integrity Commissioner of a significant corruption issue to pass on relevant information of which the agency head subsequently becomes aware. The note after subsection 20(1) refers to section 21 of the LEIC Act, however uses the language of 'referred' rather than 'notified'. The amendment to the note after subsection 20(1) will create consistent references to the notification of a significant corruption issue by the head of a law enforcement agency to the Integrity Commissioner.

Item 5 – Section 21 (heading)

Item 5 amends the heading to section 21, to correct a minor drafting error, replacing the word 'referred' with 'notified'. Subsection 21(1) of the LEIC Act requires the agency head who has notified the Integrity Commissioner of a significant corruption issue to pass on relevant information of which the agency head subsequently becomes aware. However, the heading to

section 21 is currently ‘Law enforcement agency head to pass on new information in relation to corruption issue already referred’. The amendment to the heading to section 21 will create consistent references to the notification of a significant corruption issue by the head of a law enforcement agency to the Integrity Commissioner.

Item 6 – Part 8 (heading)

Item 6 amends the heading of Part 8 of the LEIC Act, from ‘Public Inquiries into corruption issues’ to ‘Public Inquiries by Integrity Commissioner’. This more accurately reflects the broader context of Part 8 of the LEIC Act, which covers not only public inquiries by the Integrity Commissioner into a specific corruption issue or issues within a law enforcement agency (subsection 71(a)), but also public inquiries into issues about corruption generally in law enforcement agencies (subsection 71(b)) as well as public inquiries into the integrity of staff members of law enforcement agencies (subsection 71(c)).

Item 7 – Subdivision A of Division 1 of Part 9 (heading)

Item 7 amends the heading to Subdivision A of Division 1, Part 9 of the LEIC Act, from ‘Requests by Integrity Commissioner’ to ‘Notices to give information or to produce documents or things’. This heading more accurately reflects the terminology to be used in sections 75 to 77 of the Subdivision, as they will be amended by items 8 and 9 of this Bill. Item 10 inserts new sections 77A and 77B, which will also refer to ‘notices’ rather than ‘requests’.

The change in terminology reflects the mandatory nature of the Integrity Commissioner’s ‘request’ to produce information, documents or things. A person to whom a request is made *must* comply with that request, and it is an offence under section 78 of the LEIC Act to fail to comply with the request. The change in terminology will also bring the LEIC Act in line with other legislation, such as the *Australian Crime Commission Act 2002* and the *Ombudsman Act 1976*, which refer to notices to produce.

Item 8 – Sections 75 and 76

Item 8 repeals section 75 and enacts a new section 75, which does not distinguish between notices to produce issued to staff members of law enforcement agencies and notices to produce issued to other persons. This differs from current sections 75 and 76 of the LEIC Act, which separately provide the Integrity Commissioner with the power to request information, documents or things from staff members of law enforcement agencies, and the power to request information, documents or things from other persons. There are different requirements for requests to staff members of law enforcement agencies from those made to other persons.

Item 8 also repeals section 76 and replaces it with a new section 76, which sets out the requirements for compliance with a notice to produce served under the new section 75.

<u>Section 75</u>

Section 75 will provide the same requirements for the issue and service of a notice to produce, regardless of on whom the notices are served.

Subsection 75(1) empowers the Integrity Commissioner to issue a notice to produce to any person, requiring him or her to give information and/or produce documents or things

specified in the notice. This means that the Integrity Commissioner is only required to issue one notice to obtain, information, documents or things. In order to issue the notice, the Integrity Commissioner must have reasonable grounds to suspect that the information, documents or things will be relevant to the investigation. This threshold is an appropriate safeguard for the use by the Integrity Commissioner of coercive powers. The threshold is one of suspicion, rather than belief because of the investigative nature of ACLEI's functions. For example, in the course of giving evidence at a hearing, a witness may state that an associate may also be able to give evidence relevant to the corruption investigation, however the witness cannot state with any certainty whether this is the case. Alternatively, an informant might advise that documents formerly in her possession have been passed to someone else, however she is unable to confirm whether the documents are still in existence. The threshold of suspicion will enable the Integrity Commissioner to issue a notice on other persons to, for example, produce the relevant documents, without needing to form a reasonable belief that they still exist.

Subsection 75(2) allows the Integrity Commissioner to require information the subject of a notice to be provided in writing. Under existing subsection 76(4) of the LEIC Act, persons other than staff members of law enforcement agencies, are obliged to provide the information requested by the Integrity Commissioner in writing. No such obligation is imposed on staff members of law enforcement agencies under existing paragraph 75(1)(a). The inclusion of one section, applying to all persons served with a notice to produce, removes any distinction and provides the Integrity Commissioner with the discretion to require that the information be provided orally.

Subsection 75(3) states that the notice to produce must:

- be served on a person
- be signed by the Integrity Commissioner, and
- specify the period within which and the manner in which the person must comply with the notice.

Specifying the manner in which a person must comply with the notice will, amongst other matters, allow the Integrity Commissioner to state that the information, documents or things sought in the notice may be delivered to an ACLEI officer other than the Integrity Commissioner. This will eliminate delays where the Integrity Commissioner is required to forward information documents or things to where the investigation is taking place.

The period for compliance which must be specified in the notice to produce will apply equally to both staff members of law enforcement agencies and other persons. Under subsection 75(4), the Integrity Commissioner will need to specify a time to comply with the notice that is at least 14 days after service on the person of the notice, unless the Integrity Commissioner considers that allowing 14 days to comply with the notice would significantly prejudice the investigation. Circumstances where permitting the full statutory time would prejudice an investigation may include time-critical investigations or a risk that the material sought under the notice will be altered or destroyed.

If the Integrity Commissioner specifies a time to comply with the notice that is less than 14 days, subsection 75(5) requires the Integrity Commissioner to record in writing the name of the corruption investigation that would be prejudiced and why a 14 day period would

prejudice the investigation. A written record of the name of the corruption investigation and why it would be prejudiced will only be for the purposes of ACLEI's internal audits and external oversight by the Commonwealth Ombudsman or Attorney General. If a person was given reasons why an investigation would be prejudiced, this might in itself prejudice the investigation, by putting them on notice of the sensitivities of the investigation.

Subsection 75(6) clarifies that the Integrity Commissioner may serve a notice to produce on a person without holding a hearing. In this way, the notice to produce is different to a summons issued under section 83 of the LEIC Act, which will only be issued in relation to a hearing.

Section 76

New subsection 76(1) provides that a person served with a notice under section 75 must comply with the notice within the time specified in the notice or within such further time as the Integrity Commissioner allows.

Subsection 76(2) allows any person served with a notice to write to the Integrity Commissioner for further time to comply with the notice. The application for an extension would have to be made within the timeframe specified for compliance with the notice or within a reasonable time after the notice was to be complied with.

Under subsection 76(3), the Integrity Commissioner may allow further time to someone who has sought additional time, whether or not the person has made an application under subsection 76(2). The Integrity Commissioner will also be able to extend the time on his or her own accord within a reasonable time. There will be limited circumstances where the Integrity Commissioner might wish to grant an extension of time to someone who has not made a written application for extension. These include where the Integrity Commissioner is aware that a person is incapable of making a written application for an extension or where the Integrity Commissioner determines that the material is no longer urgently required because the investigation is moving from a covert to an overt phase, or because certain investigative activities have been delayed.

Under subsection 76(4), the Integrity Commissioner will be required to provide written acknowledgement to a person confirming that they have given all information, documents or things specified in a notice to produce. This acknowledgement will be provided to a person who has provided all information, documents or things specified in a notice to produce whether or not they have provided the information within the time specified in the notice or such further time as the Integrity Commissioner has allowed.

A person who produces all specified information, documents or things within the time frame specified in the notice or such further time as the Integrity Commissioner has allowed under subsection 76(3) will have complied with the notice. As non-compliance with a notice to produce is an offence (see section 78, to be inserted by item 11 of this Schedule), it is important that a person served with a notice has written proof that he or she has complied with the notice. The written acknowledgement provided by the Integrity Commissioner will contain the date of service of the notice to produce and the date of production of the last of the specified information, documents or things, as proof of compliance.

The obligation to provide an acknowledgement will apply to all situations where information is provided under a notice to produce, whether in writing or orally.

In accordance with the non-disclosure regime for notices to produce to be inserted by Item 10 of this Schedule, the Integrity Commissioner will be empowered to issue a notice prohibiting the disclosure of a record of compliance with a notice to produce.

Item 9 – Subsection 77(1)

Item 9 amends subsection 77(1) of the LEIC Act, to remove the reference 'to the Integrity Commissioner in accordance with a request under section 75 and 76' and replace it with 'in accordance with a notice under section 75'. This amendment reflects the changes made to sections 75 and 76 by item 8, and in particular:

- the change in terminology, from a 'request' to a particular class of persons, to a 'notice to give information or to produce document or thing,' and
- removal of any requirement for the information, documents or things to be provided directly to the Integrity Commissioner.

The amendment does not affect the Integrity Commissioner's powers to take possession, make copies, take extracts, retain possession and allow inspection of a document or thing.

Item 10 – After Subdivision A of Division 1 of Part 9

Item 10 inserts a new Subdivision AA into Division 1 of Part 9 of the LEIC Act.

The heading of the new Subdivision is 'Prohibitions against disclosing information about notices.' The Subdivision will introduce a non-disclosure regime in relation to notices to produce which have been issued pursuant to sections 75 of the LEIC Act, to ensure that the Integrity Commissioner can effectively control the disclosure of sensitive information. These amendments are necessary as disclosure of a notice to produce, or of the nature of the material sought in the notice, can severely undermine an investigation.

The non-disclosure regime in relation to notices to produce is consistent with the non-disclosure regime in sections 91 and 92 of the LEIC Act, in relation to summonses served under section 83 of the LEIC Act.

Section 77A

Subsection 77A(1) provides that section 77A which deals with the prohibition on disclosing notices to produce, applies to notices which have been served under section 75 of the LEIC Act (as inserted by item 8 of this Schedule).

Subsection 77A(2) allows the Integrity Commissioner to include a notation in the notice to produce, prohibiting disclosure of information about the notice or any official matter connected with the notice. Section 5 of the LEIC Act defines an official matter as a past, present or contingent corruption investigation, hearing held by the Integrity Commissioner or a special investigator in relation to a corruption investigation or court proceedings. The Integrity Commissioner may specify in the notation exceptions to the prohibition on disclosure. For example, it may be necessary for a person served with a notice to consult with others in order to comply with the notice. The Integrity Commissioner may specify to whom or in what circumstances a person served with a notice may disclose information about the notice.

Alternatively a notice to produce may simply prohibit disclosure of the information about the notice or any official matter connected with it, without specifying any exceptions to the prohibition.

Under subsection 77A(3), the Integrity Commissioner *must* prohibit disclosure where disclosure would reasonably be expected to prejudice:

- a person's safety or reputation
- the fair trial of a person who has been, or may be, charged with an offence, or
- the investigation of corruption or any action taken as a result of the investigation.

For example, the Integrity Commissioner's investigation of a corruption issue may involve links to serious and organised crime. The Integrity Commissioner may have reliable information that an individual will be personally at risk if their involvement with an investigation by the Integrity Commissioner becomes public knowledge. This individual may be the recipient of the notice, or may be a third party whose actions are the subject of the notice and of the documents or information sought. In such a situation it is appropriate that the Integrity Commissioner is required to prevent disclosure of the notice and any matters relating to it to protect the safety of that individual and also give the recipient of the notice the confidence to provide full and open disclosure to the Integrity Commissioner.

Under subsection 77A(4), the Integrity Commissioner *may* prohibit disclosure if satisfied that failure to do so might be contrary to the public interest or might prejudice:

- a person's safety or reputation
- the fair trial of a person who has been, or may be, charged with an offence, or
- the investigation of corruption or any action taken as a result of the investigation.

For example, the Integrity Commissioner may prohibit disclosure of information under subsection 77A(4) where there has been no reported threat to the safety or reputation of an individual but where the risk to their safety or reputation is a foreseeable consequence of disclosure.

There may also be public interest reasons for prohibitions on disclosure of information under subsection 77A(4). The Integrity Commissioner may be presented with serious but unsubstantiated allegations and it would not be in the public interest for such allegations to be made public at an early stage of the investigation as it may negatively and unfairly impact upon public perception of, and faith in, law enforcement. This could affect the ability of law enforcement to carry out their vital role in protecting national and individual security.

Under subsection 77A(5) there are no other circumstances where the Integrity Commissioner can include a notation which would prohibit disclosure of the notice to produce or any official matter connected with the notice.

Subsection 77A(6) provides that any notification under subsection 77A(2) must be accompanied with a written statement setting out the rights and obligations conferred or imposed on the person served with the notice by section 77B (as inserted by this item). This item will also insert section 77B into the LEIC Act. Section 77B creates offences for disclosing the existence of the notice or any official matter connected with it.

Subsection 77A(7) specifies that a notification under subsection 77A(2) is cancelled if, as a result of a concluded investigation relating to the notice, criminal proceedings or civil penalty proceedings are commenced.

Under subsection 77A(8), cancellation of the notice in accordance with subsection 77A(8) must be communicated in writing by the Integrity Commissioner to the person served with the notice. As it is an offence under subsection 77B to disclose information that is the subject of a notification under subsection 77A(2), it is essential that a person be made aware when their obligations of non-disclosure have ceased.

Subsection 77A(9) confirms that a credit reporting agency (being a corporation that carries on a credit reporting business) must not make a note on a person's file about a notice to produce information, documents or things to the Integrity Commissioner until a non-disclosure notification has been cancelled. Item 52 separately amends the note to subsection 18K(5) of the *Privacy Act 1988*. This amendment provides that a credit reporting agency must not keep a note on a person's file about a notice to produce issued to that person if the notice to produce includes a notation that information about it is not to be disclosed.

This will ensure that notices to produce served under section 75 of the LEIC Act are treated the same as summonses served under section 83 by virtue of subsection 18K(5) of the Privacy Act.

Section 77B

Under subsection 77B(1), it will be an offence to disclose the existence of the notice or any official matter connected with a notice, which includes a non-disclosure notation which has not been cancelled. The offence applies to a person who discloses the existence of the notice or an official matter connected with the notice within five years of service of the notice. The penalty for the offence is twelve months imprisonment.

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence. To establish this offence, the prosecution would need to prove, beyond reasonable doubt that:

- a person was reckless as to the circumstance of service on them of a notice to produce
- the person was reckless as to the whether the notice included a notation under section 77A of the LEIC Act
- the person intended to disclose the existence of, or any information about, the notice or any official matter connected with the notice
- the person was reckless as to whether the disclosure had not been cancelled by subsection 77A(7) of the LEIC Act
- the person was reckless as to whether the notice had been served within the last five years.

Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware that the circumstance exists or will exist, and having regard to the circumstances know to him or her, it is unjustifiable to take that risk.

Under subsection 77B(2), disclosure is allowed:

- to a legal practitioner to obtain legal advice or representation in relation to the notice
- to a legal aid officer for the purposes of obtaining legal assistance relating to compliance with the notice
- if the person is a body corporate—to an officer or agent of the body corporate to ensure compliance with the notice, or
- if the person is a legal practitioner—to obtain the agreement of another person to disclose information sought in the notice which is covered by legal professional privilege.

A defendant will bear the evidential burden of proving one or more of the circumstances in subsection 77B(2) as a defence to the charge. An evidential burden is appropriate because it is peculiarly within the knowledge of the defendant whether the existence or any official matter connected with the notice has been disclosed to others because of the circumstances listed in subsection 77B(2). For example, the fact that a defendant which is a body corporate passes on information to an agent of the body corporate about a notice, in order to ensure compliance with the notice will not be information that is readily apparent to those prosecuting the charge, but will be known to the body corporate. Once the defendant has satisfied the evidential burden, the prosecution will then have to refute the defence beyond reasonable doubt.

Subsection 77B(3) makes it an offence for a legal practitioner, legal aid officer, officer or agent of a body corporate who has been advised of the existence of a notice, or an official matter connected with a notice which includes a non-disclosure notation which has not been cancelled, to themselves disclose, while still in their position, that information to another person within five years after the notice was served. The penalty for the offence is twelve months imprisonment.

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence. To establish this offence, the prosecution would need to prove, beyond reasonable doubt that:

- a person was reckless as to the circumstances of disclosure to that person about a notice or any official matter connected with a notice to produce that includes a notation under section 77A of the LEIC Act
- the person was reckless as to whether disclosure was permitted to be made to the person because the person was a legal practitioner, legal aid officer, officer or agent of a body corporate
- while the person was a legal practitioner, legal aid officer, officer or agent of a body corporate, the person intended to disclose the existence of, or any information about the notice or any official matter connected with it,
- the person was reckless as to whether the disclosure had not been cancelled by subsection 77A(7) of the LEIC Act, and
- the person was reckless as to whether the notice had been served within the last five years.

Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware that the circumstance exists or will exist, and having regard to the circumstances know to him or her, it is unjustifiable to take that risk.

Under subsection 77B(4), legal professionals and officers and agents of a body corporate with secondary knowledge of the notice have a defence to the offence provision if they themselves disclose the existence of the notice or official matter connected with it because the information is shared:

- with another officer or agent of the body corporate for the purpose of ensuring compliance with the notice
- for the purpose of obtaining or giving legal advice or representation in relation to the notice, or
- for the purpose of seeking legal and financial assistance from the Attorney General under section 221 of the LEIC Act, in relation to an application for administrative review.

This defence ensures that legal professionals can do all things appropriate and necessary in order to properly advise a person served with a notice to produce and ensures that officers and agents of a body corporate do all things necessary to assist a person to comply with the notice.

Any legal practitioner, legal aid officer or an officer or agents of a body corporate who has been charged with disclosing information about a notice under subsection 77B(3) bears the evidential burden of proving that one or more of the circumstances described in subsection 77B(4) was present. An evidential burden is appropriate in this case as the fact that the information has been shared for one of the purposes listed in subsection 77B(4) will be peculiarly within the knowledge of the defendant. Once the defendant has satisfied the evidential burden, the prosecution will then have to refute the defence beyond reasonable doubt.

Under subsection 77B(5) it is also an offence for a legal practitioner, legal aid officer or officer or agent of a body corporate to make a record or disclose the existence of the notice, or any information about a notice which includes a non-disclosure notation which has not been cancelled, after the person ceases to act in that role, and within five years of the service of the notice in question. The penalty for the offence is twelve months imprisonment.

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence. To establish this offence, the prosecution would need to prove, beyond reasonable doubt that:

- a person was reckless as to the circumstances of disclosure to that person about a notice or any official matter connected with a notice to produce that includes a notation under section 77A of the LEIC Act
- the person was reckless as to whether disclosure was permitted to be made to the person because the person is a legal practitioner, legal aid officer, officer or agent of a body corporate
- when the person is no longer a legal practitioner, legal aid officer, officer or agent of a body corporate, the person intended to make a record of the notice, disclose the

existence of the notice or disclose any information about the notice or the existence of it

- the person was reckless as to whether the disclosure had not been cancelled by subsection 77A(7) of the LEIC Act, and
- the person was reckless as to whether the notice had been served within the last five years.

Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware that the circumstance exists or will exist, and having regard to the circumstances know to him or her, it is unjustifiable to take that risk.

Subsection 77B(6) clarifies that for the purposes of the offences in section, disclosing the existence of the notice includes disclosing information from which a person could reasonably be expected to infer its existence. For example, it would be likely that a person who advised a friend that they had been required to provide documents to the Integrity Commissioner, without reference to the notice would still be considered as disclosing the existence of a notice to produce.

Section 77B will apply the same offences for disclosure of a notice to produce that already exist under section 92 for the disclosure of the details of a summons.

Item 11 – Section 78

Section 78 of the LEIC Act makes it an offence for a person to fail to comply with the Integrity Commissioner's 'request' to produce information, documents or things. The penalty for the current offence is two years imprisonment.

Item 11 will repeal and replace section 78, to include an offence for a person who has been served with a notice to produce to fail to comply with the notice within:

- the time specified in the notice, or
- such further time as the Integrity Commissioner has allowed under subsection 76(3) (to be inserted by item 8 of this Schedule).

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence. To establish this offence, the prosecution would need to prove, beyond reasonable doubt that:

- a person was reckless as to the circumstance of service on them of a notice to produce, and
- the person intended to fail to comply with the notice within the period specified or allowed by the Integrity Commissioner.

Section 5.4 of the Criminal Code provides that a person is reckless with respect to a circumstance if he or she is aware that the circumstance exists or will exist, and having regard to the circumstances know to him or her, it is unjustifiable to take that risk.

The new section 78 is different to the previous section 78 in the following respects:

- it changes the terminology from 'request under section 75 to 76' to 'notice under section 75' in accordance with the changes made by item 8 of this Schedule

- it will add as grounds for the offence, a failure to comply with the notice in the time specified on the notice, or such further time as the Integrity Commissioner has allowed, to factor in the new provisions providing timeframes and extensions as per item 8
- it will include a new subsection 78(2), which creates a defence to the offence, where it is not reasonably practicable for a person to comply with the notice within the timeframe specified on the notice or within such further timeframe as the Integrity Commissioner has allowed.

In a prosecution for failing to comply with a notice to produce, the evidential burden will be on the defendant to show why it was not reasonably practicable to comply in the time allowed. An evidential burden is appropriate as the reasons why it was not reasonably practicable to comply with the notice with the timeframe specified or as extended by the Integrity Commissioner will be peculiarly within the knowledge of the defendant. Once the defendant has satisfied the evidential burden, the prosecution would then have to refute beyond reasonable doubt that it was not reasonably practicable to comply with the notice.

Item 12 – Paragraphs 79(1)(a) and (b)

Item 12 removes references to the Integrity Commissioner from paragraphs 79(1)(a) and (b) of the LEIC Act. Subsection 79(1) of the LEIC Act currently allows a legal practitioner to rely on a claim of legal professional privilege when refusing to give information or produce a document or thing to the Integrity Commissioner. Removal of references to the Integrity Commissioner is consistent with the amendments made by items 8 and 9 of this Schedule, which remove the requirement that the information, documents or things are to be provided directly to the Integrity Commissioner.

Item 13 – Subsection 79(1)

Item 13 amends **s**ubsection 79(1) to change the reference from 'requested to do so under section 76', to 'served with a notice to so under section 75'. This is consistent with the changes to the terminology in section 75 of the LEIC Act made by item 8 of this Schedule to reflect the mandatory nature of a request to produce information, documents or things.

Item 14 – Subsection 79(5)

Item 14 will repeal subsection 79(5) and replace it with an express provision which will remove any implication that legal professional privilege has been waived when the information, document or things are produced.

Subsection 79(3) of the LEIC Act allows a legal practitioner to disclose information or produce documents or things that are subject to legal professional privilege if the person to whom the communication was made agrees to the disclosure or production. Subsection 79(5) currently states that section 79 does not affect the law relating to legal professional privilege.

Under subsection 80(5), there are certain things that a person can be compelled to provide on public interest grounds. However, subsection 80(6) allows a person to make a claim of legal professional privilege over those documents. Subsection 80(6) therefore protects, to the extent possible, the disclosure to third parties of public interest documents which are subject to legal professional privilege. No such protection currently exists for documents which are disclosed following an agreement under subsection 79(3).

Proposed subsection 79(5) will expressly prevent ACLEI from sharing the privileged information or documents with any other party. New subsection 79(5) will further clarify that provision of the information, documents or things will not affect a claim for legal professional privilege that anyone might make in relation to the information, documents or things. It will therefore also allow a person or their legal practitioner to claim or continue to claim privilege over the documents in other proceedings.

A person may refuse to provide information, documents or things if privilege is waived when the documents are produced. An express provision protecting legal professional privilege over information documents or things provided is designed to encourage persons to provide information, documents or things that to the Integrity Commissioner or officers of ACLEI, even if they would otherwise not be compelled to provide them.

Item 15 – Subsection 80(1)

Subsection 80(1) of the LEIC Act refers to a person being requested to give information or produce a document or thing under section 75 or 76 of the LEIC Act. Item 15 amends the reference in that subsection from 'requested to do so under section 75 or 76' to 'served with a notice to do so under section 75'. This is consistent with the changes to the terminology made by items 8 of this Schedule to reflect the mandatory nature of a request to produce information, documents or things.

Item 16 – Subsection 80(2)

Item 16 repeals subsection 80(2) of the LEIC Act, which currently requires a person to expressly claim that giving information or producing a document or thing might tend to incriminate them or expose them to a penalty before the information, document or thing will be inadmissible in evidence against the person in criminal proceedings. The protection against self-incrimination must currently be claimed before the giving of any information or production of every document or thing which may incriminate the person. This can result in inconsistent claims against self-incrimination, and impact on the timeliness of production of information, documents or things, particularly where a person is confused about how the process works.

Subsection 80(1) provides that a person who is served with a notice to produce is not excused from giving information or producing a document or thing on the grounds that doing so would tend to incriminate the person or expose the person to a penalty. The repeal of subsection 80(2) will mean that, while a person is still obliged to give information or produce incriminating documents or things, they will automatically be protected by subsection 80(4) from the use of that incriminating evidence in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. The person will no longer be required to make an express claim of privilege against self-incrimination before the use immunity applies. This is consistent with the majority of other legislation providing privilege against self- incrimination.

Item 17 – Subsection 80(5)

Subsection 80(5) of the LEIC Act refers to a person being requested to give information or produce a document or thing under section 75 or 76 of the LEIC Act. Item 17 amends the reference in subsection 80(5) from 'requested to do so under section 75 or 76' to 'served with a notice to do so under section 75'. This is consistent with the changes to the terminology

made by items 8 of this Schedule to reflect the mandatory nature of a request to produce information, documents or things.

Item 18 – Subsection 80(7)

Subsection 80(7) refers to a person being required to give information, or produce a document or thing under section 75 or 76. Item 18 amends subsection 80(7), to remove reference to section 76. This reflects the amendments which will be made to the LEIC Act by the insertion of section 75 by item 8 of this Schedule. Section 75 does not distinguish between notices to produce issued to staff members of law enforcement agencies and notices to produce issued to other persons.

Item 19 – Subsections 81(1) and (2)

Section 81 of the LEIC Act sets out the protections that are available to persons required to give information or produce documents or things to the Integrity Commissioner. Item 19 amends references in subsections 81(1) and 81(2) from 'to the Integrity Commissioner in response to a request under section 75 or 76' to 'in response to a notice served on the person under section 75.' This is consistent with the changes made by items 8 of this Schedule which:

- change the terminology, from a request to a particular class of persons, to a 'notice to give information or to produce document or thing'
- create one section which does not distinguish between notices to produce issued to staff members of law enforcement agencies and notices to produce issued to other persons, and
- remove the requirement that the information, documents or things be provided directly to the Integrity Commissioner.

Item 20 – Subsection 82(3)

Item 20 amends subsection 82(3), to correct a minor technical drafting error. The words of subsection 82(3) will be amended, from 'investigation of corruption issue' to 'investigation of *a* corruption issue.'

Item 21 – Subsection 83(1)

Subsection 83(1) allows the Integrity Commissioner to summons a person to attend a hearing to give evidence or to produce documents or things specified in the summons. Items 21 amends subsection 83(1) to clarify that the summons may require a person to give evidence and/or produce documents or things. This means that only one summons is required when the Integrity Commissioner is seeking that a person give evidence as well as produce documents or things.

Item 22 – Paragraph 83(1)(a)

Subsection 83(1) allows the Integrity Commissioner to summons a person to attend a hearing to give evidence or to produce documents or things specified in the summons. Item 22 amends paragraph 83(1)(a), to clarify that the summons may require a person to give evidence and/or produce documents or things. This means that only one summons is required

when the Integrity Commissioner is seeking the person give evidence as well as produce documents or things.

Item 23 – Paragraph 83(1)(b)

Item 23 amends subsection 83(1) of the LEIC Act, to include a threshold of belief necessary before a summons can be issued. Currently, there is no threshold that the Integrity Commissioner must reach before a summons can be issued. The amendment will provide that a summons can only be issued where the Integrity Commissioner has reasonable grounds to suspect that the evidence or document or things which the person has been summonsed to give or produce will be relevant to the investigation or a corruption issue or the conduct of a public inquiry'. This threshold of reasonable suspicion is appropriate, given the nature of ACLEI investigative functions, and is consistent with amendments made by item 8 of this Schedule.

Item 24 – Subsection 90(2)

Item 24 amends subsection 90(2), to correct a minor technical drafting error. The words of subsection 90(2) will be amended, from 'give a such a direction' to 'give such a direction.'

Item 25 – Paragraph 92(2)(e)

Item 25 will correct a minor technical error in paragraph 95(2)(e), by replacing reference to paragraph 95(2) with paragraph 95(3).

Subsection 92(1) of the LEIC Act makes it an offence for a person to disclose the existence or information about a summons which contains a non-disclosure notation. Under paragraph 92(2)(e) it is a defence to such an offence if the person is a legal practitioner and has made the disclosure for the purpose of obtaining another person's agreement under subsection 95(2) to the legal practitioner answering a question or producing a document or thing at the hearing. However, subsection 95(2) does not make reference to any agreement between a legal practitioner and another person in relating to answering questions or producing documents or things. Subsection 95(3) refers to the agreement that the legal practitioner answers the question or produce the document or thing.

Item 26 – Subsection 95(5)

Subsection 95(3) of the LEIC Act allows a legal practitioner to answer a question or produce a document or thing that is subject to legal professional privilege if the person to whom the communication was made agrees to the answer or production. Subsection 95(5) currently states that section 95 does not affect the law relating to legal professional privilege.

Under subsection 96(5), there are certain communications that a person can be compelled to provide on public interest grounds. However, subsection 96(6) allows a person to make a claim of legal professional privilege over those things. Subsection 90(6) therefore protects, to the extent possible, the disclosure to third parties of public interest documents or communications which are subject to legal professional privilege. No such protection currently exists for documents which are disclosed following an agreement under subsection 79(3).

Item 26 will repeal subsection 95(5) and replace it with an express provision which will remove any implication that legal professional privilege has been waived when the answer is given or document or things are produced. This express provision will prevent ACLEI from

sharing the privileged answer, documents or thing with any other party. The new subsection will further clarify that provision of the privileged answer, documents or thing will not affect a claim for legal professional privilege that anyone might otherwise make in relation to the answer, document or thing. It will therefore also allow a person or their legal practitioner to claim or continue to claim privilege over the documents in other proceedings.

A person may refuse to allow their solicitor to answer a question or provide documents or things to the Integrity Commissioner, if they believe that privilege will be waived when the answer is given or documents are produced. An express provision protecting legal professional privilege over answers, documents or things provided to the Integrity Commissioner in response to a summons is designed to encourage persons to share with ACLEI information documents or things that they would otherwise not be compelled to provide.

Item 27 – Subsection 96(2)

Item 27 will repeal subsection 96(2) of the LEIC Act, which currently requires a person to expressly claim that answering a question or producing a document or thing might tend to incriminate them or expose them to a penalty before the answer, document or thing will be inadmissible in evidence against the person in criminal proceedings. The protection against self-incrimination must currently be claimed in relation to every question, or before the production of every document or thing, which may incriminate the person. This can severely disrupt a hearing if a claim has to be made repeatedly or if a person is confused about how the process works.

Subsection 96(1) provides that a person who is summonsed to appear at a hearing before the Integrity Commissioner is not excused from answering a question or producing a document or thing on the grounds that doing so would tend to incriminate the person or expose the person to a penalty. The repeal of subsection 96(2) will mean that while a person is still obliged to answer or produce incriminating questions or documents, subsection 96(4) would automatically protect them from the use of that incriminating evidence in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. The person will no longer have to make an express claim of privilege against self-incrimination before the use immunity applies. This is consistent with the majority of other legislation providing privilege against self-incrimination.

Despite the use immunity applied by subsection 96(4), documents or things could still be used in evidence to prove that the witness had committed an offence in relation to the examination or to the requirement to produce (for example giving a false or misleading answer or refusing to answer a question) and in proceedings for the confiscation of proceeds of crime.

Item 28 – Paragraph 96(4)(c)

Item 28 amends paragraph 96(4)(c) to include proceedings for an offence against section 77C and section 92 as an exception to the ‘use immunity rule’ when answering questions or producing documents or things to the Integrity Commissioner.

Currently, subsection 96(1) provides that a person who is summonsed to appear at a hearing before the Integrity Commissioner is not excused from answering a question or producing a document or thing on the grounds that doing so could incriminate the person or expose the person to a penalty. The repeal of subsection 96(2) by item 27 of this Schedule will result in

a use immunity applying in relation to all answers given at an examination, and any document or thing produced, if the answer or production would tend to incriminate them or expose them to a penalty.

However, there are certain proceedings outlined in subsection 96(4) where the use immunity does not apply. These include proceedings for an offence under section 93 of the LEIC Act (offences- attendance at hearings etc).

Under section 77A (to be inserted by item 10 of this Schedule) and existing section 91 of the LEIC Act, the Integrity Commissioner may include a notation in, respectively, a notice to produce and a summons, requiring a person not to disclose information about the notice to produce or summons. It will be an offence under the new section 77B (also to be inserted by item 10 of this Schedule) and existing section 92 if the person discloses such information. Offences under section 77C and section 92 are currently not listed in subsection 96(4) as proceedings for which a 'use immunity' does not apply.

At hearings where a summons including a non-disclosure notation has been issued, the Integrity Commissioner will ask a person whether he or she has disclosed any information about the summons. If a use immunity applies to the answer given by the person to that question, the person could not technically be proceeded against for any disclosure of information about the summons. This frustrates the operation of the notation in a summons requiring a person not disclose information about the summons.

It is also conceivable that a person would be asked at a hearing whether they have disclosed any information about a notice to produce served on them under section 75. Again, if the use immunity applies to the answer given by the person to this question, the person could not be proceeded against for any disclosure which is contrary to a notation included in the notice to produce.

The amendment to paragraph 96(4)(c) will ensure that an answer given to the Integrity Commissioner that a person has disclosed information about a notice to produce or summons issued by the Integrity Commissioner will be admissible in evidence against the person in criminal proceedings brought under sections 77B or 92 of the LEIC Act.

Item 29 – After Subdivision E of Division 2 of Part 9

Item 29 inserts new sections 96A-96F into the LEIC Act relating to contempt of ACLEI. These provisions will enable the Integrity Commissioner to refer a witness who is not cooperating with an ACLEI hearing to a court to be dealt with as if the person was in contempt of that court. These provisions will mirror the amendments made to the *Australian Crime Commission Act 2002* (ACC Act) as a result of the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010*.

The Integrity Commissioner has access to coercive information gathering powers. In particular, section 29 provides the Integrity Commissioner with the power to summons witnesses to attend a hearing to give evidence or to produce such documents or other things, as outlined in the summons. Section 75 provides the Integrity Commissioner with the power to require persons to produce a document or thing.

Process for dealing with an uncooperative witness

The LEIC Act contains a number of criminal offences aimed at ensuring that a person issued with a notice or summons complies with that notice or summons. These offences target:

- failing to attend a hearing (subsection 93(1))
- failing to take an oath or affirmation or answer a question (subsection 93(2))
- failing to produce a document or thing (subsection 93(4))
- insulting, disturbing or using insulting language towards the Integrity Commissioner, while performing his/her functions or his/her exercising powers as Integrity Commissioner (subsection 94(1))

These offences are punishable by up to two years imprisonment or a fine not exceeding 24 penalty units.

A hearing may occur at an early or critical stage of an investigation into a corruption issue or a public enquiry. As such, it is crucial that the Integrity Commissioner is able to obtain the information it is seeking at that stage.

There are two issues currently hindering ACLEI from obtaining the information it requires. Firstly, there is no immediate threat of detention in relation to the offences in section 93 and section 94. If a person is summonsed to appear as a witness and attends the hearing but refuses to cooperate, the matter is referred to the Commonwealth Director of Public Prosecutions and the prosecution proceeds by way of summons. It is not possible to arrest a witness for the offences in accordance with the requirements of the Crimes Act.

Secondly, ACLEI investigations are often compromised by the delay in the commencement of court proceedings. It can often take a long time before a matter is brought before a court and even longer before the court is able to deal with the matter. Witnesses have been prepared to not cooperate with examiners, knowing that no penalty will be imposed for at least 12-18 months. Witnesses are aware that they may also be able to avoid criminal conviction (and therefore any penalty) by eventually agreeing to give evidence prior to the completion of the criminal process knowing that the evidence will have lost its value to the investigation/public enquiry by that stage. By delaying when information is provided, a witness is able to effectively delay and frustrate the operation of an ACLEI investigation.

Rationale for changes

This item will mirror the contempt provisions in the ACC Act which provide an examiner with the power to refer uncooperative witness to a superior court to be dealt with as if the witness was in contempt of that court. It will also bring ACLEI into line with various State bodies, such as the NSW Police Integrity Commission, the Queensland Crime and Misconduct Commission and the Western Australian Corruption and Crime Commission, who exercise coercive investigative powers comparable to ACLEI and who currently have a contempt procedure.

Traditionally, criminal contempt of court is a summary process available in superior courts to deal with actions by parties seeking to frustrate the operation of the court. Contempt proceedings are criminal in nature and the standard of proof to be applied is ‘beyond reasonable doubt.’ The amendments allow the Integrity Commissioner to refer contempt

matters to the Supreme Court, rather than providing the Integrity Commissioner with the power to independently exercise a contempt jurisdiction. ACLEI would not deal with the person for contempt and the Supreme Court has full control of the hearing of the allegation from the time the person is brought before that court. This process has been available to the ACC since 2010 and the State agencies for some time and those agencies use the power to cite for contempt sparingly with the threat of action often being all that is necessary to secure compliance.

ACLEI, which investigates allegations of corruption by members of the ACC, should have at least the same powers as that body. An example to illustrate this point is set out below.

An ACC examiner summonses a crucial witness to give evidence relating to an organised crime syndicate. During the course of the hearing, the witness gives evidence suggesting that the syndicate's activities include alleged bribes made to staff member/s of the ACC. The witness is required to give evidence before the ACC, under threat of citation for contempt. ACLEI then summonses the same witness to answer questions based on the same set of facts, and commences an investigation into the activities of the ACC staff member/s. Under existing provisions, ACLEI would not have the power to cite the witness for contempt if they fail to answer the questions. This is clearly undesirable, given the strong interest in promptly identifying and dealing with allegations of corruption within the ACC.

Referring a person to a court to be dealt with for contempt will provide the Integrity Commissioner a swift mechanism to deal with uncooperative witnesses in certain circumstances. It is anticipated that the new contempt provisions will motivate an uncooperative witness to reconsider his or her position and comply with the requirements of an examination, as the witness is immediately subject to the possibility of being taken in custody before a superior court. Unlike the threat of criminal charges being pursued in the future, the threat is real and immediate and witnesses are more likely to cooperate, in order to avoid the threat of detention.

<u>Section 96A</u>

Section 96A will provide that a person is in ***contempt of ACLEI*** if he or she:

- fails to attend a hearing as required by a summons
- fails to appear and report from day to day unless excused or released from further attendance by the Integrity Commissioner
- refuses or fails to take an oath/affirmation when required
- refuses or fails to answer a question when required (unless the person is a legal practitioner claiming legal professional privilege over the answer)
- refuses or fails to produce a document or thing when required under a notice to produce or summons (unless the person is a legal practitioner claiming legal professional privilege over the document or thing)
- if a claim of legal professional privilege is made by a legal practitioner – refuses or fails to reveal the name and the address of the person to whom the privilege applies
- provides false or misleading information to the Integrity Commissioner

- insults, disturbs or uses insulting language towards the Integrity Commissioner while he/she is performing his/her functions or his/her exercising powers as Integrity Commissioner
- creates a disturbance, or takes part in creating or continuing a disturbance in or near the place where the Integrity Commissioner is investigating a corruption issue or conducting a public inquiry
- obstructs or hinders the Integrity Commissioner in the performance of his or her functions
- interrupts a hearing that is being held for the purpose of investigating a corruption issue or conducting a public inquiry, or
- threatens a person present at a hearing that is being held for the purpose of investigating a corruption issue or conducting a public inquiry.

These elements of being 'in contempt of ACLEI' mirror offences currently in the LEIC Act which relate to not cooperating with an ACLEI hearing.

Section 96B

Section 96B will set out the process for the Integrity Commissioner to refer an uncooperative witness to the Federal Court or the Supreme Court of a State or Territory, and for the court to determine whether the person is in contempt of ACLEI, and if so, to deal with that person if he or she was in contempt of that court. The definition of ***Federal Court*** will be inserted by item 3 of this Schedule, to mean the Federal Court of Australia.

Subsection 96B(1) will provide that where the Integrity Commissioner is of the opinion that a person is in contempt of ACLEI (within the meaning given by section 96A), the Integrity Commissioner can make an application to either the Federal Court or the Supreme Court of the State or Territory in which the hearing to is being conducted, to be dealt with for contempt. As the Integrity Commissioner presides over the hearing, it is appropriate that the Integrity Commissioner form the initial (but not conclusive) opinion that a person is in contempt. It is the court (under subsection 96B(5)) that determines whether a person is in contempt, and determines the consequences of being in contempt.

Subsection 96B(2) will require the Integrity Commissioner, before making an application under subsection 96B(1) to inform the person they intend to refer them to a court to be dealt with for contempt. This subsection will ensure that a person is given early notification of the consequences of his or her non-compliance, giving him or her an opportunity to comply with the requirements of the investigation.

Subsection 96B(3) will provide that the application to the court under subsection 96B(1) must be accompanied by a certificate that sets out the grounds for making the application and the evidence in support of the application. The certificate is necessary to set out the matters relevant to the court's determination of whether a person was in contempt of ACLEI. Ordinarily, the certificate would contain a summary of the alleged contempt, and a detailed statement from the Integrity Commissioner outlining why he or she is of the opinion that the person is in contempt. Any additional evidence or statements that become necessary will be able to be adduced under subsection 96B(5).

Subsection 96B(4) will require that a copy of the certificate referred to in subsection 96B(3) is given to the person who is the subject of the contempt proceedings before, or at the same time as, the application is made. This is a necessary and important safeguard to ensure that the person is made aware of the reasons why the Integrity Commissioner believes the person to be in contempt and is given an opportunity to prepare their own case that he or she is not in contempt.

Section 142 of the LEIC Act provides that if ACLEI obtains evidence that would be admissible in a prosecution of an offence, ACLEI must give that evidence to either the relevant Commonwealth or State or Territory Attorney-General, a relevant law enforcement agency or any other Commonwealth or State or Territory agency authorised to prosecute the offence.

If a person is dealt with for contempt under section 96B, it is not appropriate for them to be prosecuted for an offence in relation to this failure to assist with a hearing.
Subsection 96B(5) will provide that ACLEI is not required to give evidence relating to the contempt application to a prosecuting authority under subsection 142 if the Integrity Commissioner makes a contempt application under subsection 96B(1).

This provision will avoid the person being dealt with twice for the same conduct and respects the principle of double jeopardy, which is also separately addressed by proposed section 96F in this Schedule.

Subsection 96B(6) will allow the court to determine that a person was in contempt of ACLEI after considering the certificate, and any evidence or statements by or in support of ACLEI or the person. If a court does find that a person was in contempt of ACLEI, the court may deal with the person as if he or she were in contempt of that court.

Subsection 96B(7) will state that the rules and principles in Chapter 2 of the *Criminal Code Act 1995* apply to proceedings under the contempt provisions. This section is necessary to ensure that the court can apply the general principles of criminal responsibility in Chapter 2 of the Criminal Code to the contempt proceeding as if it was a proceeding for a criminal offence. For example, this will mean that the circumstances in which there is no criminal responsibility, set out in Part 2.3 of Chapter 2 of the Criminal Code, will apply to the contempt proceeding. This is necessary because the contempt provisions are not statutory offences to which Chapter 2 would ordinarily apply.

Section 96C

Section 96C will provide that contempt proceedings are to be conducted in accordance with the ordinary rules and procedures of the court to which the Integrity Commissioner applies. This will ensure that the court will retain overall control of the contempt proceedings from the time the person is brought before that court until the application is disposed of. The Integrity Commissioner will simply be a party to the proceeding.

Subsection 96C(3) will also provide that the certificate submitted under subsection 96B(3) by the Integrity Commissioner stating the grounds for making the application and evidence in support of that application is prima facie evidence showing contempt of ACLEI. This will allow the court to find the facts of the alleged contempt without necessarily having to rely on any oral testimony. This does not prevent the defendant from challenging the evidence.

However, if there is no dispute as to the facts, the certificate will expedite the contempt proceedings.

Section 96D

While it is anticipated that in most instances, uncooperative witnesses will voluntarily attend court, there may be some instances where the assistance of law enforcement is necessary to bring the alleged contemnor to the court. The power to detain a person can also be an effective mechanism to secure compliance from a non-cooperative witnesses because it enables the Integrity Commissioner to make an instant and enforceable threat to that witness's liberty. Anecdotal evidence from State coercive bodies, which have the power to cite witnesses for contempt, indicates that this power is an invaluable tool held in reserve for conducting coercive inquiries.

Section 96D will provide the Integrity Commissioner, when proposing to make an application to the court under subsection 96B(1), to direct a constable to detain a person for the purposes of bringing him or her before a court for contempt proceedings. The definition of ***constable*** will be inserted by Item 1 of this Schedule, to mean a member or special of the AFP or a member of the police of a State. Under subsection 5(1) of the LEIC Act, ***State*** includes a Territory.

If a person is detained, the Integrity Commissioner will be required, under paragraph 96D(2)(a), to apply to the court under subsection 96B(1) as soon as practicable. Under paragraph 96D(2)(b), the person who has been detained must be brought before the court as soon as practicable. Under section 96D(3), the court will then be able to:

- direct that the person be released from detention on the condition that he or she will appear before the court in relation to the application (paragraph 96D(3)(a)), or
- order that the person continue to be detained until the contempt proceedings are completed (paragraph 96D(3)(b)).

Subsection 96D(4) will allow a court to impose other conditions on a person's release under paragraph 96D(3)(a), including for example, that they surrender their passport, give an undertaking as to their living arrangements or report to a law enforcement agency. Conditions may be necessary as a person unwilling to cooperate with the Integrity Commissioner may also be unwilling to cooperate fully with a contempt hearing.

Subsection 96D(5) will allow the court to vary or revoke the conditions made under subsection 96D(4) at any time.

Section 96E

Subsection 96E(1) will enable the Integrity Commissioner to withdraw a contempt application made under subsection 96C(1) at any time. If a person is in detention under section 96D when a contempt application is withdrawn, subsection 96E(2) will require the person to be released from detention immediately.

This section will give a person who initially refuses to comply with the Integrity Commissioner a further opportunity to cooperate. It also provides a safeguard measure, ensuring that a person who is not required to appear before a court is released immediately.

Section 96F

Section 96F(1) will provide that a person can be prosecuted for an offence under the LEIC Act or under a law of a State or Territory, but not under both.

Subsections 96F(2) and (3) will respectively provide that if:

- a contempt application is made under subsection 96B(1) in respect of conduct of a person, and the court deals with the person under section 96B for that conduct, the person is not liable to be prosecuted for an offence in respect of the same conduct, or
- a person is prosecuted for an offence in relation to conduct referred to in an application under subsection 96A(1), an application under section 96B(1) in respect of that same conduct cannot be made.

As the proposed contempt regime will overlap with existing criminal offences relating to obstruction of ACLEI investigations, the Integrity Commissioner will be able to choose the most appropriate enforcement tool in each circumstance. However, once a person's conduct has been dealt with by one route, proceedings under the other will be barred. This is consistent with the 'double jeopardy' rule in section 4C of the *Crimes Act 1914*.

Item 30 – Section 93 (heading)

The heading to section 93 is simply titled 'Offences'. Given that section 94 also deals with offences under the LEIC Act, the heading to section 93 will be amended by item 30 to read 'Offences- attendance at hearings etc'.

Item 31 – Section 94 (heading)

The heading to section 94 is currently headed 'Contempt'. The subsections of section 94 create criminal offences for:

- insulting, disturbing or using insulting language towards the Integrity Commissioner while he/she is performing his/her functions or his/her exercising powers as Integrity Commissioner (subsection 94(1))
- creating a disturbance, or taking part in creating or continuing a disturbance in or near the place where the Integrity Commissioner is investigating a corruption issue or conducting a public inquiry (subsection 94(2))
- interrupting a hearing that is being held for the purpose of investigating a corruption issue or conducting a public inquiry (paragraph 94(3)(a)), or
- doing any other act or thing that would, if the hearing were held in a court of record, constitute a contempt of that court (paragraph 94(3)(b)).

To avoid confusion between this section and new sections 96A to 96F (to be inserted by item 29), item 31 will change the heading to section 94 to 'Offences-disturbing or interrupting hearings'.

Item 32 – Subsection 99(1)

Item 32 repeals and replaces subsection 99(1) of the LEIC Act. The effect of this substitution is to remove 'reasonable grounds to believe' as the appropriate test that an authorised officer

must satisfy in relation to all subparagraphs of subsection 99(1), in order to apply to the appropriate court for an arrest warrant. The item reintroduces the concept of 'reasonable ground to believe" to subparagraphs 99(1)(a), (1)(b) and (1)(c), as the appropriate test to apply when considering whether a person:

- is likely to leave Australia for the purpose of avoiding or giving evidence at a hearing before the Integrity Commissioner (subparagraph 99(1)(a)(ii))
- has absconded or is likely to abscond or is otherwise attempting or likely to attempt, to evade service' of a summons (subparagraph 99(1)(b)(i) and (ii)), or
- has committed an offence under section 93 the LEIC Act (failure to attend a hearing, swear an oath, make an affirmation, answer a question or produce a document or thing) or is likely to do so (subparagraph 99(1)(c)).

The effect of the repeal and substitution is that it will no longer be necessary for an authorised officer to have reasonable grounds to believe certain facts that will be clear from records held by ACLEI. The authorised officer no longer needs to have reasonable grounds to believe that a person:

- has been ordered to deliver his or her passport to the Integrity Commissioner, or
- is to be served with a summons under section 83 of the LEIC Act.

It is appropriate that an authorising officer only need to form reasonable grounds to believe that other persons may take particular actions.

The repeal and substitution of subsection 99(1) will also result in a minor change to subsection 99(1)(b) of the LEIC Act, to change the words "has been served" to "is to be served." The previous wording was clearly a minor technical error, as it is not possible for someone who has been served with a summons to evade service of that summons under subsection 99(1)(b)(ii).

Item 33 and 34 – Subsection 100(1) and after subsection 100(9)

ACLEI uses arrest warrants to prevent witnesses or prospective witnesses from avoiding service of a summons to give or produce evidence. There are three stages to executing an arrest warrant under the LEIC Act:

1. an ACLEI authorised officer applies to a judge for an arrest warrant (section 99)
2. the judge issues the warrant if satisfied by the evidence (subsection 100(1)), and
3. the authorised officer executes the warrant (subsections 100(2)-100(10)).

Section 100 of the LEIC Act only provides for warrants to be executed by the authorised officer who applied for the warrant. An authorised officer is an officer who has been authorised by the Integrity Commissioner under section 140 of the LEIC Act. This can be problematic where the arrest warrant needs to be executed in a different jurisdiction than the jurisdiction in which the warrant was issued.

Items 33 and 34 will make amendments to section 100 of the LEIC Act, to allow arrest warrants to be executed by any authorised officer and not just the authorised officer who applied for the arrest warrant under section 99 of the LEIC Act.

Item 33 removes the specific reference in subsection 100(1) to the issue of a warrant authorising 'the authorised officer' to arrest the person. Instead, subsection 100(1) will simply refer to a warrant that authorises the arrest of the person.

Item 34 inserts a new subsection 100(9A) to clarify that the authorised officer who executes the warrant need not be the same authorised officer who applied for the warrant.

Item 35 – Subsection 104(4)

Item 35 amends subsection 104(4) of the LEIC Act, to correct a minor technical drafting error. The words of subsection 104(4) will be amended, from 'a hearing that been held' to 'a hearing that has been held'.

Items 36 and 37 – At the end of subparagraph 110(4)(b)(iv) and at the end of paragraph 110(4)(b)

Items 36 and 37 insert a new subparagraph to paragraph 110(4)(b), to include all items that must be stated on a search warrant which are able to be seized under the warrant.

Under current paragraph 110(4)(b), an issuing officer who issues a search warrant must state that the warrant authorises the seizure of certain things if the authorised officer or an assisting officer believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence. The warrant is to state that the warrant authorises the seizure of a thing that the authorised officer believes on reasonable grounds to be:

- evidential material in relation to a corruption issue or public inquiry to which an investigation warrant relates
- a thing relevant to an offence to which an offence warrant relates
- evidential material within the meaning of the *Proceeds of Crime Act 2002* or tainted property (within the meaning of that Act), or
- a thing relevant to an indictable offence.

This list of things does not cover all items which are able to be seized under a search warrant. Item 36 amends subparagraph 110(4)(b)(iv) to add an 'or' to the end of the current list of things and Item 37 amends subsection 110(b) so that a warrant is also to state, in any case, that the warrant authorises seizure of a thing that the authorised officer or assisting officer believes on reasonable grounds to be an eligible seizable item.

An 'eligible seizable item' is defined under section 5 of the LEIC Act to mean anything that would present a danger to a person or could be used to assist a person to escape from lawful custody. The inclusion of eligible seizable items as things that must be stated in a warrant will remove any confusion over what can be authorised to be seized under a warrant.

Item 38 – Paragraph 117(2)(a)

Under section 140 of the LEIC Act, the Integrity Commissioner may in writing, authorise a person to be an 'authorised officer'. In order to provide the authority, the person must be a staff member of ACLEI and meet certain other criteria or a member of the AFP.

Under section 117 of the LEIC Act, only authorised officers may use reasonable force against persons when executing a search warrant. In executing the search warrant, authorised officers may obtain assistance from 'assisting officers.' Assisting officers, who are not also authorised officers, are only able to use reasonable force against things (for example, to open doors). In addition, only authorised officers can take part in searching a person. Assisting officers, who are not also authorised officers, cannot take part in the search of a person.

There will be cases where it would be desirable for a member of the AFP or State or Territory police force, who is trained to use force, to assist an authorised officer to execute a search warrant. Under section 117 of the LEIC Act, such officers would be able to use reasonable force against persons, even though they would be so authorised if executing warrants under other legislation such as the Crimes Act.

Item 38 addresses this anomaly by amending paragraph 117(2)(a) to include 'a constable' as someone who, while assisting and authorised officer in the execution of a search warrant, may use force against persons and things that is necessary and reasonable in the circumstances. Item 1 of this Schedule inserts into subsection 5(1) of the LEIC Act a definition of constable, meaning a member or special member of the Australian Federal Police, or a member of the police force or police service of a State (or Territory).

The amendment to paragraph 117(2)(a) therefore allows these members of the AFP and the State and Territory police forces to use reasonable force against both persons and things when acting as an 'assisting officer' in the execution of a search warrant. This is the case even where the members have not been authorised to execute the search warrant under section 140 of the LEIC Act.

Item 39 – Paragraph 117(2)(b)

Item 39 amends paragraph 117(2)(b), to clarify that an assisting officer who is neither an authorised officer or a 'constable,' (as that term is defined by the definition included in subsection 5(1) by item 1 of this Schedule) may only use reasonable and necessary force against things and not persons. The inclusion of constables in the class of persons who can use reasonable and necessary force against persons under paragraph 117(2)(a) (Item 35) results in the need to amend paragraph 117(2)(b).

Item 40 – Paragraph 117(3)

Item 40 amends subsection 117(3), to allow an authorised officer, a member or special member of the AFP, or a member of a State or Territory police force, who is not also an authorised officer, to take part in searching a person. The amendment limits officers who may take part in searching a person to authorised officers and constables (as that term is defined by the definition to be included by item 1 of this Schedule). A constable (defined in subsection 5(1) to mean a member of special member of the AFP or State or Territory police force) is trained to search a person, and is authorised to do so under other legislation, such as the Crimes Act. It is therefore appropriate for a member or special member of the AFP or a member of a State or Territory police force to search a person when assisting the authorising officer in the performance of their duties.

Item 41 – At the end of section 142

Item 29 of this Schedule will insert a new subsection 96B(5), providing that ACLEI is not required to give evidence relating to contempt to a prosecuting authority under section 142 if the Integrity Commissioner has made a contempt application under subsection 96B(1). Item 41 will add a note to the end of section 142, making reference to the new subsection 96B(5).

Item 42 – Paragraph 147(1)(d)

Item 42 amends subparagraph 147(1)(d) of the LEIC Act, to correct a minor technical drafting error. The subparagraph will be amended to remove the word 'must' from the phrase 'advise the person that the Integrity Commissioner has must brought the evidence to the notice of the Minister.'

Items 43 – Paragraph 150(2)(a)

Section 150 sets out the rules in relation to provision of information or documents that have been certified by the Attorney General under section 149 as information or documents that should not be disclosed on public interest grounds. Subsection 150(2) currently refers to provision of such information or documents in response to a request under Division 1 of Part 9.

Item 43 will repeal paragraph 150(2)(a), and replace it with language that is consistent with changes made to Subdivision A, Division 1 of Part 9 by item 8 of this Schedule to:

- reflect the mandatory nature of a request to produce information, documents or things
- remove the requirement that the information or document is to be provided directly to the Integrity Commissioner.

Item 44 – Subsection 150(2)

Item 44 amends subsection 150(2) to substitute 'request' with 'notice'. This amendment is consistent with the amendments made to Subdivision A, Division 1 of Part, by items 8 of this Schedule, to reflect the mandatory nature of a 'request' to produce information, documents or things.

Item 45 – Paragraph 156(5)(a)

Item 45 amends paragraph 156(5)(a) of the LEIC Act, to correct a minor technical drafting error. The paragraph will be amended to change the word 'authorises' to 'authorise' so that the phrase 'if the Minister decides to authorise a person' is grammatically correct.

Item 46 – Section 166 (heading)

Item 46 amends the heading to section 166 of the LEIC Act, to correct a minor technical drafting error. Part 12 of the LEIC Act is headed 'Dealing with Corruption Issues" and contains five divisions:

- Division 1 - Referring ACLEI corruption issues to Minister
- Division 2 - How Minister deals with ACLEI corruption issues

- Division 3 - Investigation by Integrity Commission
- Division 4 - Special Investigations
- Division 5 - Staff members of ACLEI to report corrupt conduct.

Section 166 of the LEIC Act follows immediately after the heading to Division 4 - Special Investigations.' The heading to section 166 will therefore be amended to refer to the 'Application of Division,' rather than the 'Application of Part.'

Item 47 – Section 166

Item 47 amends section 166 of the LEIC Act, to correct a minor technical drafting error. Part 12 of the LEIC Act is headed 'Dealing with Corruption Issues" and contains five divisions:

- Division 1 - Referring ACLEI corruption issues to Minister
- Division 2 - How Minister deals with ACLEI corruption issues
- Division 3 - Investigation by Integrity Commission
- Division 4 - Special Investigations
- Division 5 - Staff members of ACLEI to report corrupt conduct.

Section 166 of the LEIC Act follows immediately after Division 4 - Special Investigations.' However section 166 states 'This Part applies if the Minister authorises a person (the special investigator) to conduct a special investigation of an ACLEI corruption issue under this Division.' The other Divisions of Part 12 do not refer to a special investigation. The section will therefore be amended by substituting the word 'Division' for 'Part'.

Item 48 – Section 167(5)

Section 167 of the LEIC Act provides the investigative powers that apply to special investigations under Division 4 of Part 12 of the LEIC Act. Subsection 167(5) provides that, if a special investigator proposes to take action under section 142 (providing evidence of an offence or liability to civil penalty to the AFP or relevant State police force) or section 143 (providing evidence that could be used in confiscation proceedings to a the AFP or a relevant State police force), a special investigator does not need to inform a person (under subsection 145(3) or (4)) if doing so would be likely to prejudice an ACLEI investigation or any action taken as a result of an investigation.

Item 48 amends subsection 167(5), to change 'if the special investigator proposes to take action under section 142 or 143' to 'if the special investigator proposes to take action, or takes action under section 142 or 143'. This amendment is necessary because no obligation to inform a person under subsections 145(3) or (4) arises until the special investigator has taken action under either section 142 or section 143.

The amendment ensures that the exception to the obligation to inform a person under subsections 145(3) or (4) operates when the special investigator has taken action by giving evidence to the AFP or a State Police force under section 142 or section 143.

Item 49 – Section 167(5)

Item 49 also amends subsection 167(5) of the LEIC Act, to correct a minor technical drafting error. Reference in subsection 167(5) to the need for a special investigator to consult a person (under subsection 142(3) or (4)) is a typographical error as subsections 142(3) and (4) do not exist. Item 49 replaces these references with references to subsections 144(3) and (4) which provide that the Integrity Commissioner must consult the heads of Commonwealth government agencies or State and Territory integrity agencies where corruption issues relate to employees of those agencies who have been seconded to law enforcement agencies.

Item 50 – Paragraph 167(6)(b)

Item 50 amends paragraph 167(6)(b) of the LEIC Act, to correct a minor technical drafting error. Paragraph 167(6)(b) currently provides that a special investigator must give to the Minister the Integrity Commissioner's reasons for not consulting or informing a person that the special investigator proposes to take action under sections 142 or 143 of the LEIC Act. Under subsection 167(5), the special investigator, and not the Integrity Commissioner makes the decision not to consult or inform a person. Paragraph 167(6)(b) will therefore be amended to refer to the special investigator's reasons for not consulting or informing a person. This amendment, together with the amendment to subsection 167(5) by item 48 of this Schedule will have the effect that the special investigator must give the Minister the special investigator's reasons for not consulting or informing a person that the special investigator proposes to take action or has taken action under subsection 142 or 143 of the LEIC Act.

Item 51 – Subsection 187(2)

Item 51 amends subsection 187(2) of the LEIC Act, to correct a minor technical drafting error. Section 187 of the LEIC Act deals with acting appointments of Assistant Integrity Commissioners. However, subsection 187(2) currently refers to 'the LEIC Acting Integrity Commissioner'. The amendment to paragraph 187(2) will replace this reference with a reference to 'the LEIC Acting Assistant Integrity Commissioner.'

Privacy Act 1988

Item 52 – Subsection 18K(5) (note)

Item 52 amends the note to subsection 18K(5) of the *Privacy Act 1988*. This amendment provides that a credit reporting agency must not keep a note on a person's file about a notice to produce issued to that person if the notice to produce includes a notation that information about it is not to be disclosed.

Subsection 18K(5) of the Privacy Act already provides that a credit reporting agency must not keep a note on a person's file about a summons issued to that person if the summons includes a notation, made in accordance with section 91 of the LEIC Act, that information about the summons is not to be disclosed.

The new section 77A of the LEIC Act, introduced by Item 10 of this Bill, creates the same non-disclosure regime for notices to produce (issued under new section 75 of the LEIC Act) as is currently in place for a summons (issued under section 83 of the LEIC Act). It is therefore appropriate that subsection 18K(5) of the Privacy Act also applies to offences for

disclosing information about a notice to produce in contravention of a notation, made in accordance with the new section 77A of the LEIC Act.

Item 53 – Subsection 6(1) (definition of *federal law enforcement officer*)

Item 53 amends subsection 6(1) of the *Surveillance Devices Act 2004*, to amend the definition of 'federal law enforcement officer'. Paragraph 6(1)(aa) will be added to the definition of law enforcement officer to include the Integrity Commissioner, the Assistant Integrity Commissioner and staff members of ACLEI as 'federal law enforcement officers' for the purposes of the Surveillance Devices Act.

Subsection 37(1)(aa) of the Surveillance Devices Act allows a federal law enforcement officer who belongs or is seconded to ACLEI to, without warrant, use an optical surveillance device for any purpose that is within the functions of the Integrity Commissioner as set out in section 15 of the LEIC Act, if the officer is acting in the course of his or her duties. However, the definition of federal law enforcement officer in subsection 6(1) of the Surveillance Devices Act does not include the Integrity Commissioner, the Assistant Integrity Commissioner and staff members of ACLEI. The amendment to subsection 6(1) will rectify this anomaly.

Item 54 – Application—items 7 to 19

Items 7 to 19 introduce a new regime for the issue, service and compliance with a notice to produce information, documents or things.

Item 54 provides that the amendments in items 7 to 19 will apply only in relation to a notice to produce that is served on a person under the LEIC Act on or after this Schedule commences. This will ensure some certainty in relation to compliance with and non-disclosure concerning a notice to produce.

In accordance with section 15AC of the *Acts Interpretation Act 1901*, subsection 150(2) of the LEIC Act will still apply, after commencement of items 43 and 44 of this Schedule to a person who, prior to the commencement of the items, was requested to give the Integrity Commissioner information or produce a document that contained information, disclosure of which the Attorney General has certified as being contrary to the public interest under subsection 149(1) of the LEIC Act. The change in terminology from a request to give information or produce a document, to service of a notice to give information or produce a document does not affect the obligation not to contravene a certificate issued under section 49 of the LEIC Act, regardless of the timing of the request/service of the notice.

Item 55 – Application—section 96 of the *Law Enforcement Integrity Commissioner Act 2006*

Item 27 repeals subsection 96(2) of the LEIC Act, to remove the requirement for a witness in a hearing before the Integrity Commissioner from claiming that an answer or production of a document or thing might tend to incriminate them or expose them to a penalty before every such answer or production. Instead, the witness is automatically entitled to a 'use immunity' in relation to answers given or documents provided, even where compelled to answer questions or produce documents.

Item 55 provides that the amendment to section 96 applies to a hearing that commences on or after the Schedule commences. This will ensure that the same rules apply to a witness throughout a hearing.

Item 56 – Application—sections 96A to 96F of the *Law Enforcement Integrity Commissioner Act 2006*

Item 29 inserts new sections 96A to 96F into the LEIC Act, to provide ACLEI with a contempt referral power. Item 56 confirms that this power will only be exercisable in relation to matters occurring at or concerning a hearing that begins on or after the commencement of this Schedule. Any hearing that is part heard on the date of commencement will not be subject to the new contempt power, even if contempt of ACLEI occurs at a hearing held after the date of commencement.

Item 57 – Application—section 100 of the *Law Enforcement Integrity Commissioner Act 2006*

Items 33 and 34 will make amendments to section 100 of the LEIC Act, to allow arrest warrants to be executed, not only by the authorised officer who applied for it, but by any ACLEI authorised officer. Item 57 will provide that these amendments will apply to any arrest warrant which has been issued on or after the date of commencement of item 57.

Item 58 – Application—item 37

Item 37 inserts a new subparagraph to section 110(4)(b) of the LEIC Act, to ensure that any search warrant issued under the LEIC Act also states that the warrant authorises seizure of a thing that the authorised officer or assisting officer believes on reasonable grounds to be an eligible seizable item. Item 58 will provide that this amendment will apply to any search warrant issued on or after the commencement of item 58.

Item 59 – Application—section 117 of the *Law Enforcement Integrity Commissioner Act 2006*

Item 38, 39 and 40 amend section 117, to allow a constable who is not an authorised officer to use reasonable force against persons and search persons when assisting and authorised officer to execute a search warrant. Item 59 provides that these amends apply to a search warrant that is executed after item 59 commences.

Schedule 5 –Drugs, plants and precursors

Schedule 5 amends the *Criminal Code Act 1995* to list additional substances and quantities to be subject to the Commonwealth serious drug offences in Part 9.1 of the Criminal Code.

These amendments will list additional substances within the Criminal Code on the basis there is an illicit market or the potential for an illicit market to exist in Australia for those substances. This will enhance the ability of law enforcement agencies to deal with persons and organised crime groups involved in drug importation and other drug related activities.

These amendments will replicate the regulations that were enacted on 9 April 2011 through the *Criminal Code Amendment Regulations 2011 (No 1)* (the Regulations) which expire after 12 months from the date of commencement. The amendments to the Criminal Code in this Schedule will ensure that the substances and threshold quantities proscribed through the Regulations remain subject to the Commonwealth serious drug offences.

Part 9.1 of the Criminal Code contains the Commonwealth's serious drug offences, which are divided into domestic offences involving 'controlled' drugs, plants and precursors, and import/export offences involving 'border controlled' drugs, plants and precursors.

Division 314 of Part 9.1 contains two different sets of lists: one set that applies to the domestic offences and another set that applies to the import/export offences. These lists include threshold quantities for most of the listed substances, which are used for determining penalty levels. The quantity of the substance generally determines the level of seriousness of the crime. There are three levels of seriousness for offences involving controlled drugs and plants: a commercial quantity (the most serious), a marketable quantity and a trafficable quantity (less serious). Offences involving controlled precursors and border controlled drugs, plants and precursors are based on two levels of seriousness: a commercial quantity and a marketable quantity. When a quantity has not been listed for a particular substance, a possession or import/export offence with a lower penalty may apply for conduct involving any quantity of that substance.

The sets of lists applying to 'controlled' drugs, plants and precursors and their threshold quantities are contained in sections 314.1-314.3 of the Criminal Code. Subsection 314.1(1) lists the controlled drugs and their trafficable, marketable and commercial quantities. Subsection 314.3(1) lists the controlled precursors and their marketable and commercial quantities.

The set of lists that apply to import/export offences are the lists of 'border controlled' drugs, plants and precursors, and threshold quantities contained in sections 314.4 – 314.6 of the Criminal Code. Subsection 314.4(1) lists the border controlled drugs and their marketable and commercial quantities. Subsection 314.6(1) lists the border controlled precursors and their marketable and commercial quantities.

The quantities for each substance proposed to be listed through the amendments in this Schedule reflect the quantities prescribed in the Regulations. These quantities were determined by using the typical amount consumed for personal use, multiplied out to determine trafficable, marketable and commercial quantities, or based on quantities of comparable substances in the Criminal Code or as prescribed in other Australian jurisdictions.

Criminal Code Act 1995

Items 1-5 of Schedule 5 relate to the lists of controlled drugs and precursors that apply to domestic offences.

Item 1 – Subsection 314.1(1) of the *Criminal Code* (after table item 1)

This item inserts Benzylpiperazine (BZP) as item 1A on the list of controlled drugs in subsection 314.1(1) of the Criminal Code, which will make it subject to the controlled drug offences in Part 9.1 of the Criminal Code.

This item also inserts three quantities for Benzylpiperazine (BZP): a trafficable quantity of 2.0 grams, a marketable quantity of 250.0 grams, and a commercial quantity of 0.75 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Benzylpiperazine (BZP) contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure Benzylpiperazine (BZP).

Item 2 – Subsection 314.1(1) of the *Criminal Code* (after table item 7)

This item inserts Ketamine as item 7A on the list of controlled drugs in subsection 314.1(1) of the Criminal Code, which will make it subject to the controlled drug offences in Part 9.1 of the Criminal Code.

This item also inserts three quantities for Ketamine: a trafficable quantity of 3.0 grams, a marketable quantity of 500.0 grams, and a commercial quantity of 1.0 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Benzylpiperazine (BZP) contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure Ketamine.

Item 3 – Subsection 314.1(1) of the *Criminal Code* (after table item 9)

This item inserts Methcathinone as item 9A on the list of controlled drugs in subsection 314.1(1) of the Criminal Code, which will make it subject to the controlled drug offences in Part 9.1 of the Criminal Code.

This item also inserts three quantities for Methcathinone: a trafficable quantity of 2.0 grams, a marketable quantity of 250.0 grams, and a commercial quantity of 0.75 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Methcathinone contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure Methcathinone.

Item 4 – Subsection 314.1(1) of the *Criminal Code* (after table item 11)

This item inserts 4-Methylmethcathinone (4-MMC) as item 11A on the list of controlled drugs in subsection 314.1(1) of the Criminal Code, which will make it subject to the controlled drug offences in Part 9.1 of the Criminal Code.

This item also inserts three quantities for 4-Methylmethcathinone (4-MMC): a trafficable quantity of 2.0 grams, a marketable quantity of 250.0 grams, and a commercial quantity of

0.75 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of 4-Methylmethcathinone (4-MMC) contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure 4-Methylmethcathinone (4-MMC).

Item 5 – Subsection 314.3(1) of the *Criminal Code* (after table item 8)

This item inserts Phenylpropanolamine as item 8A on the list of controlled precursors in subsection 314.3(1) of the Criminal Code, which will make it subject to the controlled precursor offences in Part 9.1 of the Criminal Code.

This item also inserts two quantities for Phenylpropanolamine: a marketable quantity of 400.0 grams, and a commercial quantity of 1.2 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Phenylpropanolamine contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure Phenylpropanolamine.

Items 6-12 of Schedule 5 relate to the lists of border controlled drugs and precursors that apply to import and export offences.

Item 6 – Subsection 314.4(1) of the *Criminal Code* (after table item 20)

This item inserts Benzylpiperazine (BZP) as item 20A on the list of border controlled drugs in subsection 314.4(1) of the Criminal Code, which will make it subject to the border controlled drug offences in Part 9.1 of the Criminal Code.

This item also inserts two quantities for Benzylpiperazine (BZP): a marketable quantity of 2.0 grams, and a commercial quantity of 0.75 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Benzylpiperazine (BZP) contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of Benzylpiperazine (BZP).

Item 7 – Subsection 314.4(1) of the *Criminal Code* (after table item 83)

This item inserts Ketamine as item 83A on the list of border controlled drugs in subsection 314.4(1) of the Criminal Code, which will make it subject to the border controlled drug offences in Part 9.1 of the Criminal Code.

This item also inserts two quantities for Ketamine: a marketable quantity of 3.0 grams, and a commercial quantity of 1.0 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Ketamine contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure Ketamine.

Item 8 – Subsection 314.4(1) of the *Criminal Code* (after table item 93)

Item 8 in conjunction with item 10 in Schedule 5 below, corrects the order of the listing for Methamphetamine within subsection 314.4(1). Methamphetamine is currently listed as table item 99 within subsection 314.4(1), but as the table list is organised alphabetically, it should be listed as table item 93A. This amendment does not have any practical impact. Methamphetamine will continue to be listed as a border controlled drug in subsection 314.4(1), to be subject to the border controlled drug offences of Part 9.1, and will continue to

have the same two threshold quantities: a marketable quantity of 2.0 grams, and a commercial quantity of 0.75 kilograms. These quantities are pure quantities.

Item 9 – Subsection 314.4(1) of the *Criminal Code* (table item 95)

This item inserts two threshold quantities for Methcathinone. Methcathinone is already listed as a border controlled drug in subsection 314.4(1) (table item 95), but does not have any threshold quantities listed. Quantities are proposed to be added to the list to increase the range and severity of offences that a person can be charged with in relation to this substance.

This item inserts the following two quantities for Methcathinone: a marketable quantity of 2.0 grams and a commercial quantity of 0.75 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Methcathinone contained in a mixture of other substances. In such a case the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure Methcathinone.

Item 10 – Subsection 314.4(1) of the *Criminal Code* (after table item 99)

This item repeals the listing of Methamphetamine as table item 99 within subsection 314.4(1). Item 8 of this Schedule, re-inserts the listing for Methamphetamine as a new table item 93A. This amendment will correct the listing of Methamphetamine, to ensure the table is organised alphabetically.

Item 11 – Subsection 314.4(1) of the *Criminal Code* (after table item 104)

This item inserts 4-Methylmethcathinone (4-MMC) as item 104A on the list of border controlled drugs in subsection 314.4(1) of the Criminal Code, which will make it subject to the border controlled drug offences in Part 9.1 of the Criminal Code.

This item also inserts two quantities for 4-Methylmethcathinone (4-MMC): a marketable quantity of 2.0 grams, and a commercial quantity of 0.75 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of 4-Methylmethcathinone (4-MMC) contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure 4-Methylmethcathinone (4-MMC).

Item 12 – Subsection 314.6(1) of the *Criminal Code* (table item 10)

This item inserts two threshold quantities for Phenylpropanolamine. Phenylpropanolamine is already listed as a border controlled precursor in subsection 314.6(1) (as table item 10) but does not have any threshold quantities listed. Quantities are proposed to be added to the list to increase the range and severity of offences that a person can be charged with in relation to this substance.

This item also inserts the following two quantities for Phenylpropanolamine: a marketable quantity of 3.2 grams, and a commercial quantity of 1.2 kilograms. These quantities are pure quantities. This is relevant where a prosecution relates to a quantity of Phenylpropanolamine contained in a mixture of other substances. In such a case, the prosecution will need to prove that the mixture contained the relevant threshold quantity of pure Phenylpropanolamine.

Customs Act 1901

Schedule 5 also amends the Customs Act to remove an anomaly relating to the seizure of border controlled drugs, plants and precursors (border controlled substances).

The Australian Customs and Border Protection Service (Customs and Border Protection) performs a key role in preventing, deterring and detecting prohibited, harmful and illegal goods from entering Australia. In relation to illicit drugs, plants and precursors, Customs and Border Protection is empowered to seize substances defined by regulation 5 of the *Customs (Prohibited Imports) Regulations 1956* (PI Regulations) and border controlled substances as defined in Part 9.1 of the Criminal Code that have been unlawfully imported.

There is considerable overlap in the substances in the PI Regulations and the border controlled drugs, plants and precursors as defined in the Criminal Code. For example, both regimes list opium. The reason for this duplication is that the Criminal Code and the PI Regulations perform different functions. The Criminal Code generally prohibits the possession, trafficking, cultivation, sale, manufacture, import and export of certain drugs, plants and precursors, and applies high penalties to those offences depending on the quantities of the substance. The PI Regulations prohibit the unlawful importation of certain substances while still facilitating the legitimate importation of listed substances.

Anomalies in Seizure Powers

Anomalies currently exist in relation to the circumstances where Customs and Border Protection officers can exercise their powers of seizure:

a. Customs and Border Protection officers can seize without a warrant any unlawfully imported prohibited import pursuant to section 203B of the Customs Act (at a Customs Place). Many border controlled drugs, plants and precursors as defined in the Criminal Code are also prohibited imports

b. Customs and Border protection officers can seize without a warrant any unlawfully imported border controlled drug or plant as defined in the Criminal Code pursuant to section 203C of the Customs Act (outside a Customs Place) if it is also a prohibited import under the PI Regulations

c. where the unlawfully imported border controlled drug, plant or precursor is not also a prohibited import under the PI Regulations, Customs and Border Protection officers can only seize the drug, plant or precursor with a warrant (section 203 of the Customs Act).

It is anomalous that Customs and Border Protection officers can seize without a warrant some unlawfully imported border controlled substances under the Criminal Code, but others require a warrant.

The *Customs, Excise and Bounty Legislation Amendment Act 1995* introduced into the Customs Act the provisions enabling Customs and Border Protection to seize certain unlawfully imported border controlled substances. This Act formed part of the Government's response to the Review of the Australian Customs Service (the “Conroy Review”). The Senate Legal and Constitutional Legislation Committee considered the measures concluding

that they achieved '… *the correct balance between judicial scrutiny to protect the rights of individuals on the one hand, and the ability of the Australian Customs Service to protect the community through seizing prohibited goods…*' at the time the serious drug import-export offences were in the Customs Act itself. However, these offences were subsequently removed from the Customs Act and, along with definitions of border controlled drugs, plants and precursors, inserted into the Criminal Code by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005*. The anomaly dates back to this transition.

It is considered that all unlawfully imported border controlled substances should be subject to the same seizure regime established as part of the Government's response to the Conroy Review. The different approaches currently in existence are inefficient, placing an unnecessary administrative burden on Customs and Border Protection officers and others. Rectifying this anomaly has become a priority in light of the recent emergence of a drug analogues market.

Drug Analogues

Drug analogues are chemical compounds that share similar chemical structures and properties to other controlled illicit drugs. The majority of *drug analogues* have no or very limited legitimate scientific, industrial or medicinal uses and people have typically marketed them as 'legal' substitutes for illicit drugs such as methamphetamine and MDMA. The Australian Crime Commission has recently assessed in its *Organised Crime in Australia 2011* report that, in recent years, users have increasingly sought out specific drug analogues to the point where a market for these substances now exists. Consistent with this assessment, the number and weight of drug analogues detected at the Australian border has risen substantially since late 2009.

Pursuant to section 314.4(2) of the Criminal Code, border controlled drugs are defined to include analogues of the border controlled drugs specifically listed in the Criminal Code. While being subject to control under the Criminal Code, the vast majority of drug analogues are not also prohibited imports under the PI Regulations. Consequently, Customs and Border Protection officers cannot seize many drug analogues detected at the border unless first obtaining a warrant.

Objective

The objective of the amendments is to provide a consistent approach to the manner in which Customs and Border Protection officers can seize unlawfully imported border controlled substances. The amendments would enable Customs and Border Protection officers to seize without a warrant all unlawfully imported border controlled drugs, plants, and precursors.

Safeguards and Limitations on Seizure Power

The powers that enable Customs and Border Protection officers to seize without a warrant unlawfully imported border controlled substances are subject to a range of safeguards. These safeguards limit the circumstances and locations in which these powers can be exercised and govern the manner in which such seizures must be dealt with. For example, Customs and Border Protection officers can only exercise their powers under section 203C of the Customs Act to seize 'narcotic goods' (border controlled drugs and plants) without a warrant

outside of a Customs Place if it is necessary in order to prevent the goods from being concealed, lost or destroyed. Customs and Border Protection officers are also required under section 204 of the Customs Act to (as soon as reasonably practicable) deliver seizures of border controlled drugs and plants into the custody of the AFP.

In many cases, the substances that are subject to control under the Criminal Code but not under the PI Regulations have very limited, if any, legitimate scientific, medical or industrial uses. In most cases, there is no existing Commonwealth legislation authorising importation. This amendment will therefore enhance Customs and Border Protection's ability to prevent, deter and detect prohibited, harmful and illegal goods from entering the Australian community by enabling the consistent application of its powers to seize unlawfully imported border controlled drugs, plants and precursors.

This Bill will not:

- disrupt any other safeguards in the Customs Act governing the circumstances where seizure powers can be exercised, and how seizures must be dealt with
- alter the scope of substances which are subject to control at the Australian border
- permit Customs and Border Protection to seize more substances than it can currently seize (with and without a warrant)
- impact on the operation of the lawful authority defence in section 10.5 of the Criminal Code, or
- impact on the ability for a legitimate importer to bring controlled substances into Australia pursuant to a licence/permit or exemption under the PI Regulations or other any other Commonwealth legislation that authorises their importation.

Item 13 – Subsection 4(1)

This item inserts a new definition into the Definitions section of the Customs Act of 'border controlled precursor'. A border controlled precursor will have the same meaning as in Part 9.1 of the Criminal Code, which defines a border controlled precursor to mean a substance (including a growing plant): listed or described as a border controlled precursor in section 314.6; or prescribed by regulations under subsection 301.4(1); or specified in a determination under subsection 301.9(1).

Item 14 – Subsection 183UA(1) (definition of *special forfeited goods*)

The current definition of 'special forfeited goods' in subsection 183UA(1) means forfeited goods that are referred to in paragraph 229(1)(b), (e) or (n). Section 229 identifies the types of goods that shall be forfeited to the Crown. Forfeited goods include all prohibited imports (listed at paragraph (b)).

This item repeals the definition of 'special forfeited goods' in subsection 183UA(1) and replaces it with an expanded definition that includes the scope of the existing definition plus goods that are smuggled, unlawfully imported, exported, or conveyed that are *narcotic goods or consist of a border controlled precursor.*

Narcotic goods are defined in section 4 of the Customs Act as goods that consist of a narcotic substance, and a narcotic substance is defined as a border controlled drug or a border controlled plant.

This amendment will allow all unlawfully imported border controlled drugs, plants and precursors to be treated as special forfeited goods in the Customs Act.

This will enable Customs and Border Protection officers to seize without a warrant border controlled drugs, plants and precursors at Customs Places, such as designated ports, airports and wharfs (pursuant to section 203B).

It will also enable Customs and Border Protection officers to seize without a warrant all unlawfully imported narcotic substances or border controlled drugs and plants (not only those listed as prohibited imports) outside a Customs Place, such as a remote beach (pursuant to section 203C).

Item 15 – Subsection 183UA(1) (paragraph (b) of the definition of *special forfeited goods*)

The following amendment will only be required if the Customs Amendment (Military End-Use) Bill 2011 which is currently before Parliament commences before the commencement of this Bill.

The Customs Amendment (Military End-Use) Bill 2011, which is currently before Parliament seeks to amend the definition of special forfeited goods to extend the scope of the existing definition to reference a new paragraph (as a listing of a forfeited good) listed in section 229 of the Customs Act.

This item would replicate the amendment in the Customs Amendment (Military End-Use) Bill 2011 to ensure the amendment in that Bill continues to apply following the commencement of this Schedule. This amendment would have no substantive impact on the application of the amendments proposed in this Schedule.

Schedule 6 – Proceeds of crime amendments

Part 1 of Schedule 6 amends the *Director of Public Prosecutions Act 1983* (DPP Act) and the *Proceeds of Crime Act 2002* (the POCA) to enhance the proceeds of crime regime and facilitate the operation of the new Criminal Assets Confiscation Taskforce (the Taskforce).

During the 2010 election, the Government announced that it would establish a new multi-agency Criminal Assets Confiscation Taskforce, led by the Australian Federal Police (AFP), to enhance the identification of potential criminal asset confiscation matters and strengthen their pursuit.

On 10 March 2011, the Government formally launched the multi-agency Taskforce. The Taskforce brings together agencies with a key role in the investigation and litigation of proceeds of crime matters, including the AFP, the Commonwealth Director of Public Prosecutions (DPP), the Australian Crime Commission (ACC) and the Australian Taxation Office (ATO).

The Crimes Legislation Amendment Bill (No. 2) 2011 was introduced into Parliament on 23 March 2011 and, if passed, will enable the Commissioner of the AFP to commence and conduct proceeds of crime litigation on behalf of the Taskforce. Previously, the DPP has been the only authority able to undertake this litigation.

This Bill will make several further amendments to facilitate the work of the Taskforce and improve proceeds of crime processes, including:

- amending the POCA to allow a court to make an order restricting or prohibiting the publication of matters relating to applications for freezing orders and restraining orders if it appears necessary to prevent prejudice to the administration of justice
- making consequential amendments to the DPP Act to remove a similar provision allowing a court to restrict or prohibit publication of certain matters relating to applications for restraining orders under the POCA, and
- amending the POCA to expand the definition of 'authorised officer' to include authorised employees or secondees to the AFP who are part of the Taskforce.

Part 2 of Schedule 6 sets out the application of the amendments in Part 1.

Part 1 – Amendments

Director of Public Prosecutions Act 1983

Item 1 – Subsection 16A(1AB)

Item 1 is consequential to item 9 of Schedule 6. Item 1 repeals subsection 16A(1AB) which allows the Court to make an order prohibiting or restricting the publication of matters contained in affidavits made in support of applications for restraining orders. This provision only applies where the DPP has applied for a restraining order.

Under item 9, a new provision will be placed in the POCA to allow a court to make an order restricting or prohibiting publication of certain matters if either the DPP or the Commissioner

of the AFP has applied for a restraining order. This is necessary because, following the passage of the Crimes Legislation Amendment Bill (No. 2) 2011, the Commissioner of the AFP will be empowered to commence and conduct litigation under the POCA, including making applications for restraining orders. The new provision inserted by item 9 supersedes subsection 16A(1AB) of the DPP Act, and consequently this subsection is being repealed.

Item 2 – At the end of subsection 16A(1B)

Item 2 is consequential to item 1 and item 9 of Schedule 6.

The note inserted by item 2 will clarify that a court also has the power to make an order similar to an order under subsection 16A(1B) where an application for restraining orders has been made under the POCA. The note reflects that item 9 will insert section 28A into the POCA, which will allow a court to prohibit or restrict disclosure of matters contained in affidavits that form part of an application for a restraining order under the POCA.

Item 3 – Subsection 16A(2)

Item 3 is consequential to Item 1 and removes the reference to subsection 16(1AB) which Item 1 will repeal.

Proceeds of Crime Act 2002

Item 4 – Subsection 15B(1) (note 1)

Item 4 is consequential to Item 10 of Schedule 6 which amends the definition of 'authorised officer' in section 338 to include not only AFP members but also other AFP employees or secondees. Item 4 repeals the note that refers to the old definition of authorised officer and substitutes a note that reflects the new definition.

Item 5 – Section 15C (note)

Item 5 is consequential to Item 10 which amends the definition of 'authorised officer' in section 338 to include not only AFP members but also other AFP employees or secondees. Item 5 repeals the note that refers to the old definition of authorised officer and substitutes a note that reflects the new definition.

Item 6 – Subsection 15D(1) (note)

Item 6 is consequential to Item 10 which amends the definition of 'authorised officer' in section 338 to include not only AFP members but also other AFP employees or secondees. Item 6 repeals the note that refers to the old definition of authorised officer and substitutes a note that reflects the new definition.

Item 7 – After section 15F

Item 7 inserts new section 15FA in Chapter 2, Part 2-1A, Division 2 of the POCA, which deals with how freezing orders are obtained. Subsections (1) and (2) of section 15FA will allow a magistrate to make an order prohibiting or restricting the publication of certain matters contained in affidavits in support of an application for a freezing order if it appears to the magistrate to be necessary in order to prevent prejudice to the administration of justice.

Freezing orders may be sought by an authorised officer under section 15C (in person) or section 15D (by telephone or other electronic means) of the POCA as an initial step, prior to seeking a restraining order, and are used to prevent the dissipation of assets for up to three working days (with the possibility of extension). Where an application for a freezing order is made by telephone, fax or other electronic means under section 15D, proposed paragraph 15FA(2)(b) allows for the order to prohibit or restrict publication of matters that are contained, or that are to be contained, in the affidavit made in support of the application. This is because subsection 15D(2) allows an application for a freezing order by telephone, fax or other electronic means to be made before the supporting affidavit has been sworn.

At this early stage in proceeds of crime proceedings, it is important that courts are empowered to prevent the early release of information that could compromise investigations. A court is already able to make a similar order in relation to an application for a restraining orders under section 16A(1AB) of the DPP Act which will be repealed (Item 1) and transferred to the POCA (Item 9). The provisions in relation to freezing orders differ slightly because an authorised officer may apply for a freezing order, whereas under the POCA, restraining orders may only be applied for by a proceeds of crime authority (the DPP or Commissioner of the AFP).

Subsection (3) provides that the magistrate may make an order restricting or prohibiting the publication of matters at any time after the application for the freezing order is made and before it is determined.

Subsection (4) provides that the power to make the order under subsection (2) is in addition to, and is not taken to derogate from, any other power of the magistrate.

Item 8 – At the end of subsection 15P(1)

Item 8 inserts a new note at the end of subsection 15P(1) clarifying who is able to be an authorised officer for the purposes of subparagraph 15P(1)(a).

Item 9 – At the end of Division 2 of Part 2-1

Item 9 inserts a new section 28A. Currently under subsection 16A(1AB) of the DPP Act, a court has the power to restrict or prohibit the publication of certain matters contained in affidavits where the DPP has applied for a restraining order and the court considers it to be necessary to make the order to prevent prejudice to the administration of justice.

Item 1 repeals that subsection from the DPP Act. Item 9 will insert a similar provision into the POCA.

Subsection (1) states that if a proceeds of crime authority applies to a court for a restraining order, the court may make an order under subsection (2). The term ‘proceeds of crime authority’ will be defined in section 338 of the POCA, following the passage of the Crimes Legislation Amendment Bill (No. 2) 2011, as the Commissioner of the AFP or the DPP.

This amendment is necessary to reflect that the Crimes Legislation Amendment Bill (No.2) 2011, if passed, will enable the Commissioner of the AFP to commence and carry on litigation under the POCA on behalf of the Taskforce. This will include applying for restraining orders. Therefore, magistrates should be empowered to make orders prohibiting or

restricting publication of matters contained in the accompanying affidavits, regardless of whether the Commissioner of the AFP or the DPP applies for the restraining order.

Subsection (2) provides that if it appears to the court to be necessary in order to prevent prejudice to the administration of justice, the court may make an order prohibiting or restricting the publication of all or any of the matters that are contained in an affidavit made in support of the application that are referred to in subsection 17(3), subsection 18(3), paragraph 19(1)(e), subsection 20(3), or subsection 20A(3) (whichever is applicable to the application).

The list of provisions referred to in subsection (2) includes all of the provisions that are currently listed at subsection 16A(1AB) of the DPP Act, but has been expanded to also include information contained in an affidavit in support of an unexplained wealth restraining order under section 20A(3). This reflects the passage of the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* in February 2010, which amended the POCA to introduce unexplained wealth restraining orders (in section 20A).

Subsection (3) provides that the court may make an order restricting or prohibiting the publication of matters at any time after the application for a restraining order is made and before it is determined.

Subsection (4) provides that the power to make the order under subsection (2) is in addition to, and is not taken to derogate from, any other power of the magistrate.

Item 10 – Section 338 (paragraph (a) of the definition of *authorised officer*)

Item 10 repeals paragraph (a) of the definition of 'authorised officer' contained in section 338 of the POCA and replaces it with an amended definition.

The current definition of 'authorised officer' allows the Commissioner of the AFP to authorise an AFP member as an authorised officer. An AFP member is defined in section 338 of the POCA as a member or a special member of the AFP (within the meaning of the *Australian Federal Police Act 1979* (the AFP Act)).

Under the POCA, authorised officers are able to apply for freezing orders, make an affidavit in support of an application for a restraining order or unexplained wealth order, and exercise certain information gathering tools.

The recently established Criminal Assets Confiscation Taskforce, led by the AFP, includes, for example, financial investigators and forensic accountants employed by, or seconded to, the AFP from agencies such as the Australian Taxation Office and the Australian Crime Commission. Taskforce participants have expertise in investigation and are often actively involved in conducting proceeds of crime investigations, but will not usually be AFP members.

Therefore, subparagraph (a)(ii) will allow the Commissioner of the AFP to authorise non-member staff of the AFP to be an authorised officer.

Subparagraph (a)(iii) will allow the Commissioner of the AFP to authorise an employee of an authority of a State or Territory, or an authority of the Commonwealth, within the meaning of the AFP Act, while he or she is assisting the AFP in the performance of its functions under an agreement under section 69D of that Act, to be an authorised officer.

Section 69D of the AFP Act allows the AFP to second people who have suitable qualifications and experience to assist the AFP in the performance of its functions.

The requirement that a secondee be a government employee before they can be authorised by the Commissioner as an authorised officer provides an additional safeguard, ensuring that the person is subject to public service accountability.

Part 2 – Application of amendments

Item 11 – Application—publication prohibitions relating to restraining and freezing orders

Item 11 sets out the application of the amendments made by items 1, 2, 3, 7 and 9 of Part 1, Schedule 6.

Subitem (1) of this item provides that the amendments made by items 1, 2, 3 and 9 of this Schedule apply in relation to an application for a restraining order under the POCA made on or after the commencement of that item, regardless of whether the conduct on the basis of which the restraining order is sought occurred before, on or after commencement. While these provisions will apply to conduct that occurred prior to commencement, they do not create any retrospective criminal liability. The retrospective application of the provisions will provide clarity as to whether the old provision in the DPP Act or section 28A of the POCA applies. This is particularly important given the conduct leading to a restraining order being made may continue over several years or may not be discovered immediately.

Subitem (2) of this item provides that the amendment made by item 7 of this Schedule applies in relation to an application for a freezing order under the POCA made on or after the commencement of that item, regardless of whether the conduct on the basis of which the freezing order is sought occurred before, on or after commencement. While this provision is retrospective in application, it does not create any retrospective criminal liability. As the conduct to which an application for a freezing order relates may have occurred prior to commencement, retrospective application of this provision will ensure that the court can make an order for the restriction or prohibition of matters contained in affidavits supporting applications for freezing orders as soon as possible. This will help to preserve the integrity of ongoing investigations which may relate to matters that have continued over several years or that may not be discovered immediately.

Schedule 7 – Releasing federal offenders from prison

Federal offenders are people who have been convicted of a crime against a law of the Commonwealth.

Sentencing of federal offenders is largely governed by Part IB of the *Crimes Act 1914* (Crimes Act).

When a court sentences a federal offender to a term, or terms, of imprisonment that, in total, exceed three years, it may fix a non-parole period or make a recognizance release order (section 19AB of the Crimes Act).

'Non-parole period' is defined at subsection 16(1) of the Crimes Act as 'that part of the period of imprisonment ... during which the person is not to be released on parole'. Put simply, the non-parole period is the minimum time that the offender must serve in prison. When an offender is released at the end of his or her non-parole period, he or she is released on ***parole***. Parole allows an offender to be released back into the community under supervision and subject to conditions.

The Crimes Act provides that decisions on parole are to be made by the Attorney-General. The Attorney-General has delegated this power to senior officers within the Attorney-General's Department. In most cases, a delegate of the Attorney-General makes the decision on whether to release a federal offender to parole and the conditions on which such release is to take place. However, the Attorney-General retains the power to make parole decisions and orders, and does so in appropriate cases.

Under section 19AP of the Crimes Act, the Attorney-General may grant a ***licence*** for a federal offender to be released from prison. A licence authorises the release of the offender earlier than the date on which he or she would have been eligible for release from prison under the terms of the sentence imposed by the court.

Release on parole

Currently, if a federal offender is sentenced to a term of imprisonment of less than 10 years, and a non-parole period has been fixed by the court, then the Attorney-General must direct that the federal offender be released either:

- at the end of the non-parole period, or
- if appropriate, on a specified day not earlier than 30 days before the end of the non-parole period.

The Attorney-General has no discretion to refuse to release the prisoner on parole. A parole order ***must*** be made authorising the federal offender's release on parole. Accordingly, the prisoner will be released on parole at the end of his or her non-parole period, except if he or she refuses to sign the parole order to accept the conditions of his or her release on parole.

This type of release of a federal offender is referred to as 'automatic parole'. Automatic parole can be problematic. For example, where reports received from State or Territory corrective services agencies do not support the grant of parole, there is no discretion to refuse or delay the release of the offender. This is particularly problematic for high risk sex offenders and terrorism offenders.

In addition, where an offender commits a further offence while serving a sentence of imprisonment, but has not been sentenced at the time they become eligible for release on automatic parole, there is no discretion to refuse release.

The current arrangements can cause friction between federal and State or Territory offenders. In particular, State and Territory offenders are encouraged to take part in rehabilitation programs because a failure to do so might adversely affect their changes of parole. A federal offender has no such incentive. For example, under current arrangements, federal child sex offenders serving sentences of less than 10 years imprisonment can refuse to participate in sex offender treatment programs, as they know they will be released at the end of their non-parole period regardless.

The Commonwealth is the only jurisdiction that has automatic parole prescribed for sentences of imprisonment up to 10 years in duration. In most State and Territories discretionary parole is applied to all offenders apart from:

- South Australia for sentences of less than five years imprisonment
- New South Wales for sentences of less than three years imprisonment, and
- Western Australia for sentences of less than 12 months imprisonment.

The amendments in this Schedule will make all parole decisions discretionary. Decisions on the parole of federal offenders serving sentences of imprisonment of 10 years or more are already discretionary. Automatic parole is being abolished to address concerns that the current arrangements necessitate the release of federal offenders who are not considered suitable for reintroduction into the community.

Parole and licence periods

Under the current definition of 'parole period' at subsection 16(1) of the Crimes Act, the parole period for a federal offender who is not subject to a life sentence cannot exceed five years. The parole period for a federal offender serving a life sentence must be at least five years in duration.

Under the current definition of 'licence period' at subsection 16(1) of the Crimes Act, the licence period for a federal offender who is not subject to a life sentence cannot exceed five years.

The statutory maximum parole and licence periods mean that the total sentence imposed by the court may not be enforced. This is contrary to the concept of truth in sentencing.

The amendments in this Schedule will provide that, for a person not serving a life sentence, the parole period ends on the last day of their sentence. As is currently the case, the parole period for a federal offender serving a life sentence will be at least five years from the date of the offender's release on parole.

The amendments in this Schedule will provide that, for a person who is not serving a recognizance release order or federal life sentence, the licence period ends on the last day of their sentence. As is currently the case, the licence period for a federal offender serving a life sentence will be at least five years from the date of the offender's release on licence.

Supervision period

Under both current arrangements and the arrangements to be introduced by this Schedule, a person released on parole or licence may be subject to supervision during their parole or licence period.

'Supervision' refers to oversight and management of the offender by the relevant State or Territory parole service.

Under the current definition of 'supervision period' in subsection 16(1), for federal offenders who have not been given a life sentence, the maximum length of the supervision period that can be set under the Crimes Act is three years. For federal offenders serving a life sentence the supervision period is specified in the parole order or licence and is limited only by the length of the parole or licence period (which is set by the Attorney-General and must be at least five years after the person is released on parole or licence – see current paragraphs 19AL(4)(a) and 19AP(6)(a)).

The current legislative maximum supervision period is an arbitrary construct that prevents federal offenders who may require ongoing supervision during their parole or licence period from receiving this assistance. This can have negative impacts for both the offender and the community. It is appropriate for any supervision period to be able to extend to the end of the parole or licence period, which in all cases other than federal life sentences, will reflect the actual sentence imposed by the court, rather than for this supervision period to be constricted artificially by legislation.

Crimes Act 1914

Item 1 – Subsection 16(1) (definition of *licence period*)

Item 1 will repeal the current definition of 'licence period' in subsection 16(1) of the Crimes Act and replace it with a new definition.

Under section 19AP of the Crimes Act, the Attorney-General may grant a licence for a federal offender to be released from prison. A licence authorises the release of the offender earlier than the date on which he or she would have been eligible for release from prison under the terms of the sentence imposed by the court. A licence can be granted to any federal offender who is serving a prison sentence – whether or not the sentencing court has set a non-parole period, made a recognizance release order,[13] or imposed a fixed sentence or a life sentence without parole.

The Attorney-General must not grant a licence under section 19AP of the Crimes Act unless he or she is satisfied that exceptional circumstances exist which justify the grant of the licence. 'Exceptional circumstances' are not defined in the Crimes Act. However, the Explanatory Memorandum to section 19AP states that exceptional circumstances 'are

[13] Under paragraph 20(1)(b) of the Crimes Act, a court may sentence a person convicted of a federal offence to imprisonment but direct that the person be released, either immediately or after he or she has served a specified period of imprisonment, upon the giving of security that he or she will comply with certain conditions. This type of order is referred to in the Crimes Act as a 'recognizance release order'. It is analogous to a suspended sentence.

intended to cover matters that occur, usually post-sentence, that significantly affect an offender's circumstances, such as extensive cooperation with law enforcement agencies or development of a serious medical condition which cannot be adequately treated within the prison system.'

The new definition of 'licence period' to be inserted by Item 1 differs according to whether the federal offender who is released on licence is:

(i) subject to a recognizance release order

(ii) serving a federal life sentence, or

(iii) serving any other type of federal sentence.

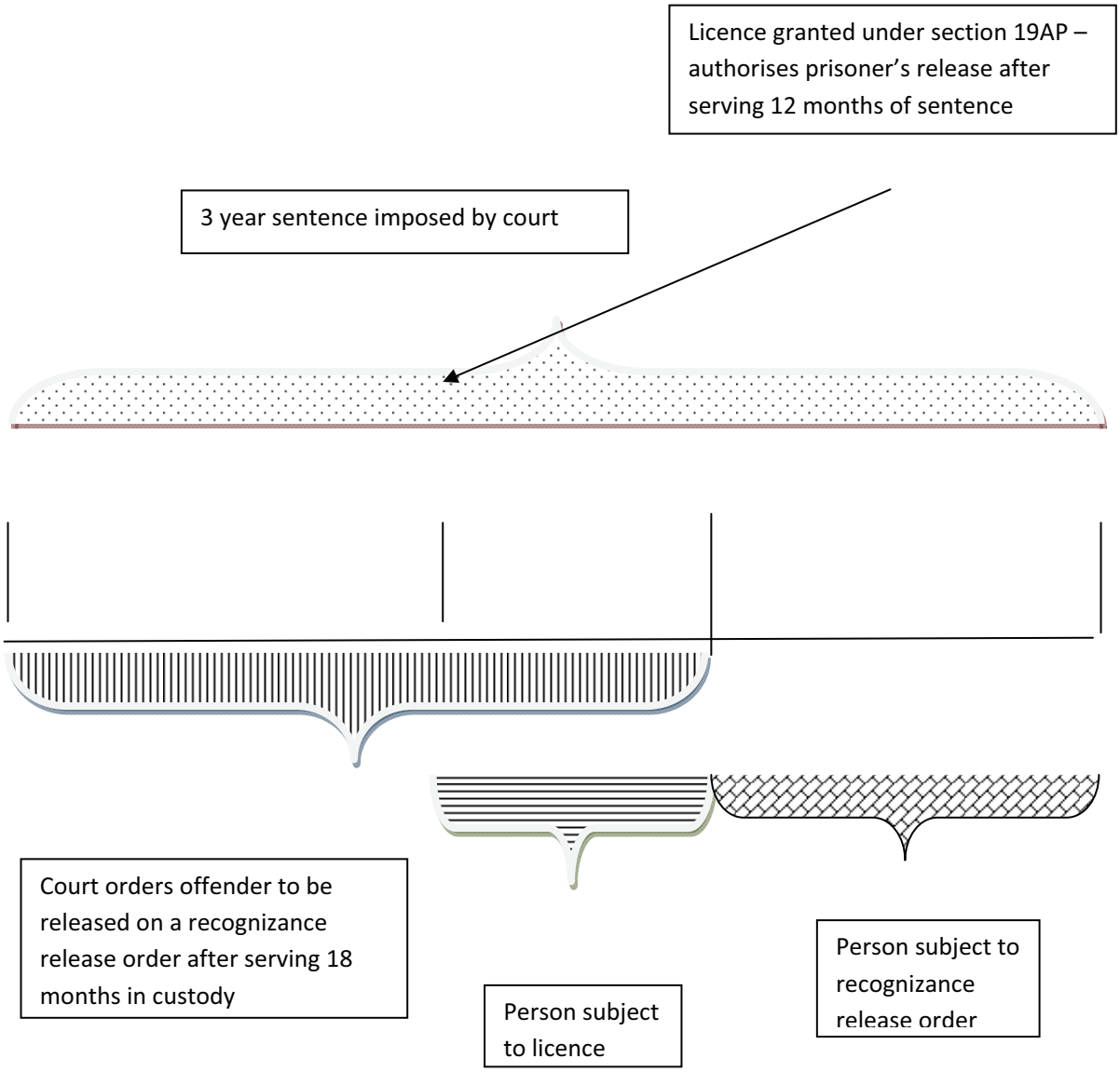
(i) Licence period where offender is subject to a recognizance release order

Paragraph (a) of the new definition of licence period will apply to federal offenders released on licence who are subject to a recognizance release order.

Under paragraph 20(1)(b) of the Crimes Act, a court may sentence a person convicted of a federal offence to imprisonment but direct that the person be released, either immediately or after he or she has served a specified period of imprisonment, upon the giving of security that he or she will comply with certain conditions. This type of order is referred to in the Crimes Act as a 'recognizance release order'. It is analogous to a suspended sentence.

When a person is released on licence, the conditions imposed on the person under the licence will be basically the same as would apply under a parole order. These conditions typically require the offender to be supervised by a parole officer, report regularly to that officer and obtain approval for accommodation and employment. In contrast, the conditions of a recognizance release order are usually much less comprehensive than those of a licence or parole order. Offenders released on recognizance release orders are not generally under supervision and usually the only condition of a recognizance release order is to be of good behaviour for a set period. As a result, it would not be fair to a federal offender who is eligible for release on a recognizance release order to be subject to the licence until the end of his or her sentence, as this would mean that the person would be subject to stricter requirements than would have been the case had exceptional circumstances not been found to exist and the person not been released on licence under section 19AP of the Crimes Act. Instead, it is appropriate for the offender to be subject to the stricter licence conditions for the period that, but for the licence, he or she would have been imprisoned, and then be subject to the conditions of the recognizance release order set by the sentencing court from the day the recognizance release order comes into effect.

This is illustrated in the following diagram:



(ii) Licence period where prisoner has been given a federal life sentence

Subparagraph (b)(ii) of the new definition of licence period will apply to federal offenders released on licence who have been given a federal life sentence. It will define the licence period for such offenders as starting on the day that the person is released on licence and ending at the end of the day specified in the licence as the day on which the licence ends.

Current paragraph 19AP(6)(a) of the Crimes Act, which will not be affected by these amendments, provides that a licence granted to a person who is serving a federal life sentence must specify the day on which the licence period ends, and this must not be earlier than five years after the day that the person is released on licence. This provision will continue to apply, so that federal offenders who have been given a life sentence and are released on licence will be subject to a licence period of at least five years. Of course, the licence period can end on any day after five years from the day of the person's release that the Attorney-General considers appropriate. Decisions on the appropriate length of the licence period will be made taking all relevant factors, including the offender's age and state of health, into account.

(iii) Licence period where prisoner serving any other federal sentence

Subparagraph (b)(i) of the new definition of licence period will apply to federal offenders released on licence who are not subject to a recognizance release order and have not been given a federal life sentence. It will define the licence period for such offenders as starting on the day that the person is released on licence and ending at the end of the last day of the person's federal sentence.

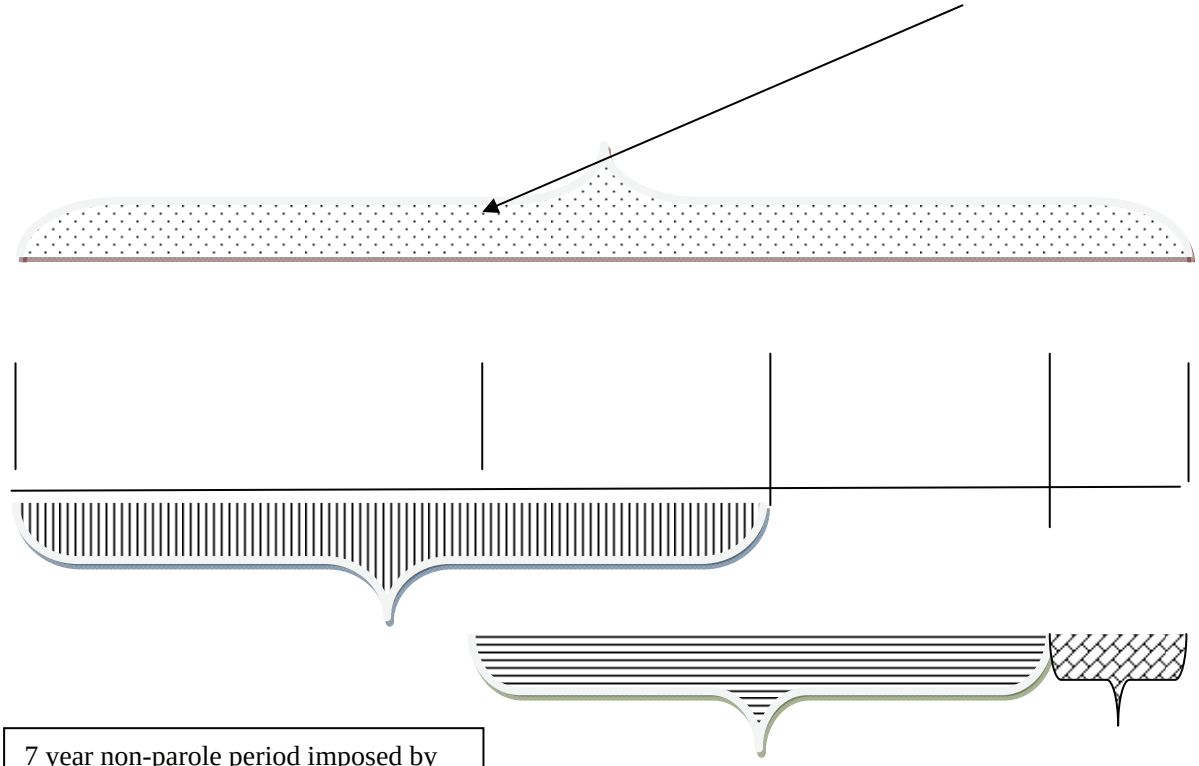
Currently the licence period for a federal offender who is not subject to a life sentence or a recognizance release order cannot exceed five years. The licence ends either five years after the offender's release on licence or on the end date of the offender's sentence, whichever occurs first.

As an example of how a licence currently operates in relation to a person who is not subject to a life sentence or a recognizance release order, suppose that a federal offender received a sentence of 12 years with a non-parole period of seven years. Due to an exceptional circumstance of some kind (eg significant post-sentence cooperation with law enforcement authorities), the Attorney-General grants a licence for the prisoner to be released from jail after serving five years of the sentence. Due to the current definition of licence period under subsection 16(1) of the Crimes Act, the licence period would end five years after the person's release from prison, or the last day of the sentence, whichever occurs first. Accordingly, under current provisions, the prisoner's licence would expire five years after his or her release, which would mean that he or she would only serve 10 years of the 12 year sentence imposed by the court. This means that the total sentence imposed by the court is not enforced and is contrary to the concept of truth in sentencing.

This is illustrated below:

12 year head sentence imposed by court

Licence granted under section19AP – authorises prisoner's release after serving 5 years of sentence

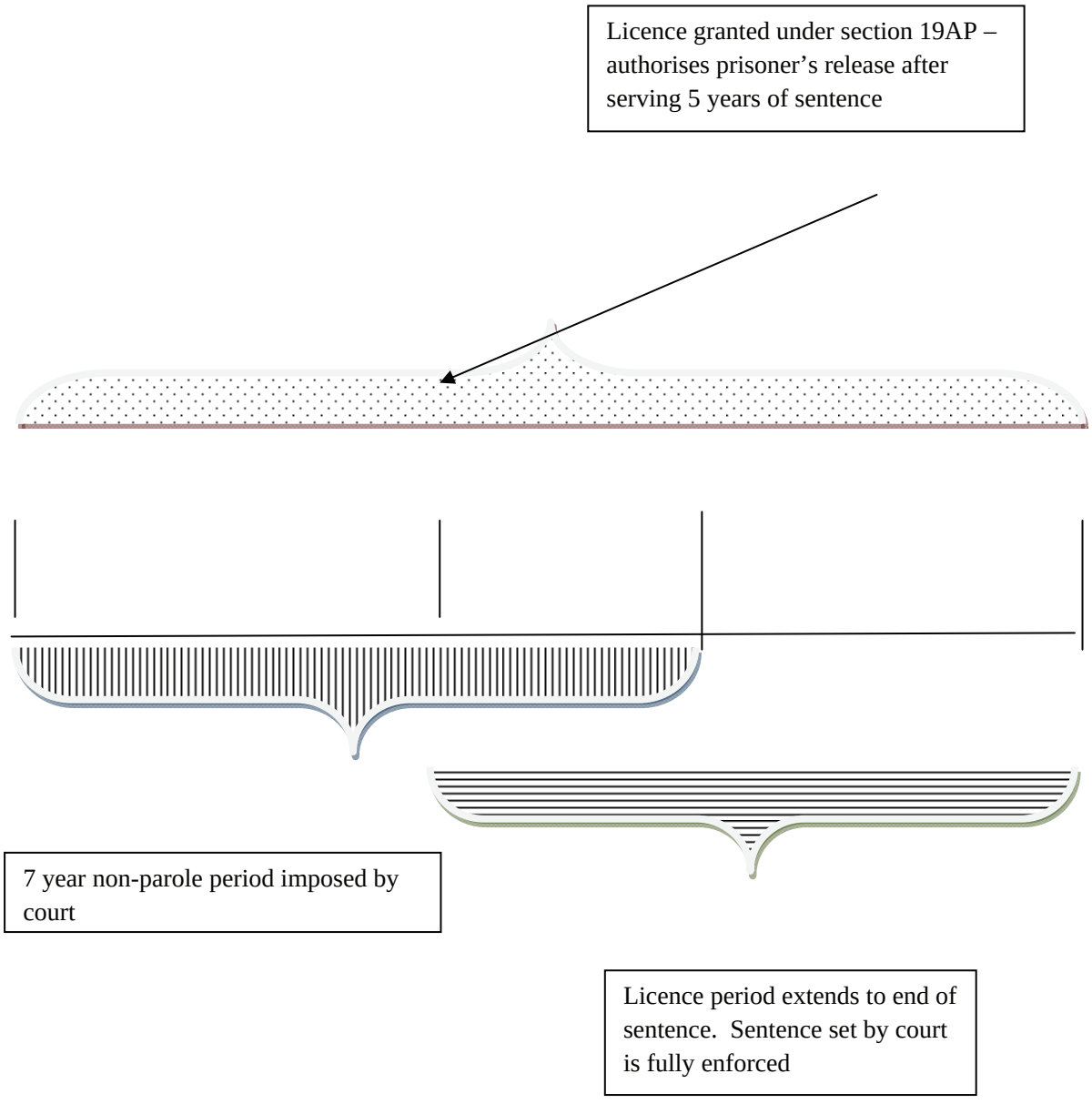


7 year non-parole period imposed by court

5 year licence period – current maximum licence period under subsection 16(1) of the Crimes Act (for person not subject to a life sentence)

2 years of sentence imposed by court is not enforced

Subparagraph (b)(ii) of the new definition of licence period to be inserted by Item 1 will ensure that federal offenders serve the full sentence imposed by the court, as illustrated below:



Item 2 – Subsection 16(1) (definition of *parole order*)

Item 2 will repeal the current definition of 'parole order' in subsection 16(1) of the Crimes Act and replace it with a new definition.

The new definition will provide that a parole order is an order made under new subsection 19AL(1) or (2) which directs that a person be released from prison on parole. New subsections 19AL(1) and (2) are inserted into the Crimes Act by item 6 of this Schedule and are discussed below.

Item 3 – Subsection 16(1) (definition of *parole period)*

Item 3 will repeal the current definition of 'parole period' in subsection 16(1) of the Crimes Act and replace it with a new definition. 'Parole period' will have the meaning given by new section 19AMA, which will be inserted by item 6 of this Schedule and is discussed below.

Item 4 - Subsection 16(1) (definition of *released on parole*)

Item 4 will amend the current definition of 'released on parole' in subsection 16(1) of the Crimes Act. The new definition will provide that:

> '*released on parole* means released from prison under a parole order in accordance with section 19AM'.

New section 19AM will be inserted by item 6 of this Schedule and is discussed below.

Item 5 – Subsection (16)(1) (definition of *supervision period*)

Item 5 will repeal the current definition of 'supervision period' in subsection 16(1) of the Crimes Act and replace it with a new definition.

Under both current arrangements and the arrangements to be introduced by this Schedule, a person released on parole or licence may be subject to supervision during their parole or licence period.

'Supervision' refers to oversight and management of the offender by the relevant State or Territory parole service.

Under the current definition of 'supervision period' in subsection 16(1), for federal offenders who have not been given a life sentence, the maximum length of the supervision period that can be set under the Crimes Act is three years. For federal offenders serving a life sentence the supervision period is specified in the parole order or licence and is limited only by the length of the parole or licence period (which is set by the Attorney-General and must be at least five years after the person is released on parole or licence – see current paragraphs 19AL(4)(a) and 19AP(6)(a)).

The current legislative maximum supervision period is an arbitrary construct that prevents federal offenders who may require ongoing supervision during their parole or licence period from receiving this assistance. This can have negative impacts for both the offender and the community. It is appropriate for any supervision period to be able to extend to the end of the parole or licence period, which in all cases other than federal life sentences, will reflect the actual sentence imposed by the court, rather than for this supervision period to be constricted artificially by legislation.

Under the new arrangements introduced by this Schedule, a parole order (which item 2 of this Schedule will define as an order made under new subsection 19AL(1) or (2) which directs that a person be released from prison on parole) or a licence issued under section 19AP must specify whether or not the federal offender is to be released subject to supervision. For parole orders, this requirement will be set out at new paragraph 19AL(3)(b), which will be inserted by item 6 of this Schedule and is discussed below. For licences, this requirement will be set out at new paragraph 19AP(6)(b), which will be inserted by item 9 of this Schedule and is discussed below.

If a parole order or licence provides that a person is to be subject to supervision and it is proposed that the supervision period should end prior to the end of the person's parole or licence period, the parole order or licence must specify the date on which the supervision period ends. For parole orders, this requirement will be set out at new paragraph 19AL(3)(c), which will be inserted by item 6 of this Schedule and is discussed below. For licences, this requirement will be set out at new paragraph 19AP(6)(c), which will be inserted by item 9 of this Schedule and is discussed below.

Under the new definition of supervision period inserted by this item, if a parole order or licence provides that the offender will be subject to supervision, the supervision period will start when the offender is released from prison on parole or licence, and end either at the end of the offender's parole or licence period, or on the earlier date specified in the parole order or licence as the day on which the supervision period ends.

The result of this definition is that offenders are able to be supervised for their entire parole or licence period. (As provided by paragraph 19AMA(3)(a), inserted by item 6 of this Schedule, except in the case of an offender who is serving a life sentence, the parole period will extend to the end of the person's sentence. As provided by the new definition of licence period inserted by item 1 of this Schedule and discussed above, except in the case of an offender who is serving a life sentence or is subject to a recognizance release order, the licence period will extend to the end of the person's sentence.)

If the circumstances of the case suggest that the offender does not require supervision for their entire parole or licence period, an earlier date on which supervision will end can be specified in the parole order or licence. This earlier date of expiry of the supervision period may be included in the parole order or licence at the time that the parole order or licence is made. A decision to change the end date of the supervision period may also be made at a later time. For example, suppose that an offender serving a federal sentence of 25 years imprisonment with a 10 year non-parole period is released on parole at the end of his or her non-parole period. Under new paragraph 19AMA(3)(a), inserted by item 6 of this Schedule, the offender's parole period will end on the date that his or her sentence ends. That is, the offender will be on parole for 15 years. Suppose that the offender's parole order specifies that he or she is to be subject to supervision, but does not specify a date on which the supervision period will end. The effect of the new definition of supervision period in this item is that the offender's supervision period will end at the end of his or her parole period. If, after 10 years on parole, the offender has demonstrated exemplary behaviour and is not considered to require further supervision, the offender's parole order could be changed to specify an earlier date on which the supervision period will expire. If, after a further two years, it was considered that the offender's behaviour illustrated that he or she would again benefit from supervision, the parole order or licence could be changed again to reinstate supervision. The ability to change the end date of the supervision period in a parole order will be set out at new paragraph 19AN(2)(c), which is inserted by item 8 and is discussed below. The ability to change the end date of the supervision period in a licence will be set out at new paragraph 19AN(8)(c), which is inserted by item 11 and is discussed below.

Regardless of when an offender's supervision period expires, the other conditions of the parole order or licence continue to apply for the entire parole or licence period. This means that if the offender breaches any of the parole or licence conditions, the parole or licence may be revoked and the offender may be required to serve the remainder of his or her sentence in prison.

Item 6 - Subsections 19AL and 19AM

Item 6 will repeal the current sections 19AL and 19AM of the Crimes Act and insert new sections 19AL, 19AM and 19AMA.

Section 19AL: Release on parole – making of parole order

As discussed above, current section 19AL of the Crimes Act sets out different arrangements for the release on parole of federal offenders serving a term of imprisonment, depending on the length of the offender's sentence.

Where a federal offender is sentenced to a term of imprisonment of 10 years or more, for which a non-parole period has been fixed, the Attorney-General may determine whether or not the prisoner should be released on parole at the expiry of his or her non-parole period.

For federal offenders serving sentences of imprisonment of less than 10 years, for which a non-parole period has been fixed by the court, the Attorney-General must make a parole order directing that the person be released either:

- at the end of the non-parole period, or
- if appropriate, on a specified day not earlier than 30 days before the end of the non-parole period.

The Attorney-General has no discretion to refuse to release the prisoner on parole. A parole order ***must*** be made authorising the federal offender's release on parole. Accordingly, the prisoner will be released on parole at the end of his or her non-parole period, except if he or she refuses to sign the parole order to accept the conditions of his or her release on parole.

This type of release of a federal offender is referred to as 'automatic parole'.

Automatic parole can be problematic. For example, where the Attorney-General's Department receives reports from State or Territory corrective services agencies in relation to an offender eligible for automatic parole, and the reports do not support the grant of parole, there is no discretion to refuse or delay the release of the offender. This is particularly problematic for high risk sex offenders and terrorism offenders.

In addition, where an offender commits a further offence while serving a sentence of imprisonment, but has not been sentenced at the time they become eligible for release on automatic parole, there is no discretion to refuse release.

The current arrangements can cause friction between federal and State or Territory offenders. In particular, State and Territory offenders are encouraged to take part in rehabilitation programs because a failure to do so might adversely affect their changes of parole. A federal offender has no such incentive. For example, under current arrangements, federal child sex offenders serving sentences of less than 10 years imprisonment can refuse to participate in sex offender treatment programs, as they know they will be released at the end of their non-parole period regardless.

Current section 19AL will be repealed by this item. Automatic parole is being abolished to address concerns that the current arrangements necessitate the release of federal offenders

who are not considered suitable for reintroduction into the community. New section 19AL will provide that all parole decisions are discretionary.

New subsection 19AL(1) will require the Attorney-General, before the end of a federal offender's non-parole period, to either make, or refuse to make, a parole order directing that the person be released from prison on parole.

As is currently the case, an offender does not need to apply for parole. The Attorney-General will be obliged, under new subsection 19AL(1), to make a decision about the offender's release on parole before the end of the offender's non-parole period.

To assist the Attorney-General to determine whether a federal offender should be released on parole, State and Territory corrective services agencies provide reports on the offender's behaviour in prison. Offenders may also make submissions on their release on parole. If an offender makes such a submission, the Attorney-General is required to take it into account when deciding whether to release the offender on parole. This is a common law requirement to which decision makers are subject, and accordingly this issue is not specifically dealt with in either the current legislation or the amendments.

As is currently the case, common law procedural fairness requirements will be respected in the parole decision process. If the Attorney-General is considering refusing a prisoner's release on parole, the prisoner will be informed of this, including the reasons why such a decision is being considered, and given an opportunity to make a submission. Any submission made by the prisoner will be taken into account by the Attorney-General in deciding whether to release the offender on parole. This is a common law requirement to which decision makers are subject, and accordingly this issue is not specifically dealt with in either the current legislation or the amendments.

As is currently the case, a decision not to make a parole order will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The operation of subsection 19AL(1) will be affected by new subsection 19AL(4). Subsection 19AL(4) is discussed below.

New subsection 19AL(2) will provide that if the Attorney-General refuses to make a parole order, the Attorney-General must give written notice to the offender within 14 days after the refusal that:

- informs the offender of the refusal
- includes a statement of reasons for the refusal, and
- explains that the Attorney-General must reconsider making a parole order for the offender and either make, or refuse to make, such an order within 12 months after the refusal.

The requirement to reconsider a prisoner's release on parole within 12 months of refusing to make a parole order will be set out at paragraph 19AL(2)(b).

If the Attorney-General refuses to make a parole order authorising an offender's release on parole, either before the end of the offender's non-parole period under subsection 19AL(1) or when reconsidering the offender's release on parole under paragraph 19AL(2)(b), the

Attorney-General must reconsider the offender's release on parole within 12 months of each refusal.

New subsection 19AL(3) will provide that every parole order must be in writing (paragraph (19AL(3)(a)) and specify whether or not the person is to be released subject to supervision (paragraph 19AL(3)(b)).

'Supervision' refers to oversight and management of the parolee by the relevant State or Territory parole service.

Under new paragraph 19AL(3)(c), if the parole order provides that the offender is to be subject to supervision and it is proposed that the supervision period should end prior to the end of the person's parole period, the parole order must specify the date on which the supervision period ends.

If a parole order provides that a person is to be subject to supervision and does not specify the date on which the supervision period ends, that period will end at the end of the parole period. New paragraph 19AMA(3)(a), inserted by item 6 of this Schedule and discussed below, provides that, except in the case of an offender who is serving a life sentence, the parole period will extend to the end of the person's sentence.

New subsection 19AL(4) will set out the arrangements that apply to federal offenders who are eligible for release on federal parole, but will still be serving a State or Territory custodial sentence when their federal non-parole period expires. This provision will basically replicate the effect of current section 19AM of the Crimes Act.

The aim of new subsection 19AL(4) (and current section 19AM) is to ensure that offenders who are in this position are not released on federal parole until their release is authorised under the State or Territory sentence. This will ensure that all sentences imposed on an offender are enforced in the way intended by the sentencing court.

As set out above, new subsection 19AL(4) will apply to all federal offenders who are eligible for release on federal parole, but will still be serving a State or Territory custodial sentence when their federal non-parole period expires. However, slightly different arrangements apply according to whether the federal offender:

(i) is not serving a federal life sentence

(ii) is serving a federal life sentence, or

(iii) is serving a State or Territory life sentence for which a non-parole period has not been set.

(i) <u>Offender is not serving a federal life sentence</u>

Paragraph 19AL(4)(a) will apply to federal offenders who are *not* serving a federal life sentence and are eligible for release on federal parole, but will still be serving a State or Territory custodial sentence when their federal non-parole period expires.

Paragraph 19AL(4)(a) will prevent the Attorney-General from making or refusing to make a parole order at the end of such a federal offender's non-parole period if the offender's federal parole period would end while the offender would still be imprisoned for a State or Territory

offence. New paragraph 19AMA(3)(a), inserted by item 6 of this Schedule, provides that, except in the case of an offender who is serving a life sentence, the parole period will extend to the end of the person's sentence. Accordingly, if the federal offender's sentence (not being a life sentence) would expire before the person was released on the State or Territory sentence, the Attorney-General is not required to comply with subsection 19AL(1). That is, the Attorney-General is not required, before the end of the offender's federal non-parole period, to either make, or refuse to make, a parole order.

It would not be appropriate for a person to be released on federal parole if they are still subject to a State or Territory sentence of imprisonment and it would be futile for the Attorney-General to make a parole order if that order would expire while the person is still in custody for other offences.

(ii) Offender is serving a federal life sentence

Paragraph 19AL(4)(b) will apply to federal offenders who are *serving a federal life sentence* and are eligible for release on federal parole, but will still be serving a State or Territory custodial sentence when their federal non-parole period expires. This situation differs from that covered by paragraph 19AL(4)(a) due to the differences in the end dates of parole periods for federal life sentences and federal sentences that are not life sentences.

New paragraph 19AMA(3)(a), inserted by item 6 of this Schedule, provides that, except in the case of an offender who is serving a life sentence, the parole period will extend to the end of the person's sentence. Thus, when a person who is serving a federal sentence that is not a life sentence is released on parole, the date on which the parole period expires is pre-determined and fixed.

However, for an offender serving a federal life sentence, new paragraph 19AMA(3)(b), inserted by item 6 of this Schedule, provides that the parole period ends at the later of the end day specified in the parole order (which must be at least five years after the person's expected release from prison) or five years after the person is released from prison. As a result, although a federal offender with a life sentence must serve at least five years on parole, the Attorney-General may specify a longer parole period. Thus, at the time that the Attorney-General is considering whether to release a federal offender serving a federal life sentence on parole, the parole period is unknown (except that it must be at least five years from the date of the offender's release from prison). This means that, until the Attorney-General determines the parole period to be served, it is not possible to determine whether that parole period will expire while the offender is imprisoned for the State or Territory offence. Accordingly, paragraph 19AL(4)(b) provides that the Attorney-General is not required to comply with subsection 19AL(1) and make, or refuse to make, a parole order for the offender, until the release of the person from prison on the State and Territory offence.

However, paragraph 19AL(4)(b) also provides that the Attorney-General may make a decision on the offender's release on parole at any time in the three months before the person's expected release on the State or Territory sentence. This will allow the Attorney-General to make a parole order authorising the offender's release on parole on the day that the offender is released on the State or Territory sentence, and that this decision is not delayed until the date of the person's release on the State or Territory sentence is reached. If the person is eligible and suitable for release on parole, there is no purpose to be served by making him or her spend additional time in prison.

(iii) Offender is serving a State or Territory life sentence for which a non-parole period has not been set

Paragraph 19AL(4)(c) will apply to federal offenders who are serving any type of federal sentence (including a federal life sentence) and are eligible for release on federal parole, but will be serving a State or Territory life sentence, for which a non-parole period has not been fixed, when their federal non-parole period expires.

Paragraph 19AL(4)(c) will prevent the Attorney-General from making or refusing to make a parole order at the end of such a federal offender's non-parole period, as a person subject to a State or Territory life sentence for which a non-parole period has not been fixed will not become eligible for release from custody. It would not be appropriate for a person to be released on federal parole if they are still subject to a State or Territory sentence of imprisonment and it would be futile for the Attorney-General to make a parole order if that order would expire while the person is still in custody for other offences.

Section 19AM: Release on parole – when is a person released

Section 19AM will set out when a federal offender is to be released from prison under a parole order.

Different arrangements will apply according to whether the person is being released on a parole order made before the end of his or her non-parole period, or made after the end of the non-parole period.

A parole order might be made after the end of the non-parole period if the Attorney-General was required to consider the person's release on parole under subsection 19AL(1), and refused to make a parole order, but then decided, when reconsidering the person's release on parole within 12 months of the initial refusal (in accordance with paragraph 19AL(2)(b)) to make a parole order. A parole order might also be made after the end of the person's non-parole period if the person came within the circumstances set out in paragraph 19AL(4)(b), that is, the person was eligible for parole on a federal life sentence, but, at the time that the federal non-parole period ended was serving a State or Territory custodial sentence. The Attorney-General is not required to consider such an offender's release on parole until the person is released on the State or Territory sentence. Thus, if a federal parole order is made in such a case, it will be made after the offender's federal non-parole period has ended.

New paragraph 19AM(1)(a) will set out when a person must be released on parole under a parole order made *before the end of the non-parole period*. In this situation the person must be released at the *earlier* of:

- the end of the non-parole period (subparagraph 19AM(1)(a)(i)), or
- a day not earlier than 30 days before the end of the non-parole period that is specified in the parole order (subparagraph 19AM(1)(a)(ii)).

However, despite paragraph 19AM(1)(a), a federal offender must not be released from prison on parole until he or she certifies that they accept the conditions of the parole order by signing the parole order or a copy of the parole order. This requirement will be set out at new subsection 19AM(3) and is discussed below.

The ability under subparagraph 19AM(1)(a)(ii) to release an offender up to 30 days before the end of their non-parole period exists under current section 19AL of the Crimes Act. It is sometimes appropriate to release an offender shortly before the end of their non-parole period, for example where a specific event is scheduled to occur in the 30 days before the expiry of the prisoner's non-parole period, such as the start of a course that is important to the offender's rehabilitation. The ability to release an offender up to 30 days before the expiry of their non-parole period is also often used for offenders whose non-parole period expires in the period between Christmas and New Year. Such prisoners are often released prior to Christmas to enable the relevant parole service to provide assistance before the Christmas shutdown period and to allow offenders the opportunity to spend Christmas with their families.

New paragraph 19AM(1)(b) will set out when a person must be released on parole under a parole order made *after the end of the non-parole period*. In this situation the person must be released at the *later* of:

- the day after the parole order is made (subparagraph 19AM(1)(b)(i)), or
- a day specified in the parole order, which must not be later than 30 days after the order is made (subparagraph 19AM(1)(b)(ii)).

As a result, if a parole order is made after the end of the offender's non-parole period the earliest day that the offender is eligible to be released is the day after the order is made. If necessary, for example in order to ensure that arrangements for the offender's release are finalised, the Attorney-General may specify that the prisoner is to be released up to 30 days after the order is made.

However, despite paragraph 19AM(1)(b), a federal offender must not be released from prison on parole until he or she certifies that they accept the conditions of the parole order by signing the parole order or a copy of the parole order. This requirement will be set out at new subsection 19AM(3) and is discussed below.

The operation of subsection 19AM(1) will also be subject to existing subsection 19AZD(2) of the Crimes Act. In some States and Territories, the law allows a prisoner to be released up to 24 hours before the end of their non-parole period or, if their release day falls on a weekend or public holiday, on the last working day before the release date. Subsection 19AZD(2) applies such laws to federal offenders serving sentences of imprisonment in the State or Territory as if they were a State or Territory offender. These laws may be valuable as if, for example, an offender was due to be released on the Thursday before Easter, he or she might not be able to make contact with his or her parole officer, or access other support services, for five days. As release from prison is usually a stressful time for the offender, during which he or she may require additional support, it may be appropriate to release the offender 24 hours early, on the Wednesday, to allow them to have an initial meeting with their parole officer and access other services prior to the Easter break.

Subsection 19AM(2) will deal with the situation where a person is imprisoned for a State or Territory offence on the day he or she would otherwise be eligible for release under subsection 19AM(1). In this situation, the offender must be released from prison under the parole order on the same day he or she is released from prison for the State or Territory offence. This ensures that all sentences imposed on an offender are enforced in the way intended by the sentencing court.

However, despite subsection 19AM(2), a federal offender must not be released from prison on parole until he or she certifies that they accept the conditions of the parole order by signing the parole order or a copy of the parole order. This requirement will be set out at new subsection 19AM(3) and is discussed below.

Subsection 19AM(3) provides that, despite subsections 19AM(1) and (2), an offender must not be released from prison on parole until he or she has accepted the conditions of the parole order and certified their acceptance on the parole order or a copy of the order. This is an important safeguard to ensure that a person acknowledges and accepts their parole conditions. A person cannot be released until they do so. For example, if a parole order is made before the end of an offender's parole order and it does not specify a day not earlier than 30 days before the end of the non-parole period on which the offender is to be released, the offender would, pursuant to paragraph 19AM(1)(a), be required to be released on the last day of their non-parole period. However, if the offender refuses to accept the conditions of the parole order, they must remain in custody even though their non-parole period has expired.

Section 19AMA: Release on parole – parole period

Section 19AMA will set out when a federal offender's parole period starts and ends.

Subsection 19AMA(2) will set out when a federal offender's parole period **starts**. Different arrangements will apply according to whether or not the person is serving a State or Territory sentence at the time the parole order is made. As set out above, new subsections 19AL(4) and 19AM(2) will set out the arrangements that apply to federal offenders who are eligible for release on federal parole but will still be serving a State or Territory custodial sentence when their federal non-parole period expires. The effect of these provisions is that in some circumstances the Attorney-General may make a federal parole order while the person is serving a State or Territory sentence, but the offender will not be released under the parole order until the person is released from prison under the State or Territory sentence.

Subsection 19AMA(2) will provide that a federal offender's parole period starts at the *earlier* of the following times:

- when the person is released from prison on parole (paragraph 19AMA(2)(a)), or
- if the person is serving a State or Territory sentence at the time the parole order is made, when he or she certifies on the parole order, or a copy of the parole order, that he or she accepts the parole conditions (paragraph 19AMA(2)(b)).

For an offender who is not serving a State or Territory sentence at the time the federal parole order is made, the day on which the parole period starts will be the same day that he or she is released on parole.

For an offender who is serving a State or Territory sentence at the time the federal parole order is made, the day on which the parole period starts may differ from the day that he or she is released on parole. For example, suppose that a person is serving two sentences, which commenced on the same day:

- a federal sentence of 10 years imprisonment, for which a non-parole period of six years has been fixed, and
- a State or Territory fixed term sentence of seven years imprisonment.

At the end of the person's federal non-parole period he or she will still be serving the State or Territory custodial sentence. In accordance with new paragraph 19AL(4)(a) (discussed above) the Attorney-General may make a parole order for the person, as the person's federal parole period will extend past the end of the time that the person will be imprisoned for the State or Territory offence. In this circumstance, in accordance with paragraph 19AMA(2)(b), the parole order will start as soon as the offender signifies his or her acceptance of the conditions of the federal parole order by signing that order, or a copy of the order. However, in accordance with new subsection 19AM(2) the person must not be released on the federal parole order until he or she is released from prison on the State or Territory sentence.

Under existing subsection 19AN(1), all federal parole orders are subject to the condition that the offender must, during the parole period, be of good behaviour and not violate any law. Subsection 19AN(1) also allows other conditions to be imposed in the parole order. These conditions typically require the offender to be supervised by a parole officer, report regularly to that officer and obtain approval for accommodation and employment. If a parole order is made for a person who is to remain in custody on a State or Territory sentence for a portion of the federal parole period, the parole order will provide that these additional conditions do not come into effect until the person is released from custody on the State or Territory sentence. This is because it would not be appropriate, or meaningful, to impose these conditions on a prisoner.

However, the mandatory parole condition to be of good behaviour and not violate any law applies from the time that the order takes effect. In the above example, the offender is required to comply with this condition from the day that he or she signs the parole order. It is important that this condition comes into effect before the person's release from prison. This is because it will allow the Attorney-General to revoke the prisoner's parole order before he or she is eligible to be released from prison on the State or Territory sentence if, in the time after the parole order was made, it has become apparent that it would not be appropriate to release the person on parole. This might occur if, subsequent to the parole order being made and the offender accepting the parole conditions, he or she has had multiple urinalysis tests that indicate repeated use of illicit drugs. If the parole period only commenced on the offender's release from prison, the Attorney-General would not be able to revoke the parole order prior to the offender's release, which could have implications for the safety of the community and the prisoner.

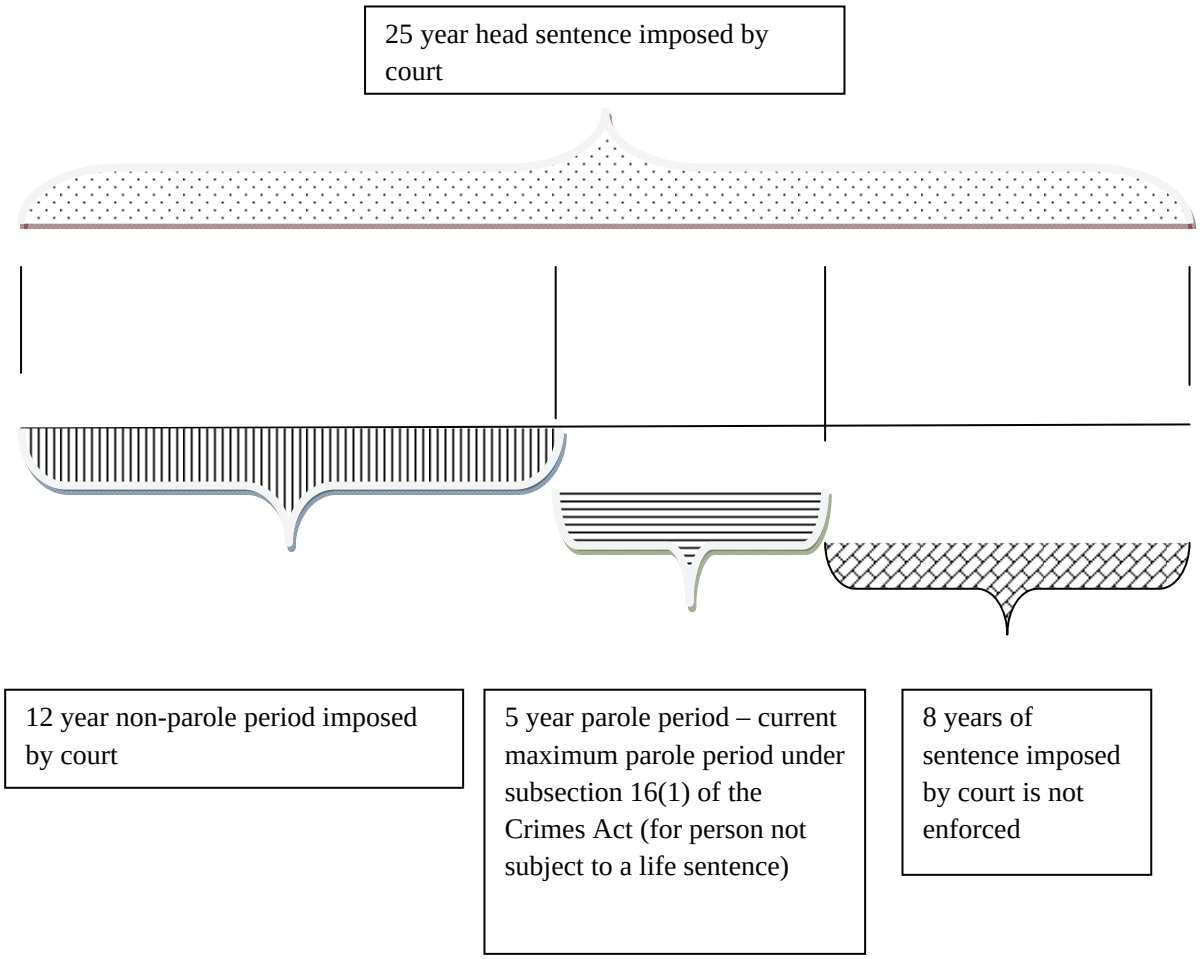
Subsection 19AMA(3) will set out when a federal offender's parole period **ends**. Different arrangements will apply according to whether or not the person is serving a federal life sentence.

New paragraph 19AMA(3)(a) will apply to offenders who are *not* serving a federal life sentence. For these offenders, the parole period will end when their sentence ends.

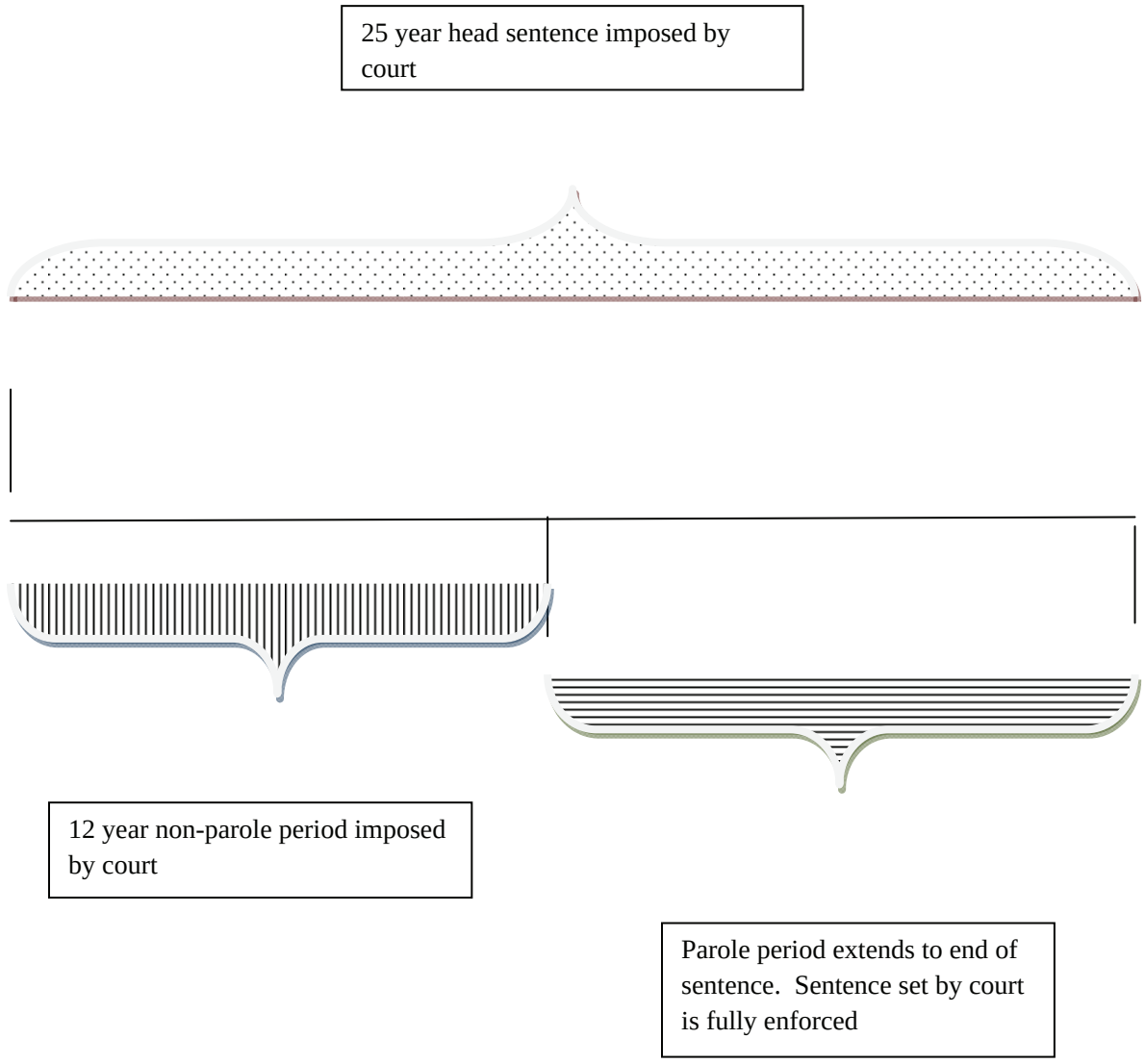
Currently the parole period for a federal offender who is not subject to a life sentence cannot exceed five years. This is due to the current definition of 'parole period' at subsection 16(1) of the Crimes Act. Currently a parole period for a federal offender who is not subject to a life sentence ends either five years after the offender's release on parole or on the end date of the offender's sentence, whichever occurs first.

As an example of how a parole order currently operates in relation to a person who is not subject to a life sentence, suppose that a federal offender received a sentence of 25 years with a non-parole period of 12 years, and that the person is released on parole at the end of their

non-parole period. Due to the current definition of parole period at subsection 16(1) of the Crimes Act, the parole period would end five years after the person's release from prison, or the last day of the sentence, whichever occurs first. Accordingly, under current provisions, the prisoner's parole period would expire five years after his or her release, which would mean that he or she would only serve 17 years of the 25 year sentence imposed by the court. This means that the total sentence imposed by the court may not be enforced and is contrary to the concept of truth in sentencing. This is illustrated below:



New paragraph 19AMA(3)(a) will ensure that federal offenders who are not serving a federal life sentence serve the full sentence imposed by the court, as illustrated below:



New paragraph 19AMA(3)(b) will apply to offenders who are *serving a federal life sentence*. The parole period for these offenders will end at the *later* of:

- five years after the person is released from prison in accordance with section 19AM (subparagraph 19AMA(3)(b)(i)), or
- the end of a later day (if any) specified in the parole order (subparagraph 19AMA(3)(b)(ii)).

This will mean that from the time of their release on parole a federal offender serving a life sentence will serve a parole period of at least five years. This continues the current arrangements in relation to the parole periods of federal offenders serving life sentences (see the current definition of parole period at subsection 16(1) of the Crimes Act and current subsection 19AL(4) of the Crimes Act.) Of course, the parole period can end on any day

after five years from the day of the person's release that the Attorney-General considers appropriate. Decisions on the appropriate length of the parole period will be made taking all relevant factors, including the offender's age and state of health, into account.

Item 7 – Paragraph 19AN(1)(b)

Item 7 will amend current paragraph 19AN(1)(b).

Section 19AN of the Crimes Act deals with conditions of a parole order. Paragraph 19AN(1)(b) refers to a supervision condition.

Under both the existing arrangements and the arrangements to be introduced by this Schedule, a federal parolee may be subject to supervision during their parole period.

'Supervision' refers to oversight and management of the parolee by the relevant State or Territory parole service.

Current paragraph 19AL(4)(b) provides that if it is proposed that an offender be subject to supervision for any part of the parole period, the parole order must specify the date that the supervision period will end. In accordance with the existing definition of supervision period at subsection 16(1) of the Crimes Act, for federal offenders who have not been given a life sentence, the maximum length of the parole supervision period that can be set under the Crimes Act is three years. This issue is explored in the discussion on the new definition of supervision period, at item 5 of this Schedule.

Under new paragraph 19AL(3)(b), which will be inserted by item 6 of this Schedule and is discussed above, a parole order must specify whether or not the federal offender is to be released subject to supervision.

Under new paragraph 19AL(3)(c), if a parole order provides that a person is to be subject to supervision and it is proposed that the supervision period should end prior to the end of the person's parole period, the parole order must specify the date on which the supervision period ends.

If a parole order provides that a person is to be subject to supervision and does not specify the date on which the supervision period ends, that period will end at the end of the parole period (see the new definition of supervision period at subsection 16(1), inserted by item 5 of this Schedule and discussed above).

The item amends paragraph 19AN(1)(b) to refer to the new supervision provision – that is new subsection 19AL(3). Amended paragraph 19AN(1)(b) will provide that if a parole order made under section 19AL specifies, in accordance with subsection 19AL(3), that the person is to be released subject to supervision, that parole order is subject to the condition that the offender must, during the supervision period, be subject to the supervision of a parole officer, or other specified person, and obey all reasonable directions of that officer or other person. Apart from the reference to a different provision (new subsection 19AL(3) rather than existing subsection 19AL(4)), paragraph 19AN(1)(b) continues to apply as it currently does – by requiring parolees to be subject to parole officer supervision, and obey the directions of that officer, if their parole order specifies that they are to be released subject to parole supervision.

Item 8 – Subsection 19AN(2)

Item 8 will amend current subsection 19AN(2).

Section 19AN of the Crimes Act deals with conditions of a parole order. Current subsection 19AN(2) provides that, at any time before the end of an offender's parole period, the Attorney-General may, by order in writing, vary or revoke a condition of the parole order, or impose additional conditions.

Parole conditions must be reasonable and must be consistent with the purposes of parole (the reintegration and rehabilitation of the offender and the protection of the community).

A condition of a parole order may need to be varied or revoked, or an additional condition may need to be imposed, if a change to the offender's circumstances means that the parole conditions are no longer reasonable, or are no longer assisting the offender's reintegration or rehabilitation, or protecting the community.

The amendment to subsection 19AN(2) will continue the Attorney-General's current power to vary or revoke a condition of the parole order, or impose additional conditions. However, it will also, at new paragraph 19AN(2)(c), allow the Attorney-General to change the day on which the offender's supervision period ends.

As explored in detail in discussion on the new definition of supervision period, inserted by item 5 of this Schedule, and on new subsection 19AL(3), inserted by item 6 of this Schedule, a parole order may provide that an offender is to be subject to supervision. If a parole order provides that a person is to be subject to supervision and does not specify the date on which the supervision period ends, that period will end at the end of the parole period.

If the circumstances of the case suggest that the offender does not require supervision for their entire parole period, an earlier date on which the supervision will end can be specified in the parole order. This earlier date of expiry of the supervision period may be included in the parole order at the time that the parole order is made. New paragraph 19AN(2)(c), inserted by this item, also allows the end date of the supervision period to be changed at a later time.

For example, an offender serving a federal sentence of 25 years imprisonment with a 10 year non-parole period is released on parole at the end of his non-parole period. Under new paragraph 19AMA(3)(a), inserted by item 6 of this Schedule, the offender's parole period will end on the date that his or her sentence ends. That is, the offender will be on parole for 15 years. Suppose that the offender's parole order specifies that he is to be subject to supervision, but does not specify a date on which the supervision period will end. The effect of the new definition of supervision period inserted by item 5 of this Schedule is that the offender's supervision period will end at the end of his or her parole period. If, after 10 years on parole, the offender has demonstrated exemplary behaviour and is not considered to require further supervision, the offender's parole order could be changed, under new paragraph 19AN(2)(c), to specify an earlier date on which the supervision period will expire. If, after a further two years, it was considered that the offender's behaviour illustrated that he or she would again benefit from supervision, the parole order could be changed again under paragraph 19AN(2)(c) to reinstate supervision.

The ability to change the day on which an offender's supervision period will end will allow the offender's changing circumstances to be taken into account and will maximise the ability

of the parole order to promote the offender's reintegration and rehabilitation, and protect the community.

Item 9 - Paragraph 19AP(6)(b)

Item 9 will amend paragraph 19AP(6)(b).

Under section 19AP of the Crimes Act, the Attorney-General may grant a licence for a federal offender to be released from prison. A licence authorises the release of the offender earlier than the date on which he or she would have been eligible for release from prison under the terms of the sentence imposed by the court. A licence can be granted to any federal offender who is serving a prison sentence – whether or not the sentencing court has set a non-parole period, made a recognizance release order, or imposed a fixed sentence or a life sentence without parole.

The Attorney-General must not grant a licence under section 19AP of the Crimes Act unless he or she is satisfied that exceptional circumstances exist which justify the grant of the licence. 'Exceptional circumstances' are not defined in the Crimes Act. However, the Explanatory Memorandum to section 19AP states that exceptional circumstances 'are intended to cover matters that occur, usually post-sentence, that significantly affect an offender's circumstances, such as extensive cooperation with law enforcement agencies or development of a serious medical condition which cannot be adequately treated within the prison system.'

Under both the existing arrangements and the arrangements to be introduced by this Schedule, a person released on licence under section 19AP may be subject to supervision during their licence period.

Current paragraph 19AP(6)(b) provides that if it is proposed that an offender be subject to supervision for any part of the licence period, the licence must specify the date that the supervision period will end. In accordance with the existing definition of supervision period at subsection 16(1) of the Crimes Act, for federal offenders who have not been given a life sentence, the maximum length of the licence supervision period that can be set under the Crimes Act is three years. This issue is explored in the discussion on the new definition of supervision period, at item 5 of this Schedule.

Under new paragraph 19AP(6)(b), inserted by this item, a licence must specify whether or not the federal offender is to be released subject to supervision.

Under new paragraph 19AP(6)(c), if a person is to be subject to supervision and it is proposed that the supervision period should end prior to the end of the person's licence period, the licence must specify the date on which the supervision period ends. If a date is not specified, the licence period will end in accordance with the new definition of licence period inserted by item 1 of this Schedule. This new definition provides that the date on which a licence period ends differs according to whether the federal offender who is released on licence is:

(i) subject to a recognizance release order

(ii) serving a federal life sentence, or

(iii) serving any other type of federal sentence.

See the discussion under item 1 for more details on the length of a licence period.

Item 10 - Paragraph 19AP(7)(b)

Item 7 will amend current paragraph 19AP(7)(b).

As set out in the discussion of item 9, above, section 19AP allows the Attorney-General to grant a licence for a federal offender to be released from prison. A licence authorises the release of the offender earlier than the date on which he or she would have been eligible for release from prison under the terms of the sentence imposed by the court.

Under existing subsection 19AP(7), all licences are subject to the condition that the offender must, during the licence period, be of good behaviour and not violate any law. Subsection 19AP(7) also allows other conditions to be imposed in the licence. Paragraph 19AP(7)(b) refers to a supervision condition.

Under both the existing arrangements and the arrangements to be introduced by this Schedule, a federal offender may be subject to supervision during their licence period.

Current paragraph 19AP(6)(b) provides that if it is proposed that an offender be subject to supervision for any part of the licence period, the licence must specify the date that the supervision period will end. In accordance with the existing definition of supervision period at subsection 16(1) of the Crimes Act, for federal offenders who have not been given a life sentence, the maximum length of the licence supervision period that can be set under the Crimes Act is three years. This issue is explored in the discussion on the new definition of supervision period, at item 5 of this Schedule.

Under new paragraph 19AP(6)(b), which will be inserted by item 9 of this Schedule and is discussed above, a licence must specify whether or not the federal offender is to be released subject to supervision.

The item amends paragraph 19AP(7)(b) to provide that if a licence specifies, in accordance with subsection 19AP(6), that the person is to be released subject to supervision, that licence is subject to the condition that the offender must, during the supervision period, be subject to the supervision of a parole officer, or other specified person, and obey all reasonable directions of that officer or other person. In essence paragraph 19AP(7)(b) continues to apply as it currently does – by requiring offenders released on licence to be subject to parole officer supervision, and obey the directions of that officer, if their licence specifies that they are to be released subject to supervision.

Item 11 - Subsection 19AP(8)

Item 11 will amend current subsection 19AP(8).

As set out in the discussion of item 9, above, section 19AP allows the Attorney-General to grant a licence for a federal offender to be released from prison. A licence authorises the release of the offender earlier than the date on which he or she would have been eligible for release from prison under the terms of the sentence imposed by the court.

Current subsection 19AP(8) provides that, any time before the end of an offender's licence period, the Attorney-General may, by order in writing, vary or revoke a condition of the licence, or impose additional conditions.

As with parole conditions, licence conditions must be reasonable and must be consistent with the purposes of graduated release (the reintegration and rehabilitation of the offender and the protection of the community).

A condition of a licence may need to be varied or revoked, or an additional condition may need to be imposed, if a change to the offender's circumstances means that the licence conditions are no longer reasonable, or are no longer assisting the offender's reintegration or rehabilitation, or protecting the community.

The amendment to subsection 19AP(8) will continue the Attorney-General's current power to vary or revoke a condition of a licence, or impose additional conditions. However, it will also, at new paragraph 19AP(8)(c), allow the Attorney-General to change the day on which the offender's supervision period ends.

As explored in detail in discussion on the new definition of supervision period, inserted by item 5 of this Schedule, and on new paragraph 19AP(6)(b), inserted by item 9 of this Schedule, a licence must specify whether or not the federal offender is to be released subject to supervision.

Under new paragraph 19AP(6)(c), if a person is to be subject to supervision and it is proposed that the supervision period should end prior to the end of the person's licence period, the licence must specify the date on which the supervision period ends. If a date is not specified, the licence period will end in accordance with the new definition of licence period inserted by item 1 of this Schedule. This new definition provides that the date on which a licence period ends differs according to whether the federal offender who is released on licence is:

(i) subject to a recognizance release order

(ii) serving a federal life sentence, or

(iii) serving any other type of federal sentence.

See the discussion under item 1 for more details on the length of a licence period.

If the circumstances of the case suggest that the offender does not require supervision for their entire licence period, an earlier date on which the supervision will end can be specified in the licence. This earlier date of expiry of the supervision period may be included in the licence at the time that it is made. New paragraph 19AP(8)(c), inserted by this item, also allows the end date of the supervision period to be changed at a later time.

For example, suppose that an offender serving a federal sentence of 25 years imprisonment with a 12 year non-parole period is released on licence after serving 10 years in custody. The licence specifies that the offender is to be subject to supervision, but does not specify the date on which the supervision period ends. Accordingly, the supervision period ends at the same time as the licence period. In accordance with the new definition of licence period inserted by item 1 of this schedule, the licence period will end on the date that the offender's sentence ends. That is, the offender will be subject to a licence, and subject to supervision, for 15 years. If, after 10 years on licence, the offender has demonstrated exemplary behaviour and is not considered to require further supervision, the offender's licence could be changed, under new paragraph 19AP(2)(c), to specify an earlier date on which the supervision period will expire. If, after a further two years, it was considered that the

offender's behaviour illustrated that he or she would again benefit from supervision, the licence could be changed again under paragraph 19AP(2)(c) to reinstate supervision.

The ability to change the day on which an offender's supervision period will end will allow the offender's changing circumstances to be taken into account and will maximise the ability of the licence to promote the offender's reintegration and rehabilitation, and protect the community.

Item 12 – Application of amendments

Item 12 will set out how the new arrangements introduced by this schedule will apply.

As set out at Clause 2 of the Bill, this Schedule will commence either on proclamation, or if a proclamation is not made earlier, six months after the Act receives Royal Assent. The delay is to allow time for State and Territory corrective services departments and probation and parole agencies to adapt to the new arrangements introduced by the Schedule.

Licences

Subsection (1) of item 12 relates to amendments that will affect licences granted by the Attorney-General under section 19AP of the Crimes Act. It provides that the amendments made by items 1, 9 and 11 apply in relation to a licence granted under amended section 19AP at or after the commencement of this Schedule.

This means that licences granted at or after the commencement of this Schedule (which, under clause 2 of the Bill, will be no later than six months after the Act receives Royal Assent) will:

- be operative for the period set out under the new definition of 'licence period' at subsection 16(1) (inserted by item 1)
- be required to specify whether the offender is to be released subject to supervision (item 9)
- be required to specify the date on which the supervision period ends, if the person is to be subject to supervision and it is proposed that the supervision period should end prior to the end of the person's licence period (item 9), and
- be able to be amended by the Attorney-General varying or revoking a condition of the licence, imposing additional conditions, or changing the day on which the supervision period ends (item 11).

Licences that are granted before the commencement of this Schedule will be subject to the current arrangements set out in the existing definition of 'licence period' in subsection 16(1) and in existing section 19AP.

The differences between the current and amended definitions of 'licence period' are explored in the discussion under item 1 of this Schedule. For offenders who are granted a licence before the commencement of this Schedule and are not serving a life sentence, the maximum licence period will be five years and the maximum supervision period will be three years. The exact date on which these periods end will be specified in the offender's licence.

A licence granted before the commencement of this Schedule will be required to specify (among other things) the day on which any supervision period to which the licence is to be subject ends, which must be a day fixed in accordance with the current definition of 'licence period' at subsection 16(1). A licence made after the commencement of this Schedule will not need to specify a date on which supervision (if specified) is to end. If no such date is specified, the supervision period will end when the licence period ends.

The Attorney-General has power to amend a licence issued before the commencement of this Schedule, during the licence period, by varying or revoking a condition of the licence, or by imposing additional conditions.

Parole

Subsection (2) of item 12 relates to amendments that will affect parole. It provides that the amendments made by:

- item 2 – new definition of 'parole order' inserted into subsection 16(1)
- item 3 – new definition of 'parole period' inserted into subsection 16(1)
- item 4 – amendment to definition of 'released on parole' at subsection 16(1)
- item 6 – new sections 19AL, 19AM and 19AMA, which set out the requirements for making a parole order, when a person is released on a parole order, and the duration of a parole period, and
- item 8 – amendment of subsection 19AN(2) to provide that, during the parole period the Attorney-General may amend a parole order by varying or revoking a condition of the parole order, imposing additional conditions, or changing the day on which the supervision period ends.

apply in relation to a person for whom a non-parole period has been fixed, whether before, at or after the commencement of this Schedule, but do not apply in relation to a person for whom a parole order has been made under current section 19AL.

This means that federal offenders for whom a parole order has been made prior to the commencement of this Schedule (which, under clause 2 of the Bill, will be no later than six months after the Act receives Royal Assent) will not be affected by the amendments. Accordingly, if they are serving a federal sentence of less than 10 years for which a non-parole period has been fixed, the Attorney-General will have had to make the order authorising their release on parole at the end of their non-parole period (as required under existing subsection 19AL(1)) and, if they are not serving a federal life sentence, their maximum parole period will be five years and their maximum supervision period will be three years. The exact date on which these periods end will be specified in the offender's parole order.

Federal offenders who have received a sentence of imprisonment for which a non-parole period is fixed and in relation to whom a parole order has not been made at the commencement of this Schedule will be subject to the amendments made by this Schedule. This means that:

- regardless of the length of their sentence, the Attorney-General will have discretion to refuse their release on parole at the end of their non-parole period (new subsection 19AL(1) discussed under item 6, above)
- any decision by the Attorney-General to refuse to make a parole order will need to be reconsidered within 12 months (new subsection 19AL(2) discussed under item 6, above)
- for a person who has not received a federal life sentence, their parole period will end on the date that their sentence ends (subsection 19AMA(3) discussed under item 6, above)
- if a person is released on parole subject to supervision, that supervision period will extend to the end of the person's parole period, unless their parole order specifies an earlier date on which the supervision period will end (new subsection 19AL(3) discussed under item 6, above), and
- if a person is released on parole subject to supervision, the Attorney-General is able to change the date on which that supervision is to end (new paragraph 19AN(2)(c) discussed under item 6, above).

These new arrangements will apply to all federal offenders who are sentenced to a period of imprisonment, with a non-parole period, *before, on* or *after* the commencement of this Schedule, for whom a parole order has not been made at the commencement of this Schedule.

Automatic parole is being abolished to address concerns that the current arrangements necessitate the release of federal offenders who are not considered suitable for reintroduction into the community. This is especially critical for serious sex offenders and terrorism offenders. If the amendments were only applied to those federal offenders sentenced after the commencement of the amendments, the Attorney-General would still be required to release federal offenders on parole, even when they were not considered suitable for release. To ensure public safety it is important that all parole decisions made after the commencement of the amendments are discretionary.

It is also appropriate for the amendments to remove the maximum parole and supervision periods to apply to all parole orders made after the commencement of this Schedule. The current legislative maximum parole period of five years means that, in many cases, the sentence imposed by the court is not fully enforced. This is contrary to the concept of truth in sentencing.

Subsection (3) of item 12 provides that new paragraph 19AL(2)(b) (introduced by item 6 of this Schedule) will apply in relation to a person who has been refused release on parole under paragraph 19AL(2)(b) of the old law, as if that refusal had occurred at the commencement of the Schedule.

New paragraph 19AL(2)(b) requires the Attorney-General to reconsider an offender's release on parole within 12 months of each refusal of parole.

Paragraph 19AL(2)(b) of the old law allowed the Attorney-General to direct that a person, serving a sentence of imprisonment of 10 years or more for which a non-parole period had been fixed, was not to be released on parole at, or at any time before, the end of their non-parole period.

Subsection (3) of item 12 will ensure that people who have been refused parole under the old law have their release on parole reconsidered within 12 months of the commencement of this Schedule. However, if a person has been refused release on parole under the old law and has been notified of a timeframe for reconsideration that is earlier than that which would apply subsequent to subsection (3) of item 12, the reconsideration will take place within the earlier timeframe. This will ensure that the offender is not adversely affected by this provision.

Supervision periods for licences and parole

Subsection (4) of item 12 relates to amendments that will affect the supervision periods for licences and parole. It provides that the amendments made by:

- item 5 – new definition of 'supervision period' inserted into subsection 16(1)
- item 7 – amendment of paragraph 19AN(1)(b) to refer to new subsection 19AL(3), and
- item 10 – amendment of paragraph 19AP(1)(b) to refer to new subsection 19AP(6)

apply in relation to a parole order made under new section 19AL, or a licence made under amended section 19AP, at or after the commencement of this Schedule.

This means that federal offenders for whom a parole order or licence has been made prior to the commencement of this Schedule (which, under clause 2 of the Bill, will be no later than six months after the Act receives Royal Assent) will not be affected by the changes to 'supervision period'. Accordingly, if a parole order or licence has been made before the commencement of this Schedule, and the offender is not serving a federal life sentence, his or her maximum supervision period will be three years. The exact date on which the supervision period ends will be specified in the offender's parole order or licence.

Parole orders or licences made under the new provisions will provide that:

- if a person is released on parole or licence subject to supervision, the supervision period will extend to the end of the person's parole or licence period, unless their parole order or licence specifies an earlier date on which the supervision period will end (new subsection 19AL(3) discussed under item 6, above)
- for a person who is not serving a federal life sentence, the parole period ends on the last day of their sentence (new paragraph 19AMA(3)(a) discussed under item 6)
- for a person who is not serving a recognizance release order or federal life sentence, the licence period ends at the end of their sentence. See the discussion under item 1 for more details on the length of a licence period.

The current legislative maximum supervision period is an arbitrary construct that prevents federal offenders who may require ongoing supervision during their parole or licence period from receiving this assistance. This can have negative impacts for both the offender and the community. It is appropriate for any supervision period imposed under a parole order or

licence that is made on after the commencement of this Schedule to be able to extend to the end of the parole or licence period, which in all cases other than federal life sentences, will reflect the actual sentence imposed by the court, rather than for this supervision period to be constricted artificially by legislation.

Definitions

Subsection (5) of item 12 will set out the definitions that apply to this item. It will provide that:

- ***amended law*** means the *Crimes Act 1914* as in force at and after the commencement of this item, and
- ***old law*** means the *Crimes Act 1914* as in force immediately before the commencement of this item.

As set out above, Clause 2 of the Bill will provide that this entire Schedule will commence either on proclamation, or if a proclamation is not made earlier, six months after the Act receives Royal Assent.

This Explanatory Memorandum has also referred to the amended law as the 'new law' or the 'new arrangements'. The old law has also been referred to as the 'existing law' or the 'current arrangements'. This is because at the time of writing this document, the amendments contained in the Bill are proposed, but have not yet been accepted by the Parliament.

Schedule 8 – Enforcement of fines

The Commonwealth does not have a fine enforcement agency and relies on State and Territory agencies to enforce Commonwealth fines on its behalf.

Currently, section 15A of the Crimes Act limits the actions that States and Territories can take on behalf of the Commonwealth. In particular, State and Territory fine enforcement agencies cannot take certain types of enforcement action for fine default unless they first obtain a court order.

The amendments will empower State and Territory fine enforcement agencies to enforce Commonwealth fines through non-judicial enforcement actions (for example: garnishment of a debt, wage or salary; a charge or caveat on property; seizure or forfeiture of property; and voluntary community service orders) without first obtaining a court order. However, State and Territory fine enforcement agencies would still be required to apply to a court of summary jurisdiction for an order imposing a judicial penalty (for example, compulsory community service, detention or imprisonment) on a person who has failed to pay a Commonwealth fine.

The amendments will also confer retrospective authority on persons who previously enforced Commonwealth fines through non-judicial enforcement actions without a court order.

Further, the amendments will make it clear that State and Territory fine enforcement agencies are not required to go back to court before proceeding to enforce a self-executing court order (regardless of whether the penalty imposed in the original court order was a judicial or non-judicial penalty).

Crimes Act 1914

Item 1 – Paragraph 15A(1)(b)

Subsection 15A(1) of the Crimes Act deals with the application of a law of a State or Territory in relation to the enforcement of a Commonwealth fine. It essentially allows State or Territory laws to be applied to enforce fines against federal offenders in the same way they are applied in relation to State or Territory offenders.

However, paragraph 15A(1)(a) of the Crimes Act provides that State and Territory laws apply only to the extent that they are consistent with Commonwealth laws. In addition, existing paragraph 15A(1)(b) of the Crimes Act provides that State and Territory laws apply subject to the modifications made by other provisions in section 15A.

Item 1 amends existing paragraph 15A(1)(b) of the Crimes Act to provide that subsection 15A(1) applies subject to the modifications (if any) made by other provisions in section 15A. This is because, in many cases, the general rule that State and Territory laws apply to the enforcement of fines against federal offenders will apply without any modifications made by other provisions in section 15A.

Item 2 – Paragraphs 15A(1AB)(a), (b), (c) and (d)

Subsection 15A(1AA) qualifies the general application of subsection 15A(1) by prescribing various types of orders that may only be made by a court, notwithstanding that the laws of a

State or Territory generally allow these types of orders (insofar as they relate to State or Territory offenders) to be made by a body other than a court. In these cases, paragraph 15(1AA)(a) provides that 'any person' may apply to a court of summary jurisdiction in the State or Territory for an order imposing the penalty.

Subsection 15A(1AB) provides that subsection 15A(1AA) applies in relation to the penalties set out in paragraphs (a) to (g) – that is, garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; forfeiture of property; community service; detention or imprisonment; a penalty that is similar to any of the preceding penalties; and a penalty prescribed by the regulations.

Item 2 repeals paragraphs 15A(1AB)(a), (b), (c) and (d). This means that the general rule in subsection 15A(1) applies in relation to these fine enforcement actions. That is, State or Territory laws can be applied to enforce fines against federal offenders in the same way they are applied in relation to State or Territory offenders, in relation to fine enforcement by way of garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; or forfeiture of property. In particular, there will be no requirement under the Crimes Act that these types of penalties can only be enforced by way of a court order.

Item 2 does not have any effect on other fine enforcement options that are already available to State and Territory fine enforcement agencies as a penalty for non-payment of a fine – for example, administrative penalties such as suspension of a fine defaulter's driver's licence.

Item 2 also has no effect on other fine enforcement options that are already offered by State and Territory fine enforcement agencies as an alternative to paying a fine rather than a penalty for failure to pay a fine – for example, if a fine defaulter applies for, or consents to, voluntary community service as an alternative to paying the fine.

Item 3 – Paragraph 15A(1AB)(g)

Existing paragraph 15A(1AB)(g) of the Crimes Act provides that subsection 15A(1AA) applies in relation to penalties that are similar to penalties described in paragraphs (a), (b), (c), (d), (e) or (f) – that is, garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; forfeiture of property; community service; or detention or imprisonment.

Item 3 amends paragraph 15A(1AB)(g) as a consequence of the amendments repealing paragraphs 15A(1AB)(a), (b), (c) and (d) in Item 2 above. Item 3 omits (a), (b), (c) and (d) from paragraph 15A(1AB)(g).

This means that the general rule in subsection 15A(1) applies in relation to fine enforcement actions that are similar to garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; or forfeiture of property. That is, State or Territory laws can be applied to enforce fines against federal offenders in the same way they are applied to State or Territory offenders, in relation to fine enforcement by way of actions that are similar to garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; or forfeiture of property. In particular, there will be no requirement under the Crimes Act that these types of penalties can only be enforced by way of a court order.

Item 4 – Before subsection 15A(1AD)

Item 4 inserts a new subsection 15A(1ACB) into the Act. New subsection 15A(1ACB) clarifies that if a court makes an order imposing a penalty for failure to pay a fine, whether or not that penalty is described in subsection 15A(1AB), then a person or authority other than a court may take action to enforce the penalty without making a further application to a court under paragraph 15A(1AA)(a).

This amendment is intended to apply where a court imposes a fine on a federal offender, but at the same time makes an order that another penalty be imposed on the offender if arrangements have not been made to pay the fine by a certain date. For example, a court may impose a fine on a federal offender, but at the same time order that the offender be imprisoned for a period of time if he or she does not pay the fine. In these circumstances, the amendment will mean that State or Territory laws can be applied to enforce the alternative penalty against federal offenders, in the manner set out in the court order, without having to return to court for a further order, even if the alternative penalty imposed is set out in subsection 15A(1AB).

Item 5 – Application

Item 5 determines the way that the amendment made by Item 4 applies. The amendment in Item 4 will apply to a court order, which imposes a penalty for failure to pay a fine, regardless of whether the order was made before, on or after the commencement of this item.

This retrospective application is considered necessary because the amendment made by Item 4 merely clarifies the operation of the existing law, and does not modify any person's accrued rights under the law.

Item 6 – Pending applications to court

Item 6 applies to applications made to a court under paragraph 15A(1AA)(a) of the Act before commencement of this item, where the application was seeking to impose a penalty described in paragraphs 15A(1AB)(a), (b), (c) or (d) or paragraph 15A(1AB)(g), insofar as that paragraph relates to paragraphs 15A(1AB)(a), (b), (c) and (d) – that is, penalties that are garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; forfeiture of property; or similar penalties.

Item 6 provides that if the court has not made an order in relation to such an application at the time Item 7 commences, then the application is taken to have been withdrawn.

This amendment, in conjunction with the amendments in Items 2 and 3, will mean that no application for a court order that is on foot but undecided at the time of commencement (for penalties that that are garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; forfeiture of property; or similar penalties), will proceed, and no further applications in relation to these penalties will be made after the time of commencement.

Item 7 – Authority for past actions taken to enforce fines etc.

Item 7 applies to actions taken, before the commencement of this item, to enforce or recover fines pursuant to section 15A of the Crimes Act by way of garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; or forfeiture of property (or similar penalties) where the action was taken by a person or authority other than a court.

Item 7 provides that, in relation to such actions, the person or authority had the power to take the action, and is always taken to have had the power to take the action, to impose such a penalty.

This amendment essentially provides retrospective authority for past actions taken by State and Territory fine enforcement agencies to enforce or recover fines from federal offenders by way of garnishment of a debt, wage or salary; a charge or caveat on property; seizure of property; or forfeiture of property (or similar penalties) without first applying for a court order under paragraph 15A(1AA)(a).

The scope of this amendment is limited to a bare conferral of authority for the actions taken, and does not extend to treating an invalid action as a valid action. It would still be possible for an affected person to challenge a past fine enforcement action on the basis that there had been some other defect in the process, other than a lack of authority on the part of the State or Territory fine enforcement agency.